

## **LEGAL UPDATES AND NEWS**

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### **The SBA's Paycheck Protection Program (The Latest Developments as of April 17, 2020)**

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The Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, was signed into law on March 27, 2020 and provides over \$2.0 trillion in emergency economic relief to individuals and businesses impacted by the COVID-19 pandemic, which includes authorizing the Small Business Administration ("SBA") to temporarily guarantee loans under a new 7(a) loan program called the Paycheck Protection Program ("PPP"). Under the PPP, participating SBA and other qualifying lenders can originate up to \$349 billion in loans to eligible businesses that are fully guaranteed by the SBA as to principal and interest, have more favorable terms than traditional SBA loans and may be forgiven if the proceeds are used by the borrower for certain purposes.

Yesterday, the SBA announced that no new applications for PPP loans will be accepted and no new lenders will be enrolled into the PPP because the processed PPP loan volume has reached the \$349 billion limit. SBA further noted that loan applications received by PPP lenders but not yet submitted to the SBA will not be processed and a queue will not be maintained for PPP applications once additional funds are authorized.

Assuming that Congress will authorize more PPP funding (which is expected), this alert provides an update on the PPP based upon the current rules and guidance issued by the U.S. Department of the Treasury and the SBA, including: (1) the interim final rule released on April 2, 2020 regarding the implementation of the PPP (the "First Interim Final Rule"); (2) SBA's associated guidance on applicable affiliation rules dated April 3, 2020; (3) the interim final rule released on April 14, 2020 that supplements the First Interim Final Rule (the "Second Interim Final Rule"); and (4) the U.S. Department of the Treasury's Frequently Asked Questions Memorandum, updated as of April 15, 2020 (the "Treasury FAQ"), which provides additional guidance and information to address borrower and lender questions concerning the PPP.

Most notably, the Second Interim Final Rule clarifies that eligible businesses owned (in whole or in part) by any outside director or a less than 30% shareholder of the PPP lender (including the spouse, child or any other relative of such outside director or shareholder) are permitted to apply for a PPP loan through the lender with which such director or shareholder is associated. Such eligible businesses, however, must follow the same process as any similarly situated customer or account holder of the PPP loan and may not receive any favoritism with respect to processing time or prioritization of their PPP applications. Financial institutions must also comply with applicable federal law regarding restrictions on loans to their insiders and should consult their own internal policies concerning lending to individuals or entities associated with them.

However, eligible businesses owned (in whole or in part) by an officer or key employee (or by the spouse or child of such officer or key employee) may not obtain a PPP loan through the lender with which such officer or key employee is associated but may obtain a PPP loan from a different PPP lender.

Although there is bipartisan consensus in Congress to authorize more PPP funding, it's possible that the eligibility criteria and administration of the PPP may change in consideration of any new funding. Luse Gorman is closely monitoring these developments and will provide updates as appropriate.

## **I. General Overview of the PPP**

### **Who are eligible businesses that can apply for a PPP loan?**

A business will be eligible to participate in the PPP if it satisfies either: (1) the “Employee Threshold Test,” or (2) the “Small Business Concern Test.”

***Employee Threshold Test.*** A business with a principal place of residence in the U.S and in operation as of February 15, 2020, including nonprofit organizations, with 500 or fewer employees (even if the business does not qualify as a “small business concern,” as defined below) can apply for a PPP loan. A business that exceeds the 500-employee threshold is still eligible if it meets the SBA employee-based size standards for the industry in which it operates. The applicable SBA employee-based size standards can be found at [www.sba.gov/size](http://www.sba.gov/size). The 500-employee threshold is applied on a per location basis for certain borrowers (e.g., hotels).

The Second Interim Final Rule clarifies that sole proprietors, self-employed individuals and independent contractors are also eligible to apply for a PPP loan if: (1) they were in operation on February 15, 2020; (2) their principal place of residence is in the U.S.; and (3) they filed or will file an IRS Form 1040, Schedule C for 2019. A partner in a partnership should not submit a separate PPP loan application as a self-employed individual. Rather, the partnership itself should file one PPP loan application, and the income of general active partners should be reported as payroll costs, up to \$100,000 annualized.

