

# COVID-19 RESOURCE

## Summary of the Small Business Administration's Regulations for the Paycheck Protection Program

by Scott Gautier

April 7, 2020

The following summarizes sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act" or the "Act") as clarified by the interim rules issued by the U.S. Small Business Administration, the named Administrator under the Act (the "SBA" or "Administrator"). Note that this reader-friendly format paraphrases and quotes portion of the Act and the interim rules without attribution. Accordingly, readers are advised to refer to the full text of the Act and rules published at 13 CFR 120 to clarify any ambiguities reflected herein.

Section 1102 of the Act temporarily adds a new product, titled the "Paycheck Protection Program," to the U.S. Small Business Administration's (SBA's) 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

### **IMPORTANT: The Rules May Change**

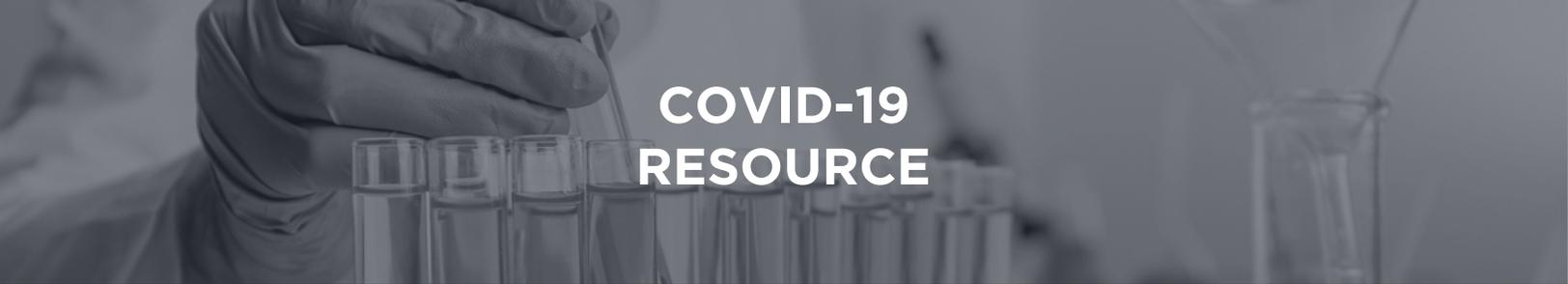
SBA Loan programs are administered by the SBA through private lenders. The SBA provides rules through federal regulations that private lenders are required to follow. Typically, legislated modifications to the SBA loan programs would only go into effect after rules are drafted, noticed, and posted; interested parties comment on the draft; and then the rules are revised and finalized – a process that typically takes months. However, due to the emergency nature of the relief, the legislature provided for the Payroll Protection Program to be implemented immediately upon issuance of interim final rules by the U.S. Treasury and SBA. The program requirements of the PPP identified in the interim final rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10). The interim final rule went into effect on Friday, April 3, 2020.<sup>1</sup>

### **Paycheck Protection Program Overview**

The SBA is to temporarily guarantee up to \$349 billion of loans under a new 7(a) loan program titled the "Paycheck Protection Program" ("PPP") through June 30, 2020. Loans guaranteed under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. It is anticipated that most of the loans will qualify for forgiveness.

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<sup>1</sup> Even though the program has been implemented, the SBA is still soliciting comments and the SBA will consider these comments and the need for any revisions.



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The PPP sets aside many of the requirements that typically apply to SBA loans:

- Does not require the lenders to comply with section 120.150 “What are SBA’s lending criteria?”
- Allows lenders to skip diligence and rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds
- Lenders may rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness
- Lenders must comply with the applicable lender obligations set forth in the interim final rule
- Lenders will be held harmless for borrowers’ failure to comply with program criteria<sup>2</sup>

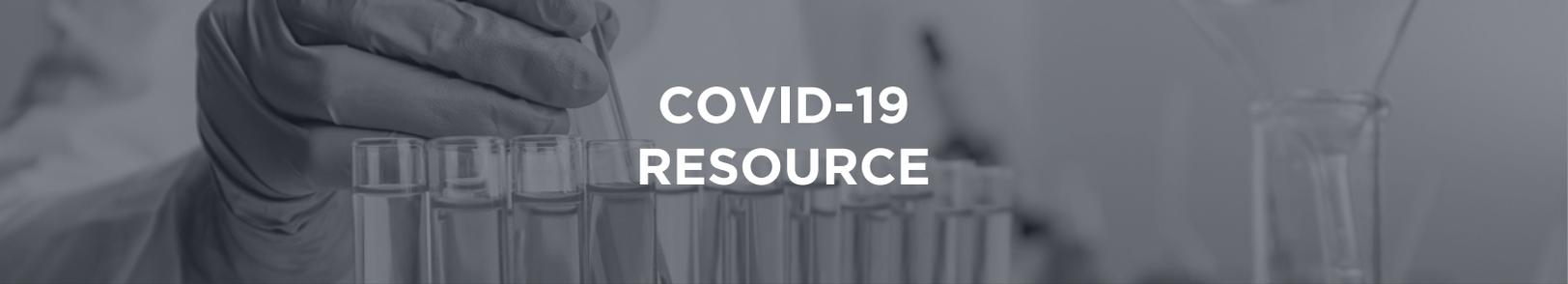
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<sup>2</sup> Remedies for borrower violations or fraud are addressed in the Q&A to the interim final rule.

