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**Huddle: COVID-19 Banking Edition C/A Top 10 FAQs May 20, 2020**

**PPP Questions**

**Q1: If a borrower returns the PPP loan funds, can they reapply? The borrower wants to restart the 8-week period to spend the money.**

**A1:** Unfortunately, there's been no indication by the Treasury or SBA that a PPP borrower who returns PPP funds may reapply for a new PPP loan. The SBA (Houston) has unofficially addressed this question in one of its recent webinars and advised against taking this course of action absent official guidance indicating it is allowed. Further, if the reason the borrower is doing this is simply to circumvent the 8-week requirement, Compliance Alliance especially have to advise against it. The 8-week period is a pretty strict rule and it's generally clear from the rules and guidance so far that the borrower can't manipulate this timing outside of the allowances below:

"Covered Period: Enter the eight-week (56-day) Covered Period of your PPP loan. The first day of the Covered Period must be the same as the PPP Loan Disbursement Date. For example, if the Borrower received its PPP loan proceeds on Monday, April 20, the first day of the Covered Period is April 20 and the last day of the Covered Period is Sunday, June 14.

Alternative Payroll Covered Period: For administrative convenience, Borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the eight-week (56-day) period that begins on the first day of their first pay period following their PPP Loan Disbursement Date (the “Alternative Payroll Covered Period”). For example, if the Borrower received its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP loan disbursement is Sunday, April 26, the first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is Saturday, June 20. Borrowers who elect to use the Alternative Payroll Covered Period must apply the Alternative Payroll Covered Period wherever there is a reference in this application to “the Covered Period or the Alternative Payroll Covered Period.” However, Borrowers must apply the Covered Period (not the Alternative Payroll Covered Period) wherever there is a reference in this application to “the Covered Period” only."

Source: <https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>

**Q2: Does the bank have to include/consider PPP loan in its ATR calculation on a subsequent loan to that individual?**

**A2:** While this has not been specifically addressed in the CARES Act or any Interim Final Rules, the bank still needs to consider the requirements of the ATR Rules. There are two main questions: whether or not PPP loans are considered debt, and whether the potential forgiveness aspect of the Program affects that determination.

Conservatively, the bank should be including the PPP loan at the time of making the determination for ATR purposes as it is considered debt and there is no allowance for excluding due to possible forgiveness. This is, of course, not contemplated in the ATR Final Rules: <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/Q/#3>

Conservatively it would be considered an installment loan liability, and per Appendix Q, if the recurring payment extends for more than 10 months, then it would be counted towards ATR.

But as far as whether PPP loans are even considered debt to begin with is arguable as it does not appear to fall within that definition. The bank is free, of course, to include that per bank policy. If the bank is going to be more flexible in its interpretation and not count all or part of the PPP as liability, the bank may want to review a borrower’s records to determine eligibility for loan forgiveness.

"Creditors have significant flexibility to consider current debt obligations in light of attendant facts and circumstances, including that an obligation is likely to be paid off soon after consummation."

Resource: <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1026/Interp-43/#43-c-2-vi-Interp>

**Q3: Is the mortgage interest or rent that is forgivable for the PPP loan applicable to the business owners’ primary residence or must it only be used for their business mortgage or business rent?**

**A3:** Amounts that are paid in interest on a mortgage obligation on real or personal property that the *company* incurred in the ordinary course of business before February 15, 2020 are permissible to be included in a forgiveness calculation, as is rent paid per a lease agreement in force before February 15, 2020. From a strict reading, it would appear that only business mortgage interest payments would be applicable to forgiveness purposes.

**Q4: How much time does the customer have to submit their application for forgiveness? Is there a deadline? And what will the general process look like?**

**A4:** The Treasury/SBA released Paycheck Protection Program Loan Forgiveness Application is a series of forms the borrower must complete and return to the lender (or the lender servicing the loan). It includes the PPP Loan Forgiveness Calculation Form, PPP Schedule A, the PPP Schedule A Worksheet, and the (optional) PPP Borrower Demographic Information Form. All Borrowers must submit the Loan Forgiveness Calculation Form and the PPP Schedule A to the lender.

