



ROADMAP FOR SMALL BUSINESSES FOR THE PAYMENT PROTECTION PROGRAM

KEEPING AMERICAN WORKERS PAID AND EMPLOYED ACT

BY: HARVEY E. BINES

- I. Title I, § 1102(a) of the CARES Act amends Section § 7(a)(2) of the Small Business Act (the “SBAAct”), section F, to which is added a new subsection (36) (“§ 36”), § 36 creates the “Paycheck Protection Program” (the “PPP”).
- II. Title I, § 1106 provides for forgiveness of loans made under the PPP.
- III. To implement the PPP, § 7(a)(2) of the SBAAct, as amended by § 1102 and the addition of § 36, commits the Small Business Administration (the “SBA”) to approve, and permits almost all approved banks and credit institutions, without risk to the lender or effect on compliance with limiting banking regulations, to underwrite PPP loans authorized by § 36, in each case, in full.¹
 - (a) As amended by § 1102, Section § 7(a)(2)(F) of the SBAAct states that the participation of the SBA in a § 36 loan “shall be” 100%.
 - (b) New § (F)(ii)(I) of § 36, titled “Delegated Authority” expands “Administration” (i.e., the SBA) to include, in ¶ (I) “approved” lenders, most of which will not have been approved lenders in SBA programs operating prior to enactment.
 - (c) Accordingly, new § (F)(iii) of § 36 authorizes the SBA and Treasury to approve “Additional Lenders” to “process, close, disburse and service” loans.
- IV. For purposes of the CARES Act generally, § 1101(2) incorporates the definition of “small business concern” in § 3 of the SBAAct, a complex provision that primarily assigns revenue caps by NAICS Code.² The PPP, however, is intended to authorize loans to eligible businesses of all character, including sole proprietors, independent contractors and “eligible” self-employed individuals, plus nonprofits and veterans organizations, irrespective of whether the company would qualify as a small business under SBA regulations.
- V. The sole limitation on obtaining a “loan” is the workforce size of a loan applicant and its affiliates: excluding multi-location businesses identified as NAICS 72 and businesses

¹ Although § 1102 amends the SBAAct, it is available currently only via the CARES Act. References to subsections of the PPP in this memorandum are also references to § 36 when incorporated into printed copy of the United States Code

² For some NAICS Codes, size is determined by number of employees, and in that group, some exceed 500. https://www.ecfr.gov/cgi-bin/text-idx?SID=b919ec8f32159d9edaaa36a7eaf6b695&mc=true&node=pt13.1.121&rgn=div5#se13.1.121_1201

identified by NAICS Code permitted higher workforce levels that the SBA designates as “small”, only businesses employing a maximum of 500 full and part time workers qualify for PPP loans.

- VI. The amount loaned is based on the formula of 2.5 times “payroll costs” up to a maximum of \$10 million. The proceeds of the loan may be used during the “covered period” (2/15 to 6/30/2020) for recurring out-of-pocket costs including compensation of and benefits for employees, and payments to independent contractors and other third parties for services, utilities, rent, and interest, measured by pre-shutdown experience.
- VII. Although § 1106 contains provisions that forgive PPP loans in part, the main object of the PPP is maintenance of the workforce. Treasury has issued guidance that no more than 25% of PPP loans expended for non-payroll costs are likely to be forgiven under § 1106.
- VIII. The critical measuring period for both “covered loan” determinations under § 11.02 and for “loan forgiveness” under Section 11.06 is the “covered period”, which is 2/15/20 through 6/30/20.
- IX. On April 1, 2020, Treasury issued a PPP “Information Sheet,”³ and both Treasury and the SBA published the PPP loan application form.⁴ On April 2, 2020, the SBA published an “Interim Final Rule” that provides additional detail on the SBA’s implementation of the PPP. Treasury and the SBA have also issued, and will continue to issue, guidance on specific issues.⁵

“Paycheck Protection Program” Loan Screen

1. Is the applicant an “eligible recipient”?
 - is it a business concern?
 - 13 C.F.R. § 121.105: definitions⁶
 - business entity of all types of legal organization, including individual proprietorship
 - organized for profit or is an eligible nonprofit

³ <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf>

⁴ https://www.sba.gov/sites/default/files/2020-04/PPP%20Lender%20Application%20Form_0.pdf

⁵ As of 4/4/20,
<https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf> (affiliation);
<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>; (no lender duty to confirm borrower payroll)

<https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf>

⁶ https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=31a8d99d0b78877ea6f254df6d6ae8ff&mc=true&n=pt13.1.121&r=PART&ty=HTML#se13.1.121_1105

- that
 - operates in U.S., or
 - makes “significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor”
- is a JV with foreign partner, no greater than 49% “participation” by the partner
- with a number of employees that for borrower and affiliates⁷ does not exceed
 - generally, 500 max, except
 - multi-location companies designated as NAICS 72 allowed more than 500, and
 - where size standards for a “small business concerns” set according to NAICS Code by SBA are greater,⁸ the 500-employee limit may be exceeded up to that limit.