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## Q&A - SUMMARIZED FROM THE INTERIM FINAL RULES BORROWER QUESTIONS

### Who is eligible?

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meets the applicable SBA employee-based size standards for that industry, **and**:

- You are:
  - A. A small business concern as defined in section 3 of the Small Business Act (15 USC 632), and subject to the SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act;
  - B. A tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), 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; and
- You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC, including individuals that operate:
  - (i) under a sole proprietorship; or
  - (ii) as an independent contractor; or
  - (iii) as an eligible self-employed individual.

Note regarding "Affiliation" Rules - SBA intends to promptly issue additional guidance with regard to the applicability of affiliation rules at 13 CFR §§ 121.103 and 121.301 to PPP loans.

### Could I be ineligible even if I meet the eligibility requirements in (a) above?

You are ineligible for a PPP loan if,<sup>3</sup> for example:

- You are engaged in any activity that is illegal under federal, state, or local law;
- You are a household employer (individuals who employ household employees such as nannies or housekeepers);
- An owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently 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
- You, or any business owned or controlled by you or any of your owners, has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.

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<sup>3</sup> 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, except that nonprofit organizations authorized under the Act are eligible. See: <https://www.sba.gov/document/sop-50-10-5-lender-development-company-loan-programs>



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## **How much can I borrow?**

The lesser of \$10 million or an amount that you will calculate using a payroll-based formula. The following methodology is one of the methodologies contained in the Act:

**Step 1:** Aggregate payroll costs from the last twelve months for employees whose principal place of residence is the United States.

**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.

**Step 3:** Calculate average monthly payroll costs (divide the amount from Step 2 by 12).

**Step 4:** Multiply the average monthly payroll costs from 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 COVID-19 loan (because it does not have to be repaid).

## **What qualifies as “payroll costs”?**

Payroll costs consist of compensation to employees (whose principal place of residence is the United States) 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 such 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.

## **Is there anything that is expressly excluded from the definition of payroll costs?**

The Act expressly excludes the following:

- Any compensation of an employee whose principal place of residence is outside of the United States;
- The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;
- 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
- 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).



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## **Do independent contractors count as employees for purposes of PPP loan calculations?**

No. Independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan calculation.

## **What is the interest rate on a PPP loan?**

The interest rate will be 100 basis points or one percent. Note that the Act provides for a maximum of 4% and the rules are determinative.

## **What will be the maturity date on a PPP loan?**

The maturity is two years. While the Act provides that a loan will have a maximum maturity of up to ten years from the date the borrower applies for loan forgiveness, the Administrator determined that a two-year loan term is sufficient.

## **Can I apply for more than one PPP loan?**

No. Eligible borrower may receive more than one PPP loan. While the Act does not expressly provide that each eligible borrower may only receive one PPP loan, the Administrator has determined that a one loan per borrower limitation is necessary.

## **Can I use e-signatures or e-consents if a borrower has multiple owners?**

Yes, e-signature or e-consents can be used regardless of the number of owners.

## **Is the PPP "first-come, first-served?"**

Yes.

## **When will I have to begin paying principal and interest on my PPP loan?**

You will not have to make any payments for six months following the date of disbursement of the loan. However, interest will continue to accrue on PPP loans during this six-month deferment. The Act authorizes the Administrator to defer loan payments for up to one year.

## **Can my PPP loan be forgiven in whole or in part?**

The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the origination date of the loan. However, *not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs.*

## **What forms do I need and how do I submit an application?**

The applicant must submit SBA Form 2483 (Paycheck Protection Program Application Form) and payroll documentation consisting of such documentation as is necessary to establish eligibility: such as payroll processor records, payroll tax filings, or Form 1099- MISC, or income



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and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

The lender must submit SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.