With the release, the SBA clarified a few of the critical definitions and documentation requirements in the instructions. The borrower must spend the money on authorized expenses in a specific period of time in order to be eligible for forgiveness. The deadline to apply for forgiveness remains unclear, but the form carries an October 31, 2020 expiration date. The application outlines what documentation will be required with the forgiveness requests, which includes but it not limited to the following:

**Payroll Costs—**

* Outlined in PPP Schedule A Worksheet and must identify each employee paid during the eight-week period
* Must identify employees paid at an annualized rate below $100,000 in 2019 on one schedule and employees paid at an annualized rate over $100,000 on another schedule.
* Business owner’s compensation is included on a separate line on the forgiveness application but it is still calculated into the application like any other employee.

Includes:

1. Bank accounts or third-party payroll service reports documenting the cash compensation paid to employees.
2. Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or Alternative Payroll Covered Period.
   1. For tax forms, the SBA is requesting payroll tax forms (usually 941s) and state quarterly wage and unemployment filings.
3. Payment receipts, cancelled checks or account statements documenting the amount of employer contributions to employee health insurance and retirement plans.

\*It remains unclear what sole proprietors or partnerships who do not have payroll and do not file 941s will use.

\*\*There will be significant time lags for some businesses when their 8-week period will be up and when the small business will file its quarterly 941s. Businesses may have to wait for a month or two after the 8-week period before filing their forgiveness application. Awaiting additional guidance from the SBA.

**Rent, Mortgage Interest and Utilities—**

* SBA is requiring existence of the obligation/service prior to February 15, 2020 and evidence of payments during the 8-week period
* For business mortgage obligations:
  + Business would provide a lender amortization schedule and receipt of payments along with statements from February 2020 and during the 8-week covered period
* For rent or lease payments:
  + Copy of the lease agreement showing it was in force before February 15, 2020
  + To document payments:
    - Produce copies of account statements from landlord/lessor showing payments or cancelled checks evidencing payments during the 8-week period

\*Those paying rent monthly generally will be able to request two months’ worth of expenses during the 8-week period.

* For utility payments:
  + Invoices or statements from February 2020 showing the utility service in place
  + To document payments:
    - Account statements showing payments made, cancelled checks or bank-account statements showing the payment.

Once the bank receives a loan forgiveness application, the bank has 60-days to approve or reject the forgiveness request. All documentation must be retained by the borrower for six-years after the date the loan is forgiven or repaid in full. The borrower must permit authorized representatives of SBA, including Officer of Inspector General, to access such files upon request.

Resource: <https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>

Compliance Alliance will be hosting a PPP Loan Forgiveness Webinar Tuesday, May 26th at 2:30 CST so stay tuned to our webpage for information on how to register.

**Q5: If a customer received an EIDL advance after they received the PPP loan, should this amount be listed on the Calculation Form?**

This confusion stems from the SBA’s requirement regarding PPP loans and their use being for payroll purposes primarily. EIDL loans can be used for other purposes if the borrower is also getting a PPP loan. If borrowers obtained an EIDL loan *before* April 3 (the start of the PPP), then the SBA was concerned about how those funds were going to be used.

If an EIDL is obtained before April 3 to cover payroll costs, then it *must* be refinanced into the PPP—this does *not* mean that if the borrower obtained an EIDL loan after April 3 that they cannot also get a PPP loan.

If the EIDL was obtained before April 3 for non-payroll costs, that is permissible. But if it was obtained after April 3, while still permissible, if the borrower also gets a PPP loan, then the post-April 3 EIDL should not be used for payroll.

Again, borrower must be documenting how all of the funds for both PPP and EIDL are spent, in general making sure those EIDLs received after April 3 are not being used for payroll purposes, but rather other operating expenses like supplies, lab, rent, marketing, working capital, etc. This is easier to achieve again with that concept of separate bank accounts between PPP, EIDL and the bank’s general operating account.

If the borrower is applying for both PPP and EIDL at the same time currently, the borrower is free to accept the PPP loan first and then decide on whether or not to close on the EIDL approved loan.

If a borrower received proceeds from an advance up to $10,000 on an EIDL loan between that window of January 31, 2020 and April 3, 2020, the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

**Q6: Is the death of an employee considered “voluntarily resigning” under the Forgiveness Exemption?**

**A6:** This is ultimately a tax law consideration that the borrower needs to seek the guidance from a tax professional on. Generally, when an employee dies, deferred compensation may be due and payable to the employee’s beneficiary or estate.