***Small Business Concern Test.*** A business can apply for a PPP loan (even if it does not satisfy the Employee Threshold Test) as long as it was in operation as of February 15, 2020 and qualifies as a “small business concern” as defined under the Small Business Act. Under current SBA rules, a business qualifies as a “small business concern” if it meets the SBA employee-based and/or revenue-based size standard(s) that corresponds to its primary industry. These industry size standards can be found at [www.sba.gov/size](http://www.sba.gov/size).

Alternatively, a business can qualify as a “small business concern” if it meets the SBA’s “alternative size standard” if both of the following tests are met as of March 27, 2020: (1) maximum tangible net worth of the business is not more than \$15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the PPP application is not more than \$5 million.

In evaluating an applicant’s eligibility under either test, a lender may consider whether a seasonal business was in operation on February 15, 2020 or for an eight-week period between February 15, 2019 and June 30, 2019.

A legal gaming business satisfying either eligibility test can apply for a PPP loan so long as it either: (1) derives no more than one third of its gross revenue from gambling activities; or (2) the following two conditions are satisfied: (a) the business’ legal gaming revenue (net of payouts but not other expenses) did not exceed \$1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) covered less than 50% of the business’ total revenue in 2019.

### **Do the SBA’s affiliation rules apply in determining whether a business is eligible to participate in the PPP?**

Yes. In determining whether a business satisfies the Employee Threshold Test or the Small Business Concern Test, the SBA’s affiliation rules would apply to all businesses applying for a PPP loan except for those expressly excluded by the CARES Act. The excluded businesses are: (1) businesses in the food and hotel industry; (2) businesses operating as a franchise; and (3) businesses receiving assistance from SBA-licensed small business investment companies.

As a result, each affiliate of the applicant (unless an excluded business) must be considered in determining whether the Employee Threshold Test or the Small Business Concern Test is satisfied. Entities are considered SBA affiliates based on certain factors, including 50% or more equity ownership, overlapping management and identity of interest. The SBA has stated that additional guidance would be forthcoming regarding the application of its affiliation rules.

**Could a business that satisfies either the Employee Threshold Test or the Small Business Concern Test be disqualified from participating in the PPP?**

Yes. A business satisfying the Employee Threshold Test or the Small Business Concern Test above would nonetheless be disqualified from participating in the PPP if it is either: (1) a household employer; (2) engaged in any illegal activity under federal, state or local law (this includes marijuana-related businesses, subject to certain exceptions); (3) has a 20% or more owner who is incarcerated, subject to criminal indictment or has been convicted of a felony within the last five years; or (4) defaulted on an SBA or federal loan or guarantee and caused a loss to the government in the last seven years. Additionally, ineligible businesses set forth in 13 CFR Section 120.110 are not eligible for PPP loans.

**Are financial institutions or their affiliates eligible to apply for a PPP loan?**

**Financial Institutions.** No. Under current SBA rules, financial businesses, such as banks and finance companies, are ineligible for SBA loans. Accordingly, neither banks, credit unions nor any other lending institutions are eligible to receive a PPP loan because of this restriction.

**Corporate Affiliates of Financial Institutions.** Subject to additional guidance and based upon current SBA affiliation rules, even if a corporate affiliate of a financial institution is not engaged in the business of lending and qualifies as a “small business concern,” it may nonetheless be ineligible to receive a PPP loan from an unaffiliated lender due its affiliation with an ineligible business (i.e., the parent financial institution).

A practical example of the foregoing would be an insurance agency that is 51% owned by a bank and 49% owned by individual agents that meets the SBA revenue tests. Despite otherwise qualifying for the PPP loan, the insurance agency would not be eligible to receive a PPP loan from an unaffiliated lender because a bank controls 50% or more of its voting power.