## **How can PPP loans be used?**

The proceeds of a PPP loan *must* be used for:

- insurance payroll costs (as defined in the Act and in 2.f.);
- costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and premiums;
- mortgage interest payments (but not mortgage prepayments or principal payments);
- rent payments;
- utility payments;
- interest payments on any other debt obligations that were incurred before February 15, 2020; and/or
- refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020.<sup>4</sup>

However, *at least 75 percent of the PPP loan proceeds shall be used for payroll costs*. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness.

## **What happens if PPP loan funds are misused?**

If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

## **What certifications need to be made?**

On the Paycheck Protection Program application, an authorized representative of the applicant must certify in good faith to all of the below:<sup>5</sup>

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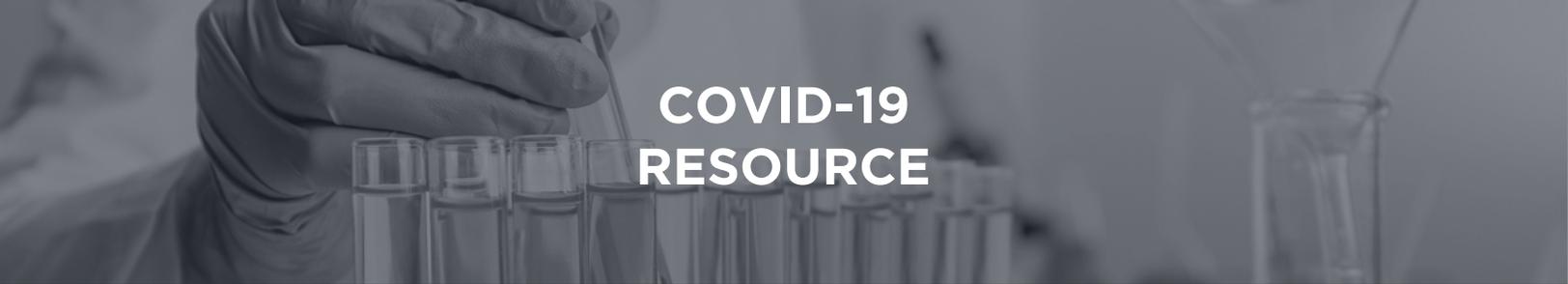
<sup>4</sup> If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

<sup>5</sup> An authorized signatory may sign for businesses with more than one owner.



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- The applicant was in operation on February 15, 2020, and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC. Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.
- The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable such as for charges of fraud. As explained above, not more than 25 percent of loan proceeds may be used for non-payroll costs.
- Documentation verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan will be provided to the lender.
- Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. As explained above, not more than 25 percent of the forgiven amount may be for non-payroll costs.
- During the period beginning on February 15, 2020, and ending on December 31, 2020, the applicant has not and will not receive another loan under this program.
- I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of (1) not more than two years and/or (2) a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.
- I acknowledge that the lender will confirm the eligible loan amount using tax documents I have submitted. I affirm that these tax documents are identical to those submitted to the Internal Revenue Service. I also understand, acknowledge, and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

