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Agricultural Eligibility under the CARES Act – EIDL and PPP

In the nearly two weeks since President Trump signed the CARES Act, there has been tremendous confusion surrounding the eligibility of agricultural concerns – of any type – to take advantage of financial assistance programs created by the CARES Act. Our summaries of these programs can be found on our CARES Act Relief Resource Center. This update aims to bring clarity to the topic of whether agricultural businesses are either not eligible or are subjected to some different treatment.

In short, agricultural enterprises, of any type – be they agricultural companies, farms, agricultural enterprises, cooperatives, or sole proprietorships – may avail themselves of the financial assistance available through both the economic injury disaster loans (EIDL), as now modified by the CARES Act, as well as the paycheck protection program (PPP) as created by the CARES Act.

Our summaries of these programs are available here, and here, but it is important to remember that although these programs can indeed both be pursued at the same time to benefit the borrower, they must be used for different purposes.

So why all the confusion? We suspect confusion exists because of a variety of factors including:

1. **The Way the Law is Written.**

The Small Business Act, guidance issued thereunder, and the CARES Act are, frankly, written in some very lawyerly ways. We think this is largely the result of a historical division of labor to support agriculture and small business between the USDA and the SBA. This has been compounded by dropping brand new CARES Act programs – specifically, the new PPP and a new emergency EIDL program – into a rubric with existing rules. A survey of the evolution of the Small Business Act is beyond the scope of this alert; however, we do need to dive deeper into the old EIDL program. Here we present each of the key programs under the CARES Act – a

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temporarily expanded EIDL (or the “CARES Act EIDL”) and the PPP.

The CARES Act EIDL

Any benefit under the SBA first starts with a review of the statute governing the federal administration, the Small Business Act. Section 3(a)(1) of the Small Business Act defines:

“small business concern, *including but not limited to enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries* **[emphasis added]**, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation: provided, that notwithstanding any other provision of law, an agricultural enterprise shall be deemed to be a small business concern if it (including its affiliates) has annual receipts not in excess of \$750,000.”

This would certainly appear to include farms and agricultural businesses so long as they did not earn more than \$750,000 per year. However, the portion of the Small Business Act dealing with disaster loans has historically carved out “agricultural enterprises” – using a nearly identical definition of what was included by the Small Business Act generally. Section 7(b) “economic interest disaster loans” (EIDL’s) have been available from the SBA for years. Typically, these disaster loans are used to help businesses in discrete geographic locations, and become available upon certain events such as a Governor’s declaration of a disaster. Section 7(b) reads:

“*except as to agricultural enterprises* **[emphasis added]** as defined in section 18(b)(1) of this Act, the Administration also is empowered to the extent and in such amounts as provided in advance in appropriation Acts...”

Section 18(b)(1), a section of the Small Business Act on the non-duplication of benefits between government agencies, defines “agricultural enterprises” to mean:

“those businesses engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural related industries...”

This historical exclusion of certain agricultural businesses from EIDL programs is confirmed more generally by 13 CFR § 120.103, **Are farm enterprises eligible?**, which provides:

Federal financial assistance to agricultural enterprises is generally made by the United States Department of Agriculture (USDA), but may be made by SBA under the terms of a Memorandum of Understanding between SBA and USDA. *Farm-related businesses which are not agricultural enterprises are eligible businesses under SBA’s business loan programs.* **[emphasis added]**

Thus, before the CARES Act, agricultural enterprises were indeed excluded from SBA Emergency Loans under the applicable Federal statutes and regulations. The CARES Act, however, has supercharged EIDLs and has temporarily changed the rules.

Section 1110 of the Cares Act modifies the SBA’s existing EIDL program to expand eligibility and to make these loan’s terms less restrictive. This expanded EIDL availability exists until December 31, 2020.

Under Section 1110(a) and (b) of the CARES Act, read together, small business concerns, private nonprofit organizations, small agricultural cooperatives may be covered by Section 7(b) loans but also

now coverage is further extended to an “eligible entity” which means (A) a business with not more than 500 employees; (B) any individual who operates under a sole proprietorship, with or without employees, or as an independent contractor; (C) cooperatives with not more than 500 employees; (D) an ESOP with not more than 500 employees; and (E) a tribal small business concern. Under this new standard, which is temporary for 2020, we see no businesses being excluded from the program unless they are involved in one of the industries which are outright banned (those include, casinos, adult entertainment, religious organizations, lobbying groups etc.).

The Paycheck Protection Program

Unlike the CARES Act EIDL which is a modified version of the historical EIDL program, the PPP is a totally new program. As such, our description of eligibility for this program can be found at our CARES Act Relief Resource Center.

Lastly, we also note that our read of the law is confirmed by the USDA, the other organization dedicated to supporting American agricultural businesses. Their FAQ’s on the CARES Act can be found here (click on the Paycheck Protection Program).

2. The NAICS Code Confusion for the Payroll Protection Program.

Some agricultural businesses have been confused by the NAICS Code resulting in a revenue number. Remember, the PPP is available to either a “small business concern” (as determined using a business’ NAICS code) OR, in short, having less than 500 employees (the eligibility rule is a bit more complicated than this so please read our full update, but know that many farms or agricultural businesses’ NAICS code results in a revenue cap of \$750,000 or \$1M which is not dispositive, rather these businesses should then rely on the 500-employee headcount as their primary eligibility criteria).

3. What’s going on with the CARES Act EIDL forms?

We have heard many reports that the SBA’s EIDL applications still include questions or certification requirements which would indicate “agricultural enterprises” are not eligible for an EIDL loan. As described above, this is not accurate. We suspect that, in the haste to accept CARES Act EIDL, the SBA grabbed the nearest application handy which was built with the original 7(b) exclusions in the form. We have seen this occur in several places and is an unfortunate byproduct of moving quickly – which we applaud the SBA for doing.

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