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Paycheck Protection Loans under the CARES Act: FAQs for Lenders Seeking Assistance

Legal Update

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On March 27, 2020, President Trump signed the Coronavirus Aid, Relief and Economic Security Act (CARES Act) into law. The CARES Act creates a specific program (Paycheck Protection Program or PPP) through the Small Business Administration (SBA) to help small businesses retain employees and pay critical expenses during this time. Since the passage of the Act, the Treasury Department and the SBA have issued some, albeit limited, guidance for lenders in the PPP application process. The following outlines general requirements for lenders under the CARES ACT with respect to PPP loans and addresses frequently asked questions. Please refer to the article, "Payroll Protection Loans Under the CARES Act: Updated FAQs for Companies Seeking Assistance," for borrower-specific information related to the Paycheck Protection Program.

Please note that the SBA may release additional guidance and regulations, and as such, the explanations below may continue to evolve.

In addition to these FAQs, please refer to the following resources, which are being periodically updated by the Department of the Treasury:

- Interim Final Rule
- Lender Application Form
- Lender Information Sheet
- U.S. Department of the Treasury FAQs on PPP loans
- U.S. Department of the Treasury, Assistance for Small Business
- SBA FAQ on Faith-Based Organizations in PPP and EIDL

What are the differences between EIDL loans, PPP loans and DEED loans?

Please see the following articles and illustrations for a comparison of EIDL loans, PPP loans and the DEED loans which are currently available to certain borrowers:

Paycheck Protection Loans under the CARES Act: FAQs for Lenders Seeking Assistance



- SBA Economic Injury Disaster Loans Due to COVID-19 FAQs
- Payroll Protection Loans Under the CARES Act: Updated FAQs for Companies Seeking Assistance
- Quick Reference Guide for COVID-19 Loans

It is important to recognize that a borrower who received an EIDL loan between January 1, 2020, and the first availability date of a PPP loan can receive a PPP loan, if the EIDL loan was not used for payroll costs. If the EIDL loan was used to cover payroll costs, the PPP loan proceeds must be used to refinance the EIDL loan. Borrowers can apply for EIDL loans directly through the SBA but must go through an SBA-certified lender for a PPP loan.

Which lenders are eligible to issue PPP loans?

Current SBA 7(a) lenders are automatically approved to issue these loans. To permit as many eligible borrowers as possible to receive loans by the June 30, 2020, deadline, additional lenders may be authorized to issue these loans. In its Interim Final Rule dated April 2, 2020, the SBA noted that the following types of lenders have been determined to meet the criteria and are eligible to make PPP loans, unless they are designated as in "Troubled Condition" by their federal regulator or are subject to an enforcement action with their primary federal regulator regarding unsafe or unsound lending practices.

1. any federally insured depository institution or any federally insured credit union;
2. any Farm Credit System institution (other than the Federal Agricultural Mortgage Corporation) as defined in 12 U.S.C. 2002(a) that applies the requirements under the Bank Secrecy Act and its implementing regulations (collectively, BSA) as a federally regulated financial institution or functionally equivalent requirements that are not altered by this rule; and
3. any depository or non-depository financing provider that originates, maintains and services business loans or other commercial financial receivables and participation interests; has a formalized compliance program; applies the BSA requirements as a federally regulated financial institution, or the BSA requirements of an equivalent federally regulated financial institution; has been operating since at least February 15, 2019, and has originated, maintained and serviced more than \$50 million in business loans or other commercial financial receivables during a consecutive 12 month period in the past 36 months, or is a service provider to any insured depository institution that has a contract to support such institution's lending activities in accordance with 12 U.S.C. § 1867 (c) and is in good standing with the appropriate Federal banking agency.

Lenders that are not currently SBA-certified can apply for approval by completing the PPP Lender Agreement SBA form 3506 and submitting it to DelegatedAuthority@sba.gov. The SBA has recently announced that its portal to facilitate PPP loan applications has now been launched for current non-SBA-certified

lenders to create an account and begin authorizing loan authorization requests found [here](#).

The SBA has encouraged lenders having trouble accessing the E-Trans system to call the Lender Customer Service Line at 833-572-0502. It is important to note that lenders considered in "Troubled Condition" by their primary federal regulator will be ineligible to participate in the PPP lending program.

What are the underwriting requirements for a PPP loan?

The lender will need to verify that the borrower was operating on February 15, 2020, *and* had employees for whom it paid payroll taxes and salaries or paid independent contractors as reported on a 1099. They must verify that they received information demonstrating the same.