**Q7: Is there any issue if the borrower and/or bank places any leftover PPP loan funds into a higher-yielding account like a CD?**

**A7:** There is not specific language in the CARES Act or any of the Interim Final Rules that expressly allow or prohibit this practice. The issue here is why are there leftover funds and will that be found to be in violation of the intent of the Program, putting into jeopardy any loan forgiveness guaranty from the SBA. Borrowers have the 8-week time period to use the proceeds from the PPP funds—proceeds that were predetermined and calculated as sufficient and needed during that timeframe to retain and pay employees. The borrower should be concerned why there are leftovers—auditing of calculations should become priorities for borrowers with surplus.

**Q8: Is the monthly amount that the borrower pays their payroll service provider included in “payroll costs”?**

**A8:** Unfortunately, this is more of a tax question that needs to be resolved with a tax professional. The best place to begin understanding what constitutes payroll costs would be the IRS and their definitions. A general understanding is that this would not be included.

**Miscellaneous Banking Questions**

**Q9: How do banks handle lobby hour changes that will be temporary while reopening and permanent after returning to normal? What notices must be given to customers/regulators/etc.?**

**A9:** For changes to business hours that were temporary and directly related to COVID-19, the FDIC guidance stated:

"Alternative Service Options for Customers: The FDIC understands that financial institutions may need to temporarily close a facility due to staffing challenges or to take precautionary measures. For example, some institutions may wish to limit foot traffic within a branch and provide services only through the drive-through lanes. The FDIC encourages financial institutions to reduce disruptions to their customers, provide alternative service options when practical, and reopen affected facilities when it is safe to do so. ***Affected financial institutions are encouraged to notify their primary federal or state regulator and their customers of temporary closure of an institution’s facilities and the availability of any alternative service options as soon as practical.*** In such case in which operational challenges persist, the FDIC, working with the state authority, will expedite, as appropriate, any request to operate temporary facilities to provide more convenient availability of services. In most cases, a telephone notice to the FDIC or state authority will suffice to start the approval process, with the necessary written notification being submitted shortly thereafter." [Emphasis added].

Source: <https://www.fdic.gov/news/news/financial/2020/fil20017a.pdf>

If the hours are permanently changing, the bank will need to follow the normal, general notice requirements to customers, regulators as applicable, as well as updating of forms, signs and Reg CC funds availability if impacted. If your funds availability will be affected, then you'd need to give 30 days’ notice:

"(e) Changes in policy. A bank shall send a notice to holders of consumer accounts at least 30 days before implementing a change to the bank's availability policy regarding such accounts, except that a change that expedites the availability of funds may be disclosed not later than 30 days after implementation."

Source: 12 CFR 229.18(e) <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=b199de6a5fc4a3f6b01b122d572d56c0&mc=true&n=pt12.3.229&r=PART&ty=HTML#se12.3.229_118>

**Q10: Does the bank have to keep the “reservation of right” for the savings accounts if the bank wants to continue reporting these as savings accounts and to exclude them from Regulation CC?**

**A10:** Reservation of right is still a condition of a savings deposit per Regulation D—this part of Regulation D did not change:

**Does the interim final rule have any impact on the "reservation of right" provisions set forth in section 204.2(d)(1) of Regulation D?**  
No. The interim final rule does not have any impact on section 204.2(d)(1) of Regulation D. The "reservation of right" continues to be a part of the definition of "savings deposit" under the interim final rule.

Source: <https://www.federalreserve.gov/supervisionreg/savings-deposits-frequently-asked-questions.htm>

If the bank ever did stop treating the account as a savings account, it would become a transaction/checking account and the bank would need to be following Regulation CC requirements for holds on deposits:

**How did the recent amendments to Reg D impact Reg CC?**  
On April 24, 2020, the Board of Governors issued an interim final rule amending its Regulation D to delete the six per month limit on convenient transfers from “savings deposits.” Among other things, the interim final rule amended the definition of “transaction account” in 12 CFR 204.2(e) such that the definition now includes accounts described in 204.2(d)(2) (savings deposits).  
  
Regulation CC provides that an “account” subject to Regulation CC includes accounts described in 12 CFR 204.2(e) (transaction accounts) but excludes accounts described in 12 CFR 204.2(d)(2) (savings deposits). Because Regulation CC continues to exclude accounts described in 12 CFR 204.2(d)(2) from the Reg CC “account” definition, the recent amendments to Regulation D did not result in savings deposits or accounts described in 12 CFR 204.2(d)(2) now being covered by Regulation CC.

Source: <https://www.federalreserve.gov/supervisionreg/savings-deposits-frequently-asked-questions.htm>