2. How much can an eligible recipient borrow?

- 2.5 times average total monthly payroll costs of the company during year preceding loan, plus
 - amount necessary to refinance SBA loan made on or after 1/1/20
 - “average” means the one-year period prior to the loan, or, for seasonal employers, the average during 2/15/19 (or, at the company’s election, 3/1/19) and 6/30/19
 - if not in business between 2/15/19 and 6/30/19, average monthly “payroll costs” between 1/1/20 ad 2/29/20

3. What is included in “payroll costs”?

- amount company paid for
 - ordinary compensation of all types, including tips
 - payments during time off for vacation or leave
 - separate compensation

⁷ An applicants must include in its count employees of “affiliates”. If an investor or investor group owns a majority of the equity, assuming full dilution, or has contractual control (whether or not exercised), of two or more companies, they will be considered affiliated for purposes of the PPP.
<https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf>

⁸ 13 C.F.R. § 121.201, cited and linked in note 3.

- health care and insurance payments
- retirement benefits
- state and local taxes on employee compensation
- Amounts a sole proprietor or independent contractor receives as compensation or income

4. What is excluded?

- compensation above \$100,000
- federal taxes
- compensation to any non-U.S.-based employee
- sick or family leave credited under the Families First Coronavirus Response Act

5. Are there use-of-funds restrictions?

- the philosophy of the PPP is to enable companies to operate and to continue employment or rehire employees and service providers
- until June 30, the funds borrowed under the PPP may be used for recurring costs, specified generally as
 - payroll costs and other forms of employment compensation
 - health benefits, paid leave and related insurance
 - interest on mortgage and other loans
 - utilities
 - refinance of certain SBA loans made between 1/31/20 and date PPP loans made available

6. How does a borrower apply?

- participating federally insured banks and approved credit lenders are responsible for processing loans
- borrowers should contact either their loan officers or the SBA to identify a suitable lender immediately to hold a place in line at a lender who will process the loan
- lenders are directed to determine that the borrower
 - was in operation on 2/15/20
 - was paying federally taxed salaried employees or independent contractors

- borrower must certify that
 - “uncertainty of current economic conditions” makes the loan request “necessary ... to support ongoing operations”
 - use of funds
 - “retain workers and maintain payroll or”
 - make mortgage, lease, loans or utility payments
 - no duplicate application submitted – *i.e.*, no multi-lender shopping
 - between 2/15/20 and 12/31/20 borrower has not received duplicative funding under a PPP loan
7. To whom does a borrower apply?
- SBA approved lenders
 - SBA identifies approved lenders online by ZIP Code
 - directly to borrower’s bank, unless it is not approved by SBA or Treasury
8. Do the loans contain protective provisions?
- loan proceeds used for purposes other than as specified uses for PPP loans are recoverable from the borrower, but otherwise
 - nonrecourse against owners *unless* proceeds used for unauthorized purpose
 - no processing fee
 - no showing that required credit otherwise unavailable
 - no personal guarantee required
 - no collateral required
 - no prepayment penalty
 - no requirement that credit be otherwise unavailable
9. What is the term of the loan?
- statutory maximum is 10 years from the loan forgiveness application date, but Treasury has established a term of 2 years
10. What is the interest rate on the loan?
- statutory maximum is 4%, but Treasury has established a rate of 1%

11. What is the loan's priority against or effect on the loan other credit facilities?
 - PPP loans do not affect priority of outstanding loans
 - PPP loans do not (and cannot) diminish compliance with existing loan covenants or other financing documents
 - counterparty waivers must be obtained, but
 - especially because of the forgiveness feature, PPP loans add to the creditworthiness
12. When do payments of principal and interest begin?
 - for an applicant in operation on 2/15/20,
 - complete deferment relief for 6 months⁹
13. What are the key lender protections?
 - lenders are protected in aftermarket, and no federal fee imposed on transfer of loan
 - risk weight for capital requirements set at zero
 - FASB accounting standards regarding troubled debt temporarily suspended
 - generous and prompt payment of processing fees

⁹ § 36(M)(ii) permits up to one year, but SBA and Treasury have set deferment administratively at 6 months. See Interim Rule, p.13.

Forgiveness Screen

1. Interest on mortgages, rent payments, utility payments and “payroll costs” (“Reduction Potential”) may be forgiven.
 - measuring period for amounts to be forgiven is 8-week period beginning on loan origination date
 - forgiveness limited to loan principal and accrued interest
 - forgiveness reduced by (at borrower’s election), either X/Y or X/Z , where,
 - X = average number of full-time equivalent employees during the covered period
 - Y = average number of full-time equivalent employees during 2/25/19-6/30/19
 - Z = average number of full-time equivalent employees during 1/1/20-1/29/20
 - any employee receiving pay at \$100k/year during 2019 may not be covered for amount above \$100k
 - forgiveness reduced by reduction in “total salary” for each employee affected of more than 25% during quarter of employment prior to “covered period”
 - employers of tipped workers credited with wage paid excluding tips
 - adjustment for rehires: no forgiveness reduction for reductions between 2/15/20 through 3/27/20 that are rehired by 6/30/20
 - forgiveness application supporting documentation
 - payment verification of mortgage interest, rent and utilities
 - certification
 - amount requested applied to employee retention, plus
 - amount requested for other approved periodic payments accurate
 - lender must review forgiveness application within 60 days
 - forgiveness not taxable