The lender will also need to confirm the borrower's eligible loan amount by reviewing the payroll documentation submitted with the borrower's application. Treasury Department guidance notes that borrower payroll calculations are the borrower's responsibility, and the lender does not need to replicate each borrower's calculation. However, lenders are expected to perform a good faith review. If the lender identifies errors in the borrower's calculation during its review, the lender should work with the borrower to correct the issue.

The lender will also need to confirm receipt of the borrower's certification contained in its PPP application. The lender may rely on the borrower's good faith certifications and may also rely on the documentation provided by the borrower in determining eligibility for loan forgiveness. In its Interim Final Rule, the SBA stated that it will hold harmless any lender that relies on such documents and attestation provided by borrower.

Banks must follow existing Bank Secrecy Act requirements when making loans to new or existing borrowers that are eligible. However, PPP loans for existing customers do not require reverification unless otherwise indicated by the bank's risk-based approach to BSA compliance.

Are there other due diligence steps lenders should take?

While it is true that the above are required by lenders under the Paycheck Protection Program, and that the lender may rely on the borrower's certifications, lenders should take care in performing additional due diligence regarding the information provided by borrower. Under the Lender Agreement, the lender is responsible for all decisions concerning the eligibility of a borrower for a PPP loan, including size. This means that the lender should carefully review and verify, to the extent possible, the information provided in the application and supporting documents, including borrower certifications, the borrower's documentation required to establish eligibility, as well as understanding the affiliate rule and guidance as it may apply to the borrower's business. Lender's should also be sure to include "hold harmless"

provisions in their documents with borrowers and to work with their attorneys as needed to draft appropriate language. The SBA has recently released a promissory note for PPP loans, and recent guidance explains that lenders may use either the SBA form or their own form promissory note.

Further, because the SBA has the right to obtain copies of all loan documents and any other records related to covered loans made by the lender, lenders will want to ensure loan documents are properly executed and retained in the loan file. Since all servicing actions are the responsibility of the lender, it is essential that lenders service and liquidate covered loans according to PPP loan requirements.

Can directors, officers, key employees or significant shareholders of the lender apply for a PPP loan with that lender?

Yes, if the lender can attest that none of the lender's associates, which includes directors, officers, employees and 10 percent or more shareholders, has a financial interest in the borrower. Additional guidance on lending to directors is still forthcoming.

Are lenders eligible to apply for a PPP loan?

No. PPP loans fall under the SBA's 7(a) loan program and lenders are not eligible borrowers.

Are there Credit Elsewhere and personal guarantee/collateral requirements for a PPP loan?

No. The Credit Elsewhere, personal guarantees and collateral requirements needed for other 7(a) loans are waived under the Paycheck Protection Program.

How much of a PPP loan is guaranteed by the SBA?

The SBA guarantees 100 percent of the outstanding loan balance on a PPP loan.

What is the interest rate on a PPP loan?

The interest rate on a PPP loan is one percent.

What is the loan maturity date for PPP loans?

The loan maturity date for a PPP loan is two years.

Is there a deferment period for a PPP loan?

PPP loans have a six-month payment deferral period from the date of disbursement, and interest will continue to accrue during this deferral period. It is anticipated that the SBA will issue guidance to lenders on the deferment process soon.

Is there a prepayment penalty on PPP loans?

No, there is no penalty for prepayment on a covered loan.

Can PPP loans be sold in the secondary market?

Yes, PPP loans can be sold in the secondary market after the loan has been fully disbursed at a premium or a discount to par value. The SBA will not collect any fee for any guarantee sold in the secondary market. SBA guidance regarding any advance purchase for loans sold in the secondary market is forthcoming.

Can the SBA purchase some or all of the loan in advance?

Yes. Lenders may request that the SBA purchase the expected forgiveness amount of a PPP loan or a pool of PPP loans at the end of week seven of the covered period. The expected forgiveness amount is the amount of loan principal the lender reasonably expects the borrower to expend on payroll costs, covered mortgage interest, covered rent, and covered utility payments during the eight-week period after loan disbursement. At least 75 percent of the expected forgiveness amount shall be for payroll costs.

To submit a PPP loan or pool of PPP loans for advance purchase, a lender must submit to the SBA a report requesting advance purchase with the expected forgiveness amount. The report must include:

1. the Paycheck Protection Program Application Form (SBA Form 2483) and any supporting documentation submitted with such application;
2. the Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty (SBA Form 2484) and any supporting documentation;
3. a detailed narrative explaining the assumptions used in determining the expected forgiveness amount, the basis for those assumptions, alternative assumptions considered and why alternative assumptions were not used;
4. any information obtained from the borrower after disbursement that the lender used to determine the expected forgiveness amount (including the same documentation required to apply for loan forgiveness such as payroll tax filings, cancelled checks, and other payment documentation); and
5. any additional information that the SBA may require to determine whether the expected forgiveness amount is reasonable.

