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UPDATE: NEW INTERIM FINAL RULES FOR PAYCHECK PROTECTION PROGRAM LOAN APPLICANTS

by Nancy Bostic, Wes Dorman, Dan Kroll, Amy Lott and Lynsey Hyde
April 3, 2020

On April 2, 2020, the Small Business Administration (SBA) posted an interim final rule (Guidance) to provide implementation guidelines for the Paycheck Protection Program (PPP). The PPP is a key provision of the Coronavirus Aid, Relief and Economic Security (CARES) Act signed into law on March 27, 2020. The Guidance is available on the SBA's website here. The Guidance was posted in advance of being published in the Federal Register and becomes effective only when published. The PPP allocates $349 billion to provide eligible borrowers with loans of up to $10 million which are up to 100 percent forgivable in order to support payroll costs and other permitted expenses. Please click here to read our prior alert detailing these provisions of the PPP.

The current SBA form of borrower application is available here (the Sample Application). The key borrower provisions in the Guidance are summarized below.

What interest rate applies?
The fixed interest rate for loans under the PPP is 1.0 percent. This is different from the CARES Act's statement that PPP loans would accrue interest at a rate not to exceed 4.0 percent as well as other SBA guidance issued on March 31, 2020, which provided that loans would accrue interest at the rate of 0.5 percent. The change to the 1.0 percent rate was in response to feedback that the lower rate of interest could prevent community banks from participating in the PPP.

What maturity date applies?
The maturity date is 2 years.

How is the loan amount calculated?
The Guidance sets forth the following methodology to help businesses that are eligible borrowers determine their maximum PPP loan amount:

Step 1: Aggregate payroll costs from the last 12 months for employees whose principal place of residence is the U.S. Payroll costs is defined as set forth below.

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. Note that the inclusion of the foregoing independent contractor payments is consistent with the language in Section 1102(a)(2) of the CARES Act but is inconsistent with the Guidance, which provides that independent contractors have the ability to apply for a PPP loan on their own and therefore do not count for purposes of a borrower's PPP loan calculation. This is discussed further below.

Step 3: Divide the amount in Step 2 by 12 to determine the average monthly payroll costs.

Step 4: Multiply the average monthly payroll costs in Step 3 by 2.5.

Step 5: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any advance under an EIDL loan (which can be up to $10,000). The Guidance states that If EIDL loan proceeds were used for payroll costs, then the PPP loan must be used to refinance the EIDL loan. Except in the foregoing circumstance, the language in Section 1102 of the CARES Act appears to allow the borrower to determine whether to refinance the EIDL loan with the PPP loan.

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An example illustrating the methodology:
The borrower's annual payroll is $1,500,000.

The borrower obtained an EIDL loan to cover payroll costs on February 1, 2020 of $10,000.

Three employees earn a salary of $200,000 per year, so their salaries in excess of $100,000 each (which totals $300,000) are subtracted from $1,500,000. Annual qualifying payroll is therefore $1,200,000.

Divide $1,200,000 by 12 to get average monthly qualifying payroll is $100,000.

Multiply $100,000 by 2.5 = $250,000.

Add the EIDL loan of $10,000 to determine the maximum loan amount of $260,000.

What dates apply when calculating payroll costs?

Non-Seasonal Employers - The CARES Act states that payroll costs for non-seasonal employers are based on the 1-year period preceding the date the loan is made, but the Sample Application instructions state that most applicants will use average monthly payroll for 2019. The Guidance does not clarify this discrepancy between the CARES Act and the Sample Application.

Seasonal Employers - The CARES Act states that average total monthly payments for payroll for seasonal employers are for the 12-week period beginning February 15, 2019 or, at the employer's election, March 1, 2019, and ending June 30, 2019. However, the Sample Application instructions provide only that seasonal businesses may elect to use average monthly payroll for the time period between February 15, 2019 and June 30, 2019. The Guidance does not clarify this discrepancy.

