

COVID-19 Alert

CARES ACT PAYCHECK PROTECTION PROGRAM LOANS APRIL 3, 2020 UPDATE

APRIL 2020

On April 1, 2020 we [posted information on the Paycheck Protection Program \(PPP\) loan offerings created by the CARES Act](#). The application process for loans under the PPP was scheduled to be live Friday, April 3, 2020. This is to provide a quick update.

IS THE PROGRAM LIVE?

Yes, and no, as of mid-day April 3, 2020. Anecdotal evidence indicates that for small business applicants some lenders have gone live with the application process, with others hoping to still do so today, and the rest likely to be further delayed. Based on a just-ended conference call featuring local Small Business Administration (SBA) officials, the hold-ups are apparently two-fold, with lenders still digesting guidance issued by SBA last night, and with some glitches existing in portals between the lenders and SBA.

In the case of sole proprietorships, independent contractors, and eligible self-employed individuals, the go-live date for applications is scheduled to be April 10, 2020.

HAS ANYTHING CHANGED?

On Thursday April 2, 2020, the SBA revised its sample application form (SBA Application). Here is a link to the [new SBA Application](#). Anecdotally, some lenders are (or will be) using this form as is, while others will be customizing and may include additional information requests (including more detailed “know your customer” or “beneficial ownership” questions).

Note that the instructions to the SBA Application tell applicants to use 2019 Payroll Cost information for average monthly Payroll Costs for determining the amount of the loan applied for. This conflicts with the CARES Act, which calls for information based on the year prior to loan origination. Informal SBA guidance indicates that is intentional, and presumably because calendar year information will be easier to document and review.

SBA is also in the process of issuing an Interim Final Rule providing additional guidance. We have seen a draft, which indicates the following:

- Interest rates for loans will be at 1.00%, up from the 0.50% announced by SBA earlier, but still below the up to 4.00% contemplated by the CARES Act itself.

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- As indicated in our prior review, SBA affiliation rules generally apply for determining whether businesses must be combined for determining compliance with the 500 or fewer employee requirement, except for employers in NAICs code 72 (food preparation and accommodations) and as subsequently determined by SBA guidance. SBA has yet to create other exceptions. SBA “intends to promptly issue additional guidance” on this topic.
- Certain categories of employers have been ruled ineligible:
 - Those engaged in illegal activity under federal, state or local law
 - Household employers (e.g., individuals employing nannies or housekeepers)
 - Businessess if an owner of 20% or more of the business’s equity is: incarcerated, on probation, or on parole; now subject to an indictment, criminal information, arraignment or similar criminal process; or has been convicted of a felony in the last five years.
 - The business or any business controlled by it or any of its owners has ever obtained an SBA direct or guaranteed loan that is currently delinquent or has defaulted in the last seven years causing a loss to the government.
- Independent contractors are not employees, and they (and compensation paid or to be paid to them) should not be taken into account by an applicant business. Rather, the independent contractors should apply separately for their own loans.
- The maturity date for the loans will be two years. This is consistent with SBA’s press release earlier in the week, but contrasts with the CARES Act itself, which provides for a maturity date of up to 10 years.
- The indication in the prior SBA Application that amounts to be forgiven other than Payroll Costs cannot exceed 25% of the amount forgiven is confirmed. There is some language that indicates that only 25% of loan proceeds can be used for those other expenses, even if not to be forgiven; it is not clear that is actually intended, or just rushed drafting.
- PPP loans are entirely “first-come, first-served.”

ANY PRACTICAL POINTERS?

The following are a mix of informal SBA guidance and anecdotal practical points:

- An applicant can apply for both a PPP loan and an Economic Injury Disaster Loan (EIDL). However they CANNOT be used to cover the same expenses. Note that recent EIDLs (but not advances against them) may be refinanced into PPP loans. The SBA Application specifically contemplates that in its calculation of loan amount requested (as an add-on to 2.5 times average monthly Payroll Costs).
- Certain points of the PPP reference “loan origination date,” most particularly for determining the starting point of the eight-week period for calculating expenses giving rise to loan forgiveness. “Loan origination date” is understood to be the day the loan funds, not the date of application or loan document execution if different.

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- Permitted uses of loans and forgivable uses of loans (with limits) include rent under leasing obligations entered prior to February 15, 2020. This is not limited to real property (e.g., building space) lease rentals. It includes equipment rentals.
- Applications will be initially processed by the lenders, but will also be subject to SBA processing. How long this will take given the large volume expected is not clear. At the moment there is no way to estimate when a loan applied for today (or whenever possible) will actually fund, although both the lenders and SBA are working to make it as quick as possible.
- Loan forgiveness will be reduced based on reduced full time equivalent employees (FTEs) during the eight-week measuring period versus the FTEs during the applicable base period (with some ability to reverse if employees are brought back prior to June 30, 2020). FTE implies part-time employees being aggregated. SBA is expected to ultimately issue guidance on whether that is how it will actually interpret things.
- “Guaranteed payments” to partners and LLC members are not W-2 income. Tax advisors are taking the position that they may, however, be included in Payroll Costs (subject to the \$100,000 annual rate limitation for salary and wages).
- If your business does not have a banking relationship, it may establish one now and apply. However, lenders will still need to apply their “know your customer” procedures as for any new relationship, in addition to the PPP specific process. This may slow the process. And as SBA and the lenders are stressing, this is “first-come, first-served.”

Please contact the Reid and Riege attorney with whom you regularly work, or a member of our Business Services practice listed to the right, for more up to date information, or questions about your unique circumstances.

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