Regardless of the SBA affiliation rules, current SBA rules prohibit a lender from originating a loan (which would include a PPP loan) to a business in which the lender has any equity interest.

**Is the business in which a financial institution director, officer, key employee or 30% shareholder has an equity interest eligible to receive a PPP loan from his or her own financial institution?**

**Outside Directors and Less Than 30% Shareholders.** Yes. An eligible business that is owned (in whole or in part) by any outside director or a less than 30% shareholder (including the spouse, child or other relative of such director or shareholder) of the PPP lender may apply for a PPP loan through the lender with which such director or shareholder is associated. As noted above, such eligible businesses may not receive any favoritism regarding processing time or prioritization of their PPP applications and must be treated the same as other similarly situated customers.

**Officers and Key Employees.** No. An eligible business that is owned (in whole or in part) by an officer or key employee (or by the spouse or child of such officer or key employee) may not obtain a PPP loan through the lender with which the officer/key employee is associated. However, such eligible business may obtain a PPP loan from a different lender. This restriction applies to an officer or key employee who also serves as a director of the PPP lender.

## **How much can an eligible business borrow under the PPP?**

An eligible business can apply for a PPP loan up to the greater of: (1) 2.5 times its average monthly “payroll costs;” or (2) \$10.0 million. Average monthly payroll costs would be determined during the 12-month period before the date the PPP loan is made. However, the PPP Borrower Application Form (SBA Form 2483, available [here](#)) (the “Borrower Application Form”) provides alternative time periods to determine average monthly payroll costs for existing, new and seasonal businesses. Notwithstanding such inconsistency, the Treasury FAQ confirmed that following the instructions in the Borrower Application Form to calculate payroll costs is appropriate.

Payroll costs for the maximum PPP loan calculation (“Payroll Costs”) include: (1) salary, wages, commissions or tips, up to \$100,000 on an annualized basis for each employee; (2) for individuals with self-employment income, their 2019 net profit amount as reported on their IRS Form 1040, Schedule C for 2019 (“2019 net profit”); (3) employee benefits, including paid time off, allowance for separation or dismissal, health insurance premiums and retirement benefits; and (4) state and local taxes assessed on compensation (excluding federal employment taxes, such as the employer and employee-portion of FICA taxes, imposed or withheld between February 15, 2020 and June 30, 2020). Only the employee-side federal payroll taxes should be considered Payroll Costs during the applicable time period. Employer-side payroll taxes would be excluded.

The applicant may not include amounts paid to independent contractors or sole proprietors in determining payroll costs since independent contractors and sole proprietors have the ability to apply for a PPP loan on their own. For sole proprietor or independent contractor applicants, Payroll Costs include their wages, commissions, income or net profit from self-employment, up to \$100,000 on an annualized basis.

The Treasury FAQ confirms that the exclusion of compensation in excess of \$100,000 only applies to cash compensation, not to non-cash benefits, including (1) employer contributions to defined-benefit or defined-contribution retirement plans; (2) payment for provision of employee benefits consisting of group health care, including insurance premiums; and (3) payment of state and local taxes assessed on compensation of employees.

## **What are the basic PPP loan terms, including loan forgiveness?**

**General Terms.** PPP loans will have: (1) an interest rate of 1.0%, an increase from 0.5% previously stated by Treasury; (2) a two-year loan term to maturity, decreased from the maximum term of 10 years under the CARES Act; and (3) principal and interest payments deferred for six months from the date of disbursement; however, interest will continue to accrue over the deferred period.

The SBA will guarantee 100% of the PPP loans made to eligible borrowers.

Borrowers are not required to pledge any collateral or provide any personal guarantee in order to obtain their PPP loans and no prepayment penalties or fees may be charged if PPP loans are repaid earlier than the two-year maturity date.