What qualifies as payroll costs?
The Guidance states that payroll costs consist of:

1. Compensation to employees whose principal place of residence is the U.S. in the form of salary, wages, commissions or similar compensation;
2. Cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips);
3. Payment for vacation, parental, family, medical or sick leave;
4. Allowance for separation or dismissal;
5. Payment for employee benefits consisting of group health care coverage, including insurance premiums, and retirement;
6. Payment of state and local taxes assessed on compensation of employees; and
7. For an independent contractor or sole proprietor, wage, commissions, income or net earnings from self-employment or similar compensation.

What is expressly excluded from payroll costs?
The following are not includable as payroll costs:

1. Any compensation of an employee whose principal place of residence is outside of the U.S.;
2. The compensation of an individual employee in excess of an annual salary of $100,000, prorated for the applicable period;

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3. 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; and

4. Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Public Law 116–127).

Do independent contractors count as employees in determining payroll costs?
No, the Guidance states that independent contractors do not count as employees for purposes of PPP loan calculations because they have the ability to apply for a PPP loan on their own. We note this because the CARES Act addressed this differently in Section 1102(a)(2) and included in the calculation of payroll costs the payments of compensation to or income of an independent contractor that was income, commission or net earnings from self-employment up to $100,000 prorated for the covered period.

Can an applicant receive more than one PPP loan?
No. Each borrower may receive only one PPP loan.

Can e-signatures or e-consents be used?
Yes. E-signatures or e-consents may be used for the application forms regardless of the number of owners a borrower has.

Are the PPP funds on a first come, first serve basis?
Yes.

Are PPP loan payments deferred?
Yes. Borrowers do not need to make any payments for 6 months after the loan date. Interest will accrue during the deferral period.

Is the PPP loan forgivable?
Yes, the Guidance provides that the loan forgiveness amount can be up to the full principal amount of the loan plus any accrued interest. Notably, the CARES Act provides that the forgivable amount cannot exceed the principal amount. The Guidance modifies this by including accrued interest.

The amount of loan forgiveness is reduced by a borrower's EIDL advance grant of up to $10,000 and is also impacted by (i) how and when the loan proceeds are spent, (ii) the borrower's employee headcount compared to earlier periods (taking into account certain rehires) and (iii) whether any employees making under $100,000 on an annualized basis prorated for the 8-week period are subject to greater than 25 percent salary or wage reductions when compared to the prior calendar quarter. A detailed summary of how to calculate loan forgiveness is in our prior alert which can be found here.

As discussed in our prior alert, PPP loan proceeds may be used for many types of costs, but only certain specific costs over the 8-week period after the loan date are counted when determining the amount of the loan that is forgivable. The Guidance modifies the CARES Act by providing that the forgivable amount of non-payroll costs is limited to 25 percent of the total forgivable amount.

How do applicants apply for a loan?
To apply for a PPP loan, the applicant must submit SBA Form 2483, found here. The applicant is also required to submit payroll documentation such as payroll processor records, payroll tax filings or Form 1099-MISC or income and expenses from a sole proprietorship. If an applicant does not have this documentation, it must provide other documents such as bank records sufficient to substantiate qualifying payroll.

Are PPP loans available to entities owned 20 percent or more by individuals who are not U.S. citizens or lawful permanent U.S. residents?
A prior version of the SBA's PPP loan application indicated that PPP loans are not available to entities owned 20 percent or more by individuals who are not U.S. citizens or lawful permanent U.S. residents. This restriction is not in the CARES Act and is not in the current Sample Application published by the SBA on April 2.

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For additional information on how PPP loan proceeds can be used, loan forgiveness qualifications, eligibility to apply for a PPP and other details about the PPP loan program, please refer to our prior alert as modified by this alert or contact one of our task force members (below).

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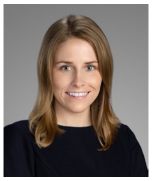

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