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| **Publication Date: April 2, 2020**  **Reference:** <https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf> | **Paycheck Protection Program**  **Affiliate Rules**  **Interim Final Rule Summary** |
| **Overview**  On April 2, 2020, the Small Business Administration (SBA) issued its Interim Final Rule (Rule) implementing sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Section 1102 of the Act temporarily adds a new type of loan named the “Paycheck Protection Program” (PPP) to the SBA’s existing 7(a) Loan Program, and Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans.  The Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely affected by the Coronavirus Disease 2019 (COVID-19) Emergency Declaration. The Interim Final Rule outlines the key provisions of sections 1102 and 1106 and requests public comment.  **Timing**  Effective Date: The Interim Final Rule is effective on the date of publication in the Federal Register. (As of publication of this summary, the Rule has not been published in the Federal Register).  Applicability Date: The Interim Final Rule covers applications submitted under the Paycheck Protection Program through June 30, 2020, or until the $349,000,000,000 in funding is exhausted.  Comment Period: Comments on the Interim Final Rule must be received within 30 days of publication in the Federal Register. (As of publication of this summary, the Rule has not been published in the Federal Register). Once published, you may submit comments through the Federal eRulemaking Portal: <http://www.regulations.gov> (use number SBA-2020-0015).  **What do Lenders Need to Know and Do?**  Eligibility to Lend  All current SBA certified 7(a) lenders are automatically approved to make PPP loans. The following types of additional lenders may also make PPP loans if they are not currently designated in Troubled Condition or subject to a formal enforcement action regarding unsafe or unsound lending practices:   * Any federally insured depository institution; * Any federally insured credit union; * Any Farm Credit System institution; and * Other depository or non-depository financing providers who meet certain conditions.   The first three types of lenders will be automatically qualified to make PPP loans upon transmission of a [Section 1102 Lender Agreement](https://www.sba.gov/sites/default/files/2020-04/PPP--Agreement-for-New-Lenders-Banks-Credit-Unions-FCS-w-seal-fillable.pdf) (SBA Form 3506) to the SBA, if they meet the conditions above.  Underwriting  PPP loans will not be subject to traditional underwriting, and the Final Rule makes clear that lenders will be in compliance with the Rule if they do the following:   * Confirm receipt of borrower certifications in the [Paycheck Protection Program Application Form](https://www.sba.gov/document/sba-form--paycheck-protection-program-borrower-application-form); * Confirm receipt of information showing the borrower had employees for whom the borrower paid salaries and payroll taxes as of February 15, 2020; * Confirm the dollar amount of average monthly payroll costs by reviewing the borrower’s payroll documentation; * Follow all applicable BSA requirements.   BSA Requirements  Federally insured depository institutions have to continue to follow their existing BSA protocols when making PPP loans to either new or existing customers. The Final Rule indicates that PPP loans for existing customers will not require “reverification” under applicable BSA requirements, unless otherwise required by the institution’s risk-based approach to BSA compliance. However, it is not clear from the Final Rule or other guidance whether this is an exemption from the “recertification” requirement for beneficial ownership purposes specifically.  Reliance on Borrower Documentation  The lender does not need to conduct any additional verification if the borrower properly submits documentation and attests that it has accurately verified the payments for eligible costs. The SBA will hold harmless any lender that relies on these documents and attestation.  Processing Fees  The SBA will pay lenders fees for processing PPP loans in the following amounts:   * 5% for loans of not more than $350,000; * 3% percent for loans of more than $350,000 and less than $2,000,000; and * 1% percent for loans of at least $2,000,000.   Credit Elsewhere Test  When evaluating an applicant’s eligibility, lenders do not have to apply the so-called “credit elsewhere test” (as set forth in the Small Business Act (15 USC 636) and 13 CFR 120.101) that apply to other 7(a) loans.  **What do Borrowers Need to Know and Do?**  Eligibility to Borrow  An entity is eligible for a PPP loan if it:   * Has 500 or fewer employees whose principal place of residence is in the United States (except for limited industries that meet applicable SBA employee-based size standards); * Is a small business concern as defined by the SBA and subject to SBA’s affiliation rules, unless specifically waived, is a tax-exempt nonprofit organization described in section 501(c)(3), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business; * Was in operation on February 15, 2020; and * Either had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.   A sole proprietor or independent contractor is also eligible for a PPP loan if the individual:   * Was in operation as of February 15, 2020; and * Submits sufficient documentation such as payroll processor records, payroll tax filings, Form 1099-MISC, or income and expenses from a sole proprietorship. If these are not available, the borrower must provide other supporting documentation that will demonstrate the qualifying payroll amount, such as bank records.   