**Use of Loan Proceeds.** Borrowers must use the PPP loan proceeds for: (1) the Payroll Costs; and (2) other authorized non-payroll costs (the “Authorized Non-Payroll Costs”), including: (a) costs related to group health benefits during periods of paid sick, medical or family leave, and insurance premiums; (b) mortgage interest payments (but not mortgage prepayments or principal payments); (c) rent payments; (d) utility payments; (e) interest on debt incurred prior to February 15, 2020; and (f) refinancing of SBA Emergency Industry Disaster Loans that are made between January 31, 2020 and April 30, 2020. At least 75% of the PPP loan proceeds must be used for Payroll Costs.

If the PPP loan proceeds are used for unauthorized purposes, the loan will not be forgiven (as discussed below) and the SBA will direct the borrower to repay the loan. If the proceeds are used knowingly for unauthorized purposes, the borrower, including its shareholders, members or partners for their unauthorized use, may be subject to additional liability.

***Loan Forgiveness.*** The entire principal amount of the borrower's PPP loan, including any accrued interest, is eligible to be reduced by the loan forgiveness amount under the PPP so long as employee and compensation levels of the business are maintained. The loan forgiveness amount is equal to the sum of all Payroll Costs and Authorized Non-Payroll Costs incurred by the borrower during the eight-week cover period following the date the PPP loan proceeds are disbursed, provided, however, that not more than 25% of the loan forgiveness amount may be attributable to Authorized Non-Payroll Costs (or, in other words, at least 75% of the loan forgiveness amount must be attributable to Payroll Costs). For self-employed individuals, their loan forgiveness amount is capped at an amount equal to eight weeks' worth of 2019 net profit (excluding any qualified sick leave that is claimed under the Families First Coronavirus Response Act).

It is still unclear as to whether compensation or employee reductions during the eight-week cover period would reduce the loan forgiveness amount, which we anticipate will be addressed by the SBA.

Borrowers seeking loan forgiveness must submit an application to their lenders and include sufficient documentation verifying their Payroll Costs and Authorized Non-Payroll Costs for the eight-week cover period. Borrowers with employees must submit their Form 941 and state quarterly wage unemployment insurance tax reporting forms or equivalent payroll processor records that best correspond to the eight-week cover period. If PPP loan proceeds are used for Authorized Non-Payroll Costs, borrowers must also submit evidence of business rent, business mortgage interest payments and business utility payments made during the eight-week cover period. Lenders must make their determination on loan forgiveness within 60 days after receipt of the application. Any loan forgiveness amount would be excluded from the borrower's gross income for IRS purposes.

The borrower's remaining PPP loan balance, if any, after reduction of the loan forgiveness amount would remain subject to the terms and conditions described above.

### **What is the borrower application process for obtaining a PPP loan?**

Eligible businesses may apply for PPP loans on a first-come, first-served basis, which commenced on April 3, 2020. The last day to apply is June 30, 2020 or, if earlier, until funds made available for the PPP have been exhausted. No borrower may receive more than one PPP loan.

To apply, an eligible business must submit: (1) the Borrower Application Form (which is permitted to be signed by a single individual who is authorized to sign on behalf of the borrower) and (2) supporting documentation to establish eligibility and the PPP loan amount, such as payroll tax processor records, payroll tax filings or Form 1099-MISC or income and expenses for a sole proprietorship. Pursuant to the Treasury FAQ, payroll documentation provided by the payroll provider that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the applicant's employees will be considered acceptable PPP loan payroll documentation.

The applicant must also make good faith certifications in the Borrower Application Form (the "Borrower Certifications"), including that: (1) it was in operation on February 15, 2020 and had employees and independent contractors that received taxable compensation; (2) the current economic uncertainty makes the PPP loan necessary to support ongoing operations; (3) the PPP loan proceeds will be used for Payroll Costs and Authorized Non-Payroll Costs; and (4) all supporting documentation provided is true and accurate in all material respects.