In its Interim Final Rule, the SBA stated that it will purchase the expected forgiveness amount of the PPP loan(s) within 15 days of the date on which the SBA receives a “complete report that demonstrates that the expected forgiveness amount is indeed reasonable.” Lenders should also note that the guaranty of any covered loan will be automatically terminated if the lender does not submit a demand to purchase the guaranty to the SBA or a request to extend the maturity within one year after the maturity of the note.

What are some of the regulatory capital requirements as they relate to the PPP?

A covered loan will have a risk-weight of 0 percent. Further, the Paycheck Protection Program offers lenders temporary relief from troubled debt restructuring (TDR) disclosures. If a bank modifies a covered loan related to COVID-19 impacts in a TDR on or after March 13, 2020, it does not have to comply with FASB standards for purposes of FDIA compliance until the Federal banking agencies deem appropriate. Section 4013 of the CARES Act outlines further relief from troubled debt restructurings.

What is the SBA offering in terms of debt relief?

- The SBA will automatically pay the principal, interest and fees of current 7(a), 504 and microloans for a period of six months.
- The SBA will also automatically pay the principal, interest and fees of new 7(a), 504 and microloans issued prior to September 27, 2020.

Will lenders be compensated for making these loans?

Yes. Lenders will receive processing fees based on balance of financing outstanding at time of final disbursement at a rate of:

- Five percent for loans not more than \$350,000;
- Three percent for loans of more than \$350,000 and less than \$2,000,000; and
- One percent for loans more than \$2,000,000. Reimbursement will be made no later than 5 days after disbursement of the loan.

Lenders should be mindful that they cannot collect any fees from the applicant.

What are the fee limits for agents helping with applications?

Agent fees are paid out of fees that the lender receives from the SBA. Agents cannot collect fees from the borrower or be paid out of PPP loan proceeds. The total amount that an agent can collect from a lender cannot exceed the following:

- One percent for loans of not more than \$350,000;
- 0.50 percent for loans of more than \$350,000 and less than \$2,000,000; and
- 0.25 percent for loans of at least \$2,000,000.

Generally, an “agent” is an authorized representative and may include an attorney, an accountant, a consultant, someone who prepares an applicant’s application for financial assistance and is employed and compensated by the applicant, someone who assists a lender with originating, disbursing, servicing, liquidated or litigating SBA loans, a loan broker or any other individual or entity representing an applicant by conducting business with the SBA.

What certifications does the lender have to make?

The lender must certify that:

- it has complied with the applicable lender obligations set forth in paragraphs 3.b (i)-(iii) of the Paycheck Protection Program Rule; and
- it has obtained and reviewed the required application, including the documents demonstrating qualifying payroll amounts, of the borrower and will retain copies of these documents in the borrower’s loan file; and
- neither the authorized lender official, nor such individual’s spouse or children, has a financial interest in the borrower.

What guidance have lenders received from the bank regulatory agencies on PPP loans?

On Bank Secrecy Act: As mentioned previously, banks must follow existing Bank Secrecy Act requirements when making loans to new or existing borrowers that are eligible. However, PPP loans for existing customers do not require reverification unless otherwise indicated by the bank’s risk-based approach to BSA compliance.

On liquidity constraints: Bank regulators recognize that participating in the PPP loan program could impact an institution’s liquidity as they draw on available or alternative funding sources to fund PPP loans. The regulators will not criticize financial institutions that experience short-term reductions in liquidity to meet PPP demands when administered in a prudent manner.

On legal lending limits: Generally, the portion of the loan guaranteed by a U.S. government agency is excluded when calculating legal lending limits. Lenders should work with their attorneys to review applicable state legal lending limit laws to determine the most accurate method for calculating legal lending limits

On Community Reinvestment Act: In most cases, PPP loans will be eligible to receive CRA credit. When consistent with safe and sound banking practices, loans that benefit small businesses due to the impact of COVID-19 serve the long-term

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interest of those communities and the financial system. In CRA evaluations, loans to for-profit businesses in amounts of \$1 million or less are considered small business loans under the lending test. PPP loans to small businesses may also be considered as innovative or flexible lending practices.

Since roll-out, the PPP application and process has been constantly evolving and much of the guidance is still forthcoming. The attorneys at Fredrikson & Byron have been monitoring new issuances and guidance closely, so keep checking this webpage for updates and forthcoming guidance from the SBA.