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Cannabis Businesses Under the CARES Act and Paycheck Protection Program

President Trump signed the CARES Act into law on March 27, 2020, allowing borrowers to begin submitting loan applications to SBA-approved lenders. On April 2, 2020 the U.S. Small Business Administration (SBA) approved the Interim Final Rule to implement key provisions of the new Paycheck Protection Program (the “Program”). Our team has continuously provided updates regarding the Program and there are several general business FAQs answered here. Some of our attorneys have also provided detailed information about how the CARES Act and Economic Injury Disaster Loan (EIDL) Program all apply to Agricultural businesses. Those resources are excellent references for all businesses, including cannabis businesses generally. This article, however, is specifically focused on addressing the concerns and considerations of marijuana, hemp, and ancillary businesses related to the applicability of the Program to the cannabis industry. Please feel free to reach out to one of our team members if you have specific questions or believe we can help with the Program application.

Are Hemp Farmers and Hemp Businesses Eligible?

Qualified hemp farmers and hemp businesses are entitled to the same relief as other businesses and industries under the Program. Several hemp farmers and businesses have officially been approved by the SBA and banks are deploying the funds to hemp companies. In Section III, 2(c) of the Interim Final Rule, the SBA stated that eligibility will be determined in accordance with the SOP 50 10 5(K) released on April 1, 2019. Under SOP 50 10 5(K), Section III. 8(b)(iii) the rule clearly states: “Consistent with the Agriculture Improvement Act of 2018 (Public Law No. 115-334), a business that grows, produces, processes, distributes, or sells products made from hemp (as defined in section 297A of the Agricultural Marketing Act of 1946) is eligible.” This language makes a strong case for hemp businesses to receive funding under the Program, especially if the company

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is primarily engaged in farming hemp or selling legal hemp products. If hemp companies are selling or producing ingestible products from parts of the cannabis plant other than the seeds, the company may face additional hurdles to receive funding under the Program. Questions related to ingestible products should be reviewed separately from this analysis.

As we have previously reported, food, beverage, and supplement products that contain cannabidiol (CBD) derived from hemp are not in compliance with various laws governing food and supplements. The Interim Final Rule states that businesses that are not operating in compliance with federal, state, or local laws may not qualify for the Program. Therefore, there is a chance that a company could be denied access to the Program based on selling products that are not federally approved.

While many hemp companies are receiving funding under the Program, we are aware of some banks that continue to discriminate against the hemp industry and have refused hemp company applications. The Michael Best Cannabis Team has frequently advocated on behalf of hemp clients with multiple banks and remains ready to help hemp companies access the Program.

Marijuana Businesses and Ancillary Marijuana Businesses

Unfortunately, as of the latest guidance from SBA, marijuana businesses and even businesses ancillary to marijuana are likely ineligible to participate in federal assistance or the Program. Currently, marijuana is considered a Schedule I substance under the Controlled Substances Act, and this federal status makes many cannabis businesses ineligible to participate in federal programs, including the Program. Not only are businesses that grow and sell marijuana prohibited from participating in federal programs, but under SOP 50 10 5(K), ancillary businesses, which the SBA refers to as “indirect businesses”, are also excluded from eligibility. The prohibition is somewhat broad as it includes, “a business that derived any of its gross revenue for the previous year (or, if a start-up, projects to derive any of its gross revenue for the next year) from sales to Direct Marijuana Businesses of products or services that could reasonably be determined to aid in the use, growth, enhancement, or other development of marijuana.” The SBA goes on to say that Indirect Marijuana Businesses would not include a plumber who fixes a sink for a Direct Marijuana Business, but that related products and services to help or aid Marijuana Businesses would qualify. Ultimately, the question of whether an ancillary business is an “indirect business” under the SBA rules may involve specific facts and circumstances related to your particular business.

What’s next?

Several members of the cannabis industry and the Cannabis Bar Association have recently petitioned Congress to address these issues, especially trying to improve access to the Program for indirect businesses. In the meantime, if you are a direct marijuana business or even an indirect business, you will have to look to state programs and other support during this crisis.

If you are interested in applying for a loan under the Program, you should contact your banker as quickly as possible. While the Program authorized \$349 Billion in funding, and the government has suggested that they will work to authorize additional funding, this is a limited resource. Many banks are only working with current customers, but we would be happy to help you connect with a banker that can help with your application.

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