

## Treasury Issues Regulations Implementing The PPP Loan Application Process

On Thursday, April 2, 2020 the Small Business Administration (SBA) issued a rule to implement the Payroll Protection Program (PPP) under the Coronavirus Aid, Relief and Economic Security Act (CARES Act). This regulation becomes effective upon publication in the Federal Register. The SBA has stated that eligible lenders may start accepting applications from small businesses and sole proprietorships on **Friday, April 3** and may start accepting applications from independent contractors and self-employed individuals on **April 10, 2020**. The SBA also published a new version of the application form [here](#). Previous versions should not be used. Notable information on the new rule and application form follows.

The rule confirms the PPP is “first come, first served,” presumably meaning the applications will start to get processed started on April 3 until all the funds made available for the program (which runs through June 30, 2020) are exhausted.

Entities are eligible if they have 500 or fewer employees or meet the applicable employee-based size standard for their industry and are either a “small business concern” subject to the SBA’s affiliation rules unless waived in the Act or a tax-exempt, nonprofit or veterans organization or a Tribal small business, so long as such entity was in operation on February 15, 2020, and had employees or independent contractors at that time. Each eligible borrower may take only one PPP Loan.

Under the PPP, the maximum available loan amount is the lesser of \$10 million or an amount calculated using a payroll-based formula specified in the Act. The SBA provided a sample calculation of maximum eligible loan amount to be: aggregate payroll costs minus *any compensation paid to an employee in excess of an annual salary of \$100,000* to calculate an average monthly payroll average times 2.5 plus any Economic Injury Disaster Loan (EIDL) made between January 31, 2020, and April 3, 2020, less any \$10,000 advance. This example caps annual salary at \$100,000 while allowing other non-salary payroll above that figure on a per person basis.

Previous guidance indicated that all federal employee withholding (e.g., FICA) would be excluded from the payroll calculation. The rules state that only withholding from February 15 – June 30, 2020, is excluded.

The instructions to the application form published by the SBA states that most applicants will use the average monthly payroll for 2019 to calculate the loan amount. The rule, however, states that payroll costs should be calculated from the last 12 months before the loan, which is consistent with the CARES Act. While we believe it is prudent to follow the new regulations in any case where there is ambiguity between the regulations and the application form, the most important thing for applicants is to ensure their application is transparent and clear as to the particular chosen methodology and the specific guidance they are relying upon. Applicants may wish to check with their lender to see what the lender requires.

The rules state that 75 percent of the loan proceeds must be used for payroll costs, and the application form requires the borrower to certify that it will use the loan proceeds in accordance with the rules. For purposes of determining the amount of forgiveness, no more than 25 percent may be based on non-payroll costs. Funds used for an unauthorized purpose are required to be repaid.

Any entity that received an EIDL between January 31, 2020, and April 3, 2020, may apply for a PPP loan, but, if any such EIDL was used for payroll costs, it must be rolled into the PPP loan and any \$10,000 advance must be deducted from forgiveness. The amount of such a refinanced EIDL loan



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will be included in determining use of proceeds for payroll costs. If the EIDL loan was not used for payroll costs, then it does not affect the PPP Loan.

**Independent contractors of an entity may not be counted in the payroll of an eligible entity and do not count as employees for purposes of its PPP loan calculations** since they may obtain their own PPP Loan.

**The interest rate on the loan is set at 1 percent**, rather than 0.5 percent stated in SBA's previous guidance. The SBA confirmed that the maturity of the loan is two years, with no payments until 6 months after disbursement of the loan. Interest accrues during the deferral period.

Certain entities are ineligible even if they would otherwise qualify as a small business under this regulation including any business engaged in an illegal activity, a household employer, an entity with an owner of 20 percent or more with a defined criminal background, and person or business concerned by any owner that is currently delinquent on or defaulted on a direct or guaranteed loan within the last seven years causing a loss to the government.

Previous versions of the application form stated that all 20 percent or more owners of the applicant must be either U.S. citizens or lawful permanent residents (green card holders). The version posted on April 3 for use in the program has removed this limitation.

The rule allows the use of e-signatures and requires electronic submission of SBA Form 2483 (Paycheck Protection Program Application Form) and SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty).

The rule expands lender eligibility to certain lenders upon completion of a CARES Act Section 1102 Lender Agreement (SBA Form 3506). In order to underwrite a loan, lenders must confirm:

- Receipt of certifications in the application;
- Receipt of information demonstrating borrower had employees for whom it paid salaries and payroll taxes on or around February 15, 2020; and
- The dollar amount of average monthly payroll costs for the preceding year by reviewing the payroll documentation submitted with the borrower's application.

Borrowers must attest that they are eligible for a loan. The SBA said it will allow lenders to rely on certifications by applicants when determining eligibility for the loans and to rely on documents provided by borrowers when deciding loan amounts and eligibility for loan forgiveness. The SBA expects banks to follow existing Bank Secrecy Act requirements for policing financial crime but they will not require lenders to re-verify existing customers for BSA purposes.

Borrowers must submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

Lenders can 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 in an amount that the lender reasonably expects the borrower to expend pursuant to the forgiveness requirements along with a narrative and analysis explaining the basis for such expected forgiveness request and including any supporting documentation from the borrower in the possession of the lender such time.

The SBA states that it will promptly **issue additional regulations on affiliation and loan forgiveness**. This means for now businesses will be subject to the SBA's general affiliation rules other than those classified under NAICS Sector 72 (Accommodation and Food Service). The rule therefore leaves concerns of private equity and venture capital firms unaddressed, who called upon the SBA to relax affiliation rules so that businesses in their portfolios would qualify for the loans and not have their employees counted in aggregate.

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Please contact your Cozen O'Connor relationship attorney or a member of our Small Business team if you have questions or would like additional information.