Pursuant to the Treasury FAQ, an applicant that satisfies the Small Business Concern Test may truthfully attest to its eligibility on the Borrower Application Form, unless otherwise ineligible.

The PPP loan proceeds must be disbursed to the borrower no later than 10 calendar days from the date of loan approval.

## **II. Aspects of the PPP Significant to Lenders**

### **Who is eligible to be a lender under the PPP?**

All SBA 7(a) lenders are automatically approved to make PPP loans.

Federally insured depository institutions and federally insured credit unions not currently approved to be SBA 7(a) lenders are qualified to participate in the PPP, so long as there is no pending enforcement action addressing unsafe or unsound lending practices or troubled conditioned designation from their primary federal regulator. These institutions will be enrolled in the PPP upon completing the CARES Act Section 1102 Lender Agreement (SBA Form 3506, which is available [here](#)) and the Certificate of Incumbency of Officers (FS Form 1014, which is available [here](#)) and sending the forms via email to the SBA at [DelegatedAuthority@sba.gov](mailto:DelegatedAuthority@sba.gov).

### **What underwriting is required?**

***Underwriting Obligations.*** The lender's underwriting obligations under the PPP are limited to: (1) reviewing the Borrower Application Form; (2) confirming receipt of the Borrower Certifications and supporting documentation to establish eligibility and how the PPP loan was calculated; and (3) following applicable BSA protocols. For depository institutions and credit unions, PPP loans made to existing customers will not require: (1) re-verification under applicable BSA requirements; or (2) the collection of beneficial ownership information on an existing customer to the extent it has not been provided, unless otherwise indicated by the institution's risk-based approach to BSA compliance. However, PPP loans to non-existing customers will need to go through the institution's BSA/AML onboarding process.

In evaluating the applicant's eligibility, the lender is not required to consider whether the applicant is unable to obtain credit elsewhere pursuant to the SBA's credit elsewhere test. The Treasury FAQ also clarifies that lenders are not required to make an independent determination whether the SBA's affiliation rules were applied correctly by the applicant.

Lenders are also permitted to use their own online systems and a form they establish that requests the same information (using the same language) as the Borrower Application Form. However, Lenders are still required to send the data to the SBA using the SBA's interface.

***Lender Reliance and Limited Liability.*** The SBA will allow lenders to rely on Borrower Certifications to determine eligibility and use of loan proceeds and supporting documentation to determine the borrower's PPP loan amount and eligibility for loan forgiveness. Although lenders must comply with its PPP underwriting obligations, they will not be liable for the borrower's failure to comply with PPP requirements.

***Processing Loan Forgiveness.*** Lenders do not need to conduct any loan forgiveness verification if the borrower submits documentation supporting its request and attests that it has accurately verified its eligible payments.

***SBA Form 2484.*** Lenders must also submit a PPP Lender's Application for 7(a) Loan Guaranty (SBA Form 2484, available [here](#)) electronically to the SBA with respect to each PPP loan made, which includes a certification that the underwriting obligations above were satisfied. Lenders do not need separate SBA authorization for the SBA to guarantee a PPP loan so long as the SBA Form 2484 related to the PPP loan made has been executed.

**Promissory Note.** Lenders may use their own promissory note or the SBA's form of promissory note, which is available [here](#).

### **Will Lenders receive processing fees for making PPP loans?**

Yes. Processing fees will be paid by the SBA to a lender within five days after the disbursement of the PPP loan. The processing fee amount will be based on the balance of the PPP loan at the time of disbursement, calculated as follows: (1) 5.0% for loans \$350,000 and under; (2) 3.0% for loans greater than \$350,000 to \$2 million; and (3) 1.0% for loans greater than \$2 million.

In addition, lenders will not owe the SBA any up-front guarantee fee, annual service fee or subsidiary recoupment fee. If an agent is hired to assist a borrower, agent fees must be paid by the lender out of the fees the lender receives from the SBA. Agents may not collect fees from the borrower or collect a portion of the PPP loan proceeds. The total amount that an agent may collect from the lender related to the PPP loan may not exceed: (1) 1.0% for loans \$350,000 and under; (2) 0.5% for loans greater than \$350,000 to \$2 million; and (3) 0.25% for loans greater than \$2 million.

