

Insights

Cannabis & Hemp Industry Eligibility for COVID-19 Federal Stimulus Programs

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As noted in our prior publication, on April 16, 2020, the Small Business Administration (“SBA”) announced that it would no longer be accepting new applications for the Emergency Injury Disaster Loan Program (“EIDL”) or the Payroll Protection Program (“PPP”). However, several congressional leaders, including Senator Marco Rubio, chairman of the Senate Small Businesses and Entrepreneurship Committee, and U.S. House Speaker Nancy Pelosi have indicated that a fourth stimulus bill will more than likely include additional funding for small businesses.

Assuming additional funding becomes available, marijuana-related, hemp-related, and their ancillary businesses interested in applying for relief under the PPP, EIDL or alternative relief available through the SBA should confirm their eligibility for relief under such programs.

To date, the Federal Government has adopted three stimulus bills geared toward addressing the impacts of COVID-19. The three bills include:

- [H.R. 6074](#) – Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (P.L. 116-123) (CPRS)
- [H.R. 6201](#) – Families First Coronavirus Response Act (P.L. 116-127) ([Families First Act](#))
- [H.R. 748](#) – Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

This article will focus on the eligibility of marijuana-related, hemp-related and ancillary industry businesses for the relief offered under the aforementioned federal stimulus bills. The relief offered to United States businesses include, without limitation:

- [Tax incentives](#) to employers under the Families First Coronavirus Response Act;
- The SBA’s [Payroll Protection Program](#), offering potentially [forgivable loans](#) to qualifying small businesses;

- Expansion of the SBA's Economic Injury Disaster Loan Program;
- Changes to Net Operating Loss (NOL) provisions, providing relief to companies with NOLs;
- Elimination of income caps; and
- Deferral of payroll taxes.

Amid a slew of relief packages, potential applicants in any industry should keep in mind that eligibility is assessed on a case-by-case basis.

Eligibility of Hemp Businesses for SBA Funding

In the wake of the 2018 Farm Bill, in 2019, the SBA revised its lending policies to allow "hemp-related businesses" to access SBA-funded programs. The SBA defines "Hemp-Related Business" as follows:

"Hemp-Related Business" — a business that grows, produces, processes, distributes or sells products purportedly made from "hemp" is ineligible unless the business can demonstrate that its business activities and products are legal under federal and state law. Examples of legal hemp products include paper, clothing and rope.

Cannabis businesses, however, do not share the same protections as hemp.

Eligibility of Marijuana Businesses for SBA Funding (PPP & EIDL)

As the cultivation and sale of marijuana remains illegal under federal law, the SBA has confirmed that marijuana businesses and certain ancillary businesses are not eligible for programs funded by the SBA, such as the EIDL. While the SBA has not specifically addressed whether marijuana businesses will be eligible for the PPP, SBA policy guidance suggests that both "direct" and "indirect" marijuana-related businesses will not be eligible. The SBA defines the aforementioned terms as follows:

- *"Direct Marijuana Business"* — a business that grows, produces, processes, distributes, or sells marijuana or marijuana products, edibles, or derivatives, regardless of the amount of such activity. This applies to personal use and medical use even if the business is legal under local or state law where the applicant business is or will be located.
- *"Indirect Marijuana Business"* — 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 support the use, growth, enhancement or other development of marijuana. Examples include businesses that provide testing services, or sell grow lights or hydroponic equipment, to one or more Direct Marijuana Businesses. In addition, businesses that sell smoking devices, pipes, bongs, inhalants, or other products that may be used in connection with marijuana are ineligible if the products are primarily intended or designed for such use or if the business markets the products for such use.

The broad exclusion of direct and indirect marijuana businesses has a significant impact on cannabis companies nationwide, especially in the wake of financial concerns caused coronavirus.

Potential Relief for Marijuana-Related Businesses

The National Cannabis Industry Association, National Cannabis Roundtable, Minority Cannabis Business Association and International Cannabis Bar Association (INCBA) are among the industry groups pushing Congress to limit restrictions and allow marijuana-related businesses the same relief that has been provided to other industries.

In an April 13 letter to congressional leaders, the INCBA stressed that the cannabis industry generated over a billion dollars in tax revenue from legal cannabis sales in 2018. The letter requests Congress: “(i) Direct the SBA to remove reference in any active guidance to so-called “Indirect Marijuana Businesses;” (ii) Include an amendment in the next funding bill that exempts ineligibility requirements for otherwise lawful businesses that derive revenue from Direct Marijuana Businesses; and (iii) Take any further action required to make relief available to Indirect Marijuana Businesses that provide legal and other professional services in compliance with their state’s legal and ethical requirements.”

Further, pending U.S. House Bill H.R. 3540 – the Ensuring Safe Capital Access for Small Business Act of 2019 – aims to remove cannabis from the schedule of controlled substances and prohibit the SBA from denying funding to companies on the basis of being a “marijuana-related business.”

The push for federal changes and guidance for the cannabis industry has not stopped there. Most recently, in a letter dated April 17, 2020, a bipartisan group of 34 representatives urged House leadership to include cannabis businesses in the fourth stimulus bill. The letter noted that there are over 240,000 workers in the cannabis industry across 33 states and four territories, and that the industry has generated \$1.9 billion in state and local taxes in 2019. Thus, failing to provide such relief to the cannabis industry would lead to unnecessary pay cuts and layoffs that will affect thousands of state legal cannabis workers and their families. The letter also aptly pointed out the irony of cannabis businesses being deemed as “essential” in many states nationwide, while still not qualifying for coronavirus relief or aid from the SBA.

Several congressional leaders have indicated that Congress intends to enact additional coronavirus legislation. We will continue to monitor additional government relief offered at the state and federal level and provide updates if the treatment of marijuana-related businesses changes. In the interim, please feel free to reach out to us with any questions regarding available relief and your company’s eligibility for such relief.