Exceptions  Examples of businesses ineligible for a PPP loan if are:   * Those engaged in any activity that is illegal under federal, state, or local law; * Household employers (e.g. employing nannies or housekeepers); * Those owned 20% or more by someone who is incarcerated, on probation, on parole; subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years; or * Those who have ever obtained a direct or guaranteed loan from any Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.   To find out more, businesses that are not eligible for PPP loans are identified in 13 CFR 120.110  and described further in SBA’s Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations specifically authorized under the Act are eligible: <https://www.sba.gov/document/sop50-10-5-lender-development-company-loan-programs>.  Maximum Loan Amount  The maximum loan amount is the lesser of $10 million or the amount calculated using the following payroll-based formula:   1. Add up payroll costs (defined below) from the last 12 months for employees whose principal place of residence is the US. 2. Subtract any salary or compensation in excess of $100,000 per year. 3. Divide the amount from Step 2 by 12 to get average monthly payroll costs. 4. Multiply the average monthly payroll costs from Step 3 by 2.5. 5. If applicable, 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 COVID-19 loan (because it does not have to be repaid).   The following are examples of how this would be calculated:   * Example 1 – No employees make more than $100,000   1. Annual payroll: $120,000   2. Average monthly payroll: $10,000   3. Multiply by 2.5 = $25,000   **Maximum loan amount is $25,000**   * Example 2 – Some employees make more than $100,000   1. Annual payroll: $1,500,000   2. Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000   3. Average monthly qualifying payroll: $100,000   4. Multiply by 2.5 = $250,000   **Maximum loan amount is $250,000**   * Example 3 – No employees make more than $100,000, outstanding EIDL loan of $10,000.   1. Annual payroll: $120,000   2. Average monthly payroll: $10,000   3. Multiply by 2.5 = $25,000   4. Add EIDL loan of $10,000 = $35,000   **Maximum loan amount is $35,000**   * Example 4 – Some employees make more than $100,000, outstanding EIDL loan of $10,000.   1. Annual payroll: $1,500,000   2. Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000   3. Average monthly qualifying payroll: $100,000   4. Multiply by 2.5 = $250,000   5. Add EIDL loan of $10,000 = $260,000   **Maximum loan amount is $260,000**  “Payroll Costs”  Payroll costs include all the following:   * Compensation to employees (whose principal place of residence is the US) in the form of salary, wages, commissions, or similar compensation; * Cash tips or the equivalent (based on employer records of past tips or, in the absence of records, a reasonable, good-faith employer estimate of such tips); * Payment for vacation, parental, family, medical, or sick leave; * Allowance for separation or dismissal; * Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; * Payment of state and local taxes assessed on compensation of employees; and * For an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.   The following *may not* be included in payroll costs:   * Any compensation of an employee whose principal place of residence is outside of the US; * The compensation of an individual employee in excess of an annual salary of $100,000, prorated; * Federal employment taxes imposed/withheld between February 15, 2020 and June 30, 2020; and * Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act.   Interest Rate  The Rule sets the interest rate at 100 basis points or 1%. Although the SBA’s initial guidance set the interest rate at 0.5%, the Final Rule indicates that the SBA believes a 1% interest rate to be appropriate. See the Final Rule for more of the reasoning behind the change.  Maturity Date  The maturity for a PPP loan is two years. While the CARES Act provided for a maximum maturity of up to ten years, the SBA determined that a two-year loan term is sufficient “in light of the temporary economic dislocations caused by the coronavirus.”  Deferment  Payments will be deferred for six months following the date of disbursement of the loan, but interest will continue to accrue during the six-month deferment. Although the CARES Act authorized the SBA to defer loan payments for up to one year, the SBA determined that a six-month deferment period is appropriate considering the “modest” interest rate of 1% and the loan forgiveness provisions.  Forgiveness  The amount of forgiveness can be up to the full principal amount of the loan and any accrued interest, as long as the borrower:   1. Uses all the loan proceeds for forgiveable purposes; and 2. Employee and compensation levels are maintained after loan origination.   Originally, the CARES Act provided that borrowers are eligible for forgiveness for the loan proceeds used for: 1) payroll costs; 2) mortgage interest; 3) rent payments; and 4) utilities. However, in this Final Rule, the SBA determined that the non-payroll portion of the forgivable loan amount should be limited to 25% in order to “effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll.” In other words, to the extent that more than 25% of the loan proceeds are not used for payroll costs, those proceeds will not be forgivable.  