

COVID-19 Alert: PPP Interim Rules

U.S. Treasury Releases Interim Rules on Paycheck Protection Program – What You Need to Know

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On April 3, 2020, the Department of the Treasury (“Treasury”) released implementing regulations (“Interim Final Rule”) with respect to the Paycheck Protection Program (“PPP”) as addressed in Title I of the Coronavirus Aid, Relief and Economic Security (“CARES”) Act.

Here is what you need to know:

EFFECTIVE DATE OF INTERIM RULE

The Interim Final Rule is effective immediately, with an effective date of April 3, 2020.

- The Interim Final Rule is still open to public comment; however, for the purpose of soliciting feedback for any necessary revisions.

BASIC STRUCTURE OF PPP LOANS

The Small Business Administration (“SBA”) is authorized to guarantee loans under the PPP through June 30, 2020.

- Loans under the PPP are 100% guaranteed by the SBA, and the full principal amount of the loans may qualify for loan forgiveness, subject to certain restrictions more fully outlined below.

LOAN APPLICANT CERTIFICATIONS

SBA-certified lenders can rely solely on certifications of the borrower company in order to determine both (i) the eligibility of the borrower and (ii) the intended use of loan proceeds.

- Lenders will be held harmless for borrowers’ failures to comply with the PPP rules.
- Borrowers will be held liable under the PPP
 - The use of PPP funds for unauthorized purposes will require repayment of the borrowed amounts in full.

Borrowers who knowingly use PPP loan funds for unauthorized purposes will be subject to additional liability such as criminal charges for fraud.

An authorized representative of the borrower must certify to understanding that knowingly making a false statement to obtain a guaranteed loan from the SBA is punishable under the law and may carry imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

- Additionally, if a borrower's stockholders, members, or partners use PPP funds for unauthorized purposes, the SBA will have recourse against the stockholder, member, or partner in question for the unauthorized use.

An authorized representative of the borrower must certify in good faith to all of the below:

- The applicant business was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contracts, as reported on a Form 1099-MISC;
- Current economic uncertainty makes the loan request necessary to support the ongoing operations of the application;
- The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments;
 - The authorized representative must also certify that he or she understands that if the funds are knowingly used for unauthorized purposes, the federal government may hold the applicant legally liable such as for charges of fraud.
- Documentation verifying the full 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 the loan will be provided to the lender;
- Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities.
 - The applicant must certify to understanding that not more than 25% of the forgiven amount may be for non-payroll costs.
- During the period beginning on February 15, 2020 and ending on December 31, 2020, the applicant has not and will not receive another loan under the PPP;
- The applicant must further certify that the information provided in the application and the information provided in all supporting documents and forms is true and accurate in all material respects; and
 - **The applicant must certify to understanding that knowingly making a false statement to obtain a guaranteed loan from the SBA is punishable under the law and may carry imprisonment of not more than thirty 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, affirming that they are identical to those submitted to the Internal Revenue Service.

BORROWER ELIGIBILITY REQUIREMENTS

Eligibility:

- Business Concerns employing fewer than 500 employees.
- Independent contractors and sole proprietorships may apply for PPP funds.

- Certain Non-profits, employing fewer than 500 employees, authorized under the Act are eligible.
- **Affiliation rules** – There is still no clarity surrounding the SBA affiliation rules. The Interim Final Rule notes that the SBA intends to “promptly” issue additional guidance with regard to the applicability of affiliation rules.
 - **Clients with affiliation uncertainty are cautioned against applying for a PPP loan without additional guidance as the PPP application requires a good faith certification that the information provided in the application and in all supporting documents and forms is true and accurate in all material respects.**
- Recipients of EIDL loans may be eligible for PPP if loan was received between Jan. 31, 2020 and April 3, 2020
 - If EIDL was used for payroll costs, PPP loan **must** be used to refinance EIDL loan
 - Proceeds from any advance up to \$10K on EIDL loan to be deducted from loan forgiveness on PPP loan

Ineligibility:

- Applicant is engaged in any illegal activity under federal, state, or local law;
- Applicant is a household employer (such as employing a nanny);
- A 20% owner is incarcerated, on probation or parole; or presently subject to indictment, or other formal criminal charges; or felony conviction in last 5 years;
- Any previous SBA or federal loans to business owned or controlled by owners defaulted or delinquent in the last 7 years

LOAN PROCEEDS

Loan Amount:

- Maximum loan amount per business = \$10 million
- Loan amount will be the lesser of \$10 million or payroll-based formula
- The following methodology set forth in the Interim Final Rule will be most useful for most applicants:
 - Step 1: Aggregate payroll costs from the last 12 months for employees whose principal place of residence is the United States;
 - Step 2: Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year;
 - Step 3: Divide the amount from Step 2 by 12 to get the Average Monthly Payroll Costs.
 - Step 4: Multiply the answer in Step 3 by 2.5
 - Step 5: Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under a COVID-19 EIDL.

Total Payroll Costs for Purposes of Calculating Loan Amount:

- Employee compensation (U.S. employees only) – includes salary, wages, commissions, tips, vacation, parental, family, medical, or sick leave; separation payments, employee benefit costs

(group health care, insurance premiums), payment of state and local taxes assessed on compensation.

The Final Interim Rule explicitly provides that independent contractors do not count as employees for purposes of PPP loan calculations, reasoning that independent contractors can apply on their own for a PPP loan.

- Payroll costs exclude:
 - Non-US employee compensation
 - Compensation in excess of \$100K per employee
 - Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees

LOAN FORGIVENESS RULES

Loan Forgiveness:

- Up to the full principal amount and any accrued interest
- Loan funds must be used for purposes defined under the Act to be forgiven
- Employee and compensation levels must be maintained for forgiveness.
- Forgivable Uses:
 - Loans can be used to cover payroll costs and benefits, including:
 - Insurance premiums, vacation, parental, family, medical and sick leave, health and retirement benefits, and state and local taxes.
 - Can also be used for payments of mortgage interest, rent, and utilities (**non-payroll costs**):
 - Interest on mortgage obligations, incurred before February 15, 2020;
 - Rent, under lease agreements in force before February 15, 2020;
 - Utilities, for which service began before February 15, 2020;
 - Interest payments on other debt obligations incurred before February 15, 2020; and
 - Refinancing SBA EIDL loan made between Jan. 31, 2020 and April 3, 2020
 - However, not more than 25% of loan forgiveness may be used for non-payroll costs.
- The Interim Final Rule provides that the SBA will issue additional guidance on loan forgiveness.

MISCELLANEOUS

Other Major Terms:

- All PPP loans will carry an interest rate of 1%.
- All PPP loans have a maturity date of 2 years from origination.
- Borrowers may only apply for **one** PPP loan and may only apply once.
- PPP loans can be executed via electronic signatures and electronic consents.

- Repayment of PPP loans begin 6 months from the date of disbursement of the PPP loan; however, interest will accrue from the origination date and continue through the entire period of the loan.
- Applicant businesses are not required to provide any collateral.
- 20% owners of the applicant business are not required to provide personal guarantees.
- Any fees payable to an agent assisting an applicant in the preparation of a PPP loan is payable by the lender out of fees collected from the SBA.
- PPP loans may be sold on the secondary market after the loan is fully disbursed. The SBA will issue further guidance in the future on this point.

Morse is following this topic closely. Please feel free to reach out to your Morse contact, or to speak with **Joe Hunt** or **Amanda Thibodeau** directly, should you have any questions.

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