### **What is the regulatory capital treatment of a PPP loan?**

PPP loans have a risk weight of zero due to the 100% unconditional guarantee of the payment of principal and interest provided by the SBA.

### **What is the treatment under GAAP of a modified PPP loan?**

If a PPP loan is modified due to the COVID-19 pandemic, the financial institution may elect to suspend GAAP for loan modifications that would otherwise result in the modified PPP loan being considered a troubled debt restructuring.

### **Can PPP loans be sold in the secondary market or repurchased by the SBA?**

A PPP loan may be sold in the secondary market after the loan is fully disbursed at a premium or a discount to par value. No fee will be payable to the SBA for any guarantee sold in the secondary market.

To better ensure that financial institutions will have sufficient liquidity when participating in the PPP, the lender may request that the SBA purchase the expected loan forgiveness amount of the PPP loan (or pool of PPP loans) in advance of any loan forgiveness request by the borrower(s). Specifically, this request may be made by the lender to the SBA at the end of week seven of the eight-week cover period following the date the PPP loan is made.

For the expected loan forgiveness amount to be purchased, the lender must submit a detailed report to the SBA setting forth the expected loan forgiveness amount that includes: (1) the Borrower and Lender Application Forms, including any supporting documentation; (2) a detailed narrative explaining the assumptions and information used to calculate the expected loan forgiveness amount, the basis for those assumptions, alternative assumptions considered and why alternative assumptions were not used; (3) any information obtained from the borrower since the PPP loan was disbursed that the lender used to determine the expected loan forgiveness amount, including documentation to apply for loan forgiveness; and (4) any additional information the SBA may require. If the report demonstrates that the expected loan forgiveness amount is reasonable, the SBA will make the purchase within 15 days thereafter.

We anticipate that the SBA will clarify what happens if the report fails to demonstrate reasonableness, particularly since the lender is relying primarily on information and attestations provided by the borrower in preparing the report.

**Do the SBA's rules for loan pledges apply to PPP loans pledged for borrowings from a Federal Reserve Bank or advances by a Federal Home Loan Bank?**

No. Current SBA rules provide that a pledge of a 7(a) loan (which would include a PPP loan) to the Federal Reserve Bank or the Federal Home Loan Bank does not require the SBA's prior written consent or notice to the SBA. The Second Interim Final Rule clarifies that the SBA's other requirements for loan pledges, such as having to approve loan documents or requiring a multi-party agreement, would also not apply to PPP loans pledged for borrowings from a Federal Reserve Bank or advances by a Federal Home Loan Bank.

**May a participating financial institution limit PPP lending to existing customers only or impose other conditions on a PPP loan borrower?**

Yes. Neither the CARES Act nor any other PPP supplemental guidance prevents financial institutions from limiting PPP participation to existing customers only or imposing other conditions on a borrower obtaining a PPP loan (other than those being applied in a non-discriminatory manner in compliance with applicable laws). Due to several concerns cited by financial institutions following the launch of the PPP, such as BSA/AML concerns, the volume of applications and expedited application process, uncertainty over the conditions for loan forgiveness and a potentially weak secondary market, it is expected that many participating institutions will prioritize eligibility for their PPP lending to existing customer relationships, limit the amount of loans they will originate and impose conditions on borrowers obtaining a PPP loan.

In light of the recent class action lawsuit filed against Bank of America (and related criticism by members of Congress) for placing restrictions on and prioritizing access to its PPP program, lenders should be cognizant of potential scrutiny or discrimination claims when designing any PPP participation limitations, exclusions and other conditions, even though there are no such restrictions under the CARES Act or any other PPP supplemental guidance upon doing so for legitimate business reasons.

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