Independent Contractors  Independent contractors do not count as employees for purposes of a borrower’s maximum loan amount calculation, since independent contractors have the ability to apply for a PPP loan on their own. In other words, the Government is trying to avoid “double dipping.”  Use of Proceeds  The proceeds of a PPP loan can only be used for the following purposes:   1. Payroll costs; 2. Costs to continue group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; 3. Mortgage interest payments (but not mortgage prepayments or principal payments); 4. Rent payments; 5. Utility payments; 6. Interest payments on any other debt obligations that were incurred before February 15, 2020; and/or 7. Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020.   If a borrower uses PPP funds for unauthorized purposes, SBA will require the borrower to repay those amounts. Further, if a borrower *knowingly* uses the funds for unauthorized purposes, there will be additional liability such as charges for fraud.  Application Process  The applicant has to submit to the lender SBA Form 2483 ([Paycheck Protection Program Application Form](https://www.sba.gov/document/sba-form--paycheck-protection-program-borrower-application-form)) and sufficient payroll documentation, described above.  The lender must submit SBA Form 2484 ([Paycheck Protection Program Lender’s Application for 7(a) Loan Guaranty](https://content.sba.gov/sites/default/files/2020-04/PPP%20Lender%20Application%20Form_0.pdf)) electronically according to program requirements and maintain all required forms and supporting documentation in its files.  Certification  There are various certifications that the applicant must make in good faith. These are all listed in the SBA [Paycheck Protection Program Application Form](https://www.sba.gov/document/sba-form--paycheck-protection-program-borrower-application-form).  Additional Information   * Each eligible borrower may only receive one PPP loan, so borrowers should consider obtaining the maximum loan amount allowed, as needed. * The SBA allows e-signatures and e-consent for PPP loan documentation, regardless of the number of owners in the business. * The Paycheck Protection Program will be implemented on a “first come, first served” basis because there is a limited funding amount of $349,000,000,000.   **What do Both Borrowers and Lenders Need to Know and Do?**  Loan Terms and Conditions  Loans will generally be guaranteed under the PPP under the same terms, conditions, and processes as other SBA 7(a) loans, with certain changes including but not limited to:   * The guarantee is 100%. * No collateral will be required. * No personal guarantees will be required. * The interest rate will be 1%. * All loans will be processed by all lenders under delegated authority. * Lenders will be permitted to rely on borrower certifications in order to determine borrower eligibility and use of loan proceeds.   Fee Waivers   * There will be no up-front guarantee fee payable to the SBA by the Borrower; * There will be no lender’s annual service fee (“on-going guaranty fee”) payable to the SBA; * There will be no subsidy recoupment fee; and * There will be no fee payable to the SBA for any guarantee sold into the secondary market.   Agent Fees  If an agent is involved, any agent fees will be paid by the lender out of the fees the lender receives from the SBA. Agents may not collect any additional fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed:   * 1% for loans of not more than $350,000; * 0.50% for loans of more than $350,000 and less than $2 million; and * 0.25% for loans of at least $2 million.   Secondary Market  A PPP loan may be sold on the secondary market after the loan is fully disbursed, at a premium or a discount to par value. SBA will issue additional guidance regarding any advance purchase for loans sold in the secondary market.  SBA PPP Loan Purchase  A lender may request that the SBA purchase the expected forgiveness amount of a PPP loan at the end of week seven after disbursement. The expected forgiveness amount is the amount of loan principal the lender reasonably expects the borrower to expend on payroll costs, covered mortgage interest, covered rent, and covered utility payments during the eight-week period after disbursement. As discussed above, at least 75% of the expected forgiveness amount has to be for payroll costs.  To request advance purchase of the expected forgiveness, a lender has to submit a report with the expected forgiveness amount to the SBA. The report has to include:   * The borrower’s Paycheck Protection Program Application Form; * Any supporting documentation submitted with the Application; * The Paycheck Protection Program Lender’s Application for 7(a) Loan Guaranty; * Any other supporting documentation; * A detailed narrative explaining the assumptions used in determining the expected forgiveness amount, the basis for those assumptions, alternative assumptions considered, and why those were not used; * Any information obtained from the borrower since the loan was disbursed that the lender used to determine the expected forgiveness amount, which may include payroll tax filings, cancelled checks, and other payment documentation; and * Any additional information the SBA may require to determine whether the expected forgiveness amount is reasonable.   The expected forgiveness amount may never exceed the total amount of principal on the PPP loan. The SBA will purchase the expected forgiveness amount within 15 days of the date on which the SBA receives a complete report that demonstrates that the expected forgiveness amount is indeed reasonable. | |
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