

PUBLICATION

CARES Act Paycheck Protection Program Applications Now Available: Guidance for Lenders and Borrowers

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On April 2, the Small Business Administration (SBA) issued an Interim Final Rule (the Rule) implementing the Paycheck Protection Program (PPP) created under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The Act and the PPP became law on March 27, but many of the specifics of the implementation and administration of PPP loans was left to the Department of Treasury and SBA to decide. The Rule clarified and expanded guidance from the Treasury Department in the form of information sheets addressed to lenders and borrowers, an overview, and an application. Notably, the Rule clarified the loan terms from the text of the Act. The interest rate for all loans has been set at 100 basis points (1 percent), the term set at two years, and payment deferments set for six months.

Specific Guidance

Application Period. Small businesses and sole proprietorships may begin submitting applications under this program on April 3. Independent contractors and self-employed individuals can apply for loans starting on April 10. The PPP Borrower Application Form is available [here](#). Submit complete PPP applications with required documentation to an approved lender by June 30. Warning: funds will be available on a "first-come, first-served" basis.

Ineligible Businesses. In addition to the eligibility requirements set out in the Act, the Rule adopts the SBA's list of ineligible businesses set forth in [13 CFR 120.110](#). In addition, potential applicants may be ineligible due to criminal activity or default on an SBA or other federally made or guaranteed loan in the last seven years. Further, the SBA Administrator, in consultation with the Secretary of the Treasury, has determined that household employers (e.g., employers of nannies, housekeepers, etc.), are not eligible because they are not "businesses."

Payroll Costs. In addition to the Act's definition of "payroll costs," the Rule provides that cash tips or the equivalent can be included in payroll costs for purposes of the loan amount and forgiveness if based on the employer's records of past tips or based on the employer's good faith estimate of such tips in the absence of such records.

Independent Contractors. Independent contractors do **not** count for purposes of a borrower's PPP loan calculation. However, independent contractors can apply for PPPs on their own.

Participation by Lenders. Existing SBA certified lenders are enrolled in the program and are authorized to take applications and make loans. All federally insured depository institutions, federally insured credit unions, and any Farm Credit System institution (other than the Federal Agricultural Mortgage Corporation) are eligible upon transmission of the CARES Act Section 1102 Lender Agreement (SBA Form 3506) if they are not currently designated in Troubled Condition by their primary federal regulator. Lenders who are not SBA certified can enroll by submitting the Form 3506 to DelegatedAuthority@sba.gov.

Other depository or non-depository financing providers may qualify as well if they meet conditions set forth in the Rule.

Fee Limits. The SBA did not change the processing fees paid to the lenders. However, the Rule clarified that the borrower will not be charged fees for these loans. Any "agent" fee, whether borrower's agent or lender's agent, must be paid by the lender (and not with PPP funds) and are limited to:

- 1 percent for loans \$350,000 and under
- 0.5 percent for loans greater than \$350,000 to \$2 million
- 0.25 percent for loans greater than \$2 million

An "agent" for these purposes is identified as an authorized representative and can be:

- An attorney
- An accountant
- A consultant
- Someone who prepares an applicant's application for financial assistance
- Someone who assists a lender with originating, disbursing, servicing, liquidating, or litigating SBA loans
- A loan broker
- Any other individual or entity representing an applicant by conducting business with the SBA

Borrower Certifications. The Rule requires that borrowers make the following certifications in good faith:

- In operation on February 15 and had employees for whom it paid salaries and payroll taxes or paid independent contractors as reported on a Form 1099-MISC.
- Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.
- Funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments and understands that if the funds are knowingly used for unauthorized purposes, the federal government will hold them legally liable such as for charges of fraud. Not more than 25 percent of loan proceeds may be used for non-payroll costs.
- Provide documentation to the lender verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.
- Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. Not more than 25 percent of the forgiven amount may be for non-payroll costs.
- During the period beginning on February 15 and ending on December 31, the applicant has not and will not receive another loan under this program.
- Applicant further certifies that the information provided in the application and all supporting documents and forms is true and accurate in all material respects and they understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of

up to \$250,000, under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000, and if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than 30 years and/or a fine of not more than \$1 million.

- Acknowledge that the lender will confirm the eligible loan amount using tax documents submitted. Affirm that these tax documents are identical to those submitted to the Internal Revenue Service.
- Understands, acknowledges, and agrees that the lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews. A representative of the applicant can certify for the business as a whole if the representative is legally authorized to do so.

Underwriting/Approval Guidance. The Rule provided important information on the underwriting and approval expectations related to the PPP loans.

- Lenders will be required to confirm receipt of the borrower's certifications contained in the Paycheck Protection Program Application Form.
- Lenders will be required to confirm receipt of information demonstrating their borrower had employees for whom they paid salaries and payroll taxes on or around February 15.
- Lenders will be required to confirm the dollar amount of the average monthly payroll costs by reviewing the payroll documentation with the borrower's application.
- Lenders will be required to follow applicable Bank Secrecy Act requirements which include the Beneficial Owner Rule.

The lender's underwriting obligations under the PPP are limited to the items above and reviewing the Paycheck Protection Application Form.

Form Application. Borrowers must submit SBA Form 2485 (Paycheck Protection Application Form) and payroll documentation. Lenders must submit SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.

Loan Forgiveness Provisions Clarifications

The PPP loan forgiveness was reasserted to cover payroll costs (not to exceed \$100,000 of annualized compensation per employee), mortgage interest, rent, and utilities costs over the eight-week period after the loan is made.

However, the Rule clarified that at least 75 percent of the PPP loans must be used for payroll costs. Any other qualified expenses are limited to 25 percent in order to qualify for forgiveness.

Lenders are not required to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs. The SBA will hold harmless any lender that relies on such borrower documents and attestation from a borrower.

Additional Considerations for Lenders

SBA Purchase. A lender may request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of week seven of the covered period. To submit a PPP loan or pool of PPP loans for advance purchase, a lender shall submit a report requesting advance purchase with the expected forgiveness amount to the SBA.

Additional Guidance will be forthcoming from the SBA on:

- Affiliation
- Forgiveness
- Advance purchase for loans sold on the secondary market.

Baker Donelson is working hard to assist clients in these unprecedented times. Our team of attorneys and advisors continue to monitor and advise on new issues as they develop. For specific guidance or more information on this alert, please contact [D. Jeffrey Wagner](#) or [Martha A. Hartley](#). For more information and general guidance on how to address legal issues related to COVID-19, please visit the [Coronavirus \(COVID-19\): What you Need to Know information page](#) on our website.