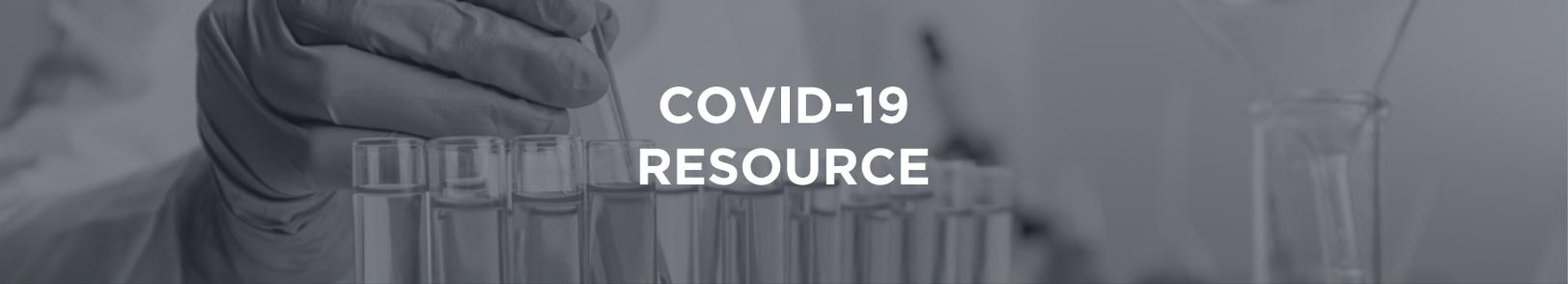


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## LENDER QUESTIONS

### Who is eligible to make PPP loans?

- All SBA 7(a) lenders are automatically approved to make PPP loans on a delegated basis.
- The Act provides that the authority to make PPP loans can be extended to additional lenders determined by the Administrator and the Secretary to have the necessary qualifications to process, close, disburse, and service loans made with the SBA guarantee. Since SBA is authorized to make PPP loans up to \$349 billion by June 30, 2020, the Administrator and the Secretary have jointly determined that authorizing additional lenders is necessary to achieve the purpose of allowing as many eligible borrowers as possible to receive loans by the June 30, 2020, deadline.
- The following types of lenders have been determined to meet the criteria and are eligible to make PPP loans unless they currently are designated in Troubled Condition by their primary federal regulator or are subject to a formal enforcement action with their primary federal regulator that addresses unsafe or unsound lending practices:
  - a. Any federally insured depository institution or any federally insured credit union;
  - b. Any Farm Credit System institution (other than the Federal Agricultural Mortgage Corporation) as defined in 12 U.S.C. 2002(a) that applies the requirements under the Bank Secrecy Act and its implementing regulations (collectively, BSA) as a federally regulated financial institution, or functionally equivalent requirements that are not altered by this rule; and
  - c. Any depository or non-depository financing provider that originates, maintains, and services business loans or other commercial financial receivables and participation interests; has a formalized compliance program; applies the requirements under the BSA as a federally regulated financial institution, or the BSA requirements of an equivalent federally regulated financial institution; has been operating since at least February 15, 2019, and has originated, maintained, and serviced more than \$50 million in business loans or other commercial financial receivables during a consecutive 12-month period in the past 36 months, or is a service provider to any insured depository institution that has a contract to support such institution's lending activities in accordance with 12 U.S.C. § 1867(c) and is in good standing with the appropriate Federal banking agency.
- Qualified institutions described in 3.a.iii. I. and II. will be automatically qualified under delegated authority by the SBA upon transmission of CARES Act Section 1102 Lender Agreement (SBA Form 3506) unless they currently are designated in Troubled Condition by their primary federal regulator or are subject to a formal enforcement action by their primary federal regulator that addresses unsafe or unsound lending practices.



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## What do lenders have to do in terms of loan underwriting?

Each lender shall:

- Confirm receipt of borrower certifications contained in Paycheck Protection Program Application form issued by the Administration;
- Confirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;
- Confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentation submitted with the borrower's application; and
- Follow applicable BSA requirements:
  - Federally insured depository institutions and federally insured credit unions should continue to follow their existing BSA protocols when making PPP loans to either new or existing customers who are eligible borrowers under the PPP. PPP loans for existing customers will not require re-verification under applicable BSA requirements, unless otherwise indicated by the institution's risk-based approach to BSA compliance.
- Entities that are not presently subject to the requirements of the BSA, should, prior to engaging in PPP lending activities, including making PPP loans to either new or existing customers who are eligible borrowers under the PPP, establish an anti-money laundering (AML) compliance program equivalent to that of a comparable federally regulated institution. Depending upon the comparable federally regulated institution, such a program may include a customer identification program (CIP), which includes identifying and verifying their PPP borrowers' identities (including e.g., date of birth, address, and taxpayer identification number), and, if that PPP borrower is a company, following any applicable beneficial ownership information collection requirements. Alternatively, if available, entities may rely on the CIP of a federally insured depository institution or federally insured credit union with an established CIP as part of its AML program. In either instance, entities should also understand the nature and purpose of their PPP customer relationships to develop customer risk profiles. Such entities will also generally have to identify and report certain suspicious activity to the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). If such entities have questions with regard to meeting these requirements, they should contact the FinCEN Regulatory Support Section at [FRC@fincen.gov](mailto:FRC@fincen.gov).
- In addition, FinCEN has created a COVID-19-specific contact channel, via a specific drop-down category, for entities to communicate to FinCEN COVID-19-related concerns while adhering to their BSA obligations. Entities that wish to communicate such COVID-19-related concerns to FinCEN should go to [www.FinCEN.gov](http://www.FinCEN.gov), click on "Need Assistance," and select "COVID19" in the subject drop-down list.

Each lender's underwriting obligation under the PPP is limited to the items above and reviewing the "Paycheck Protection Application Form."



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## **Can lenders rely on borrower documentation for loan forgiveness?**

Yes. The lender does not need to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs. The Administrator will hold harmless any lender that relies on such borrower documents and attestation from a borrower.

## **What fees will lenders be paid?**

SBA will pay lenders fees for processing PPP loans in the following amounts:

- Five (5) percent for loans of not more than \$350,000;
- Three (3) percent for loans of more than \$350,000 and less than \$2,000,000; and
- One (1) percent for loans of at least \$2,000,000.

## **Do lenders have to apply the “credit elsewhere test”?**

No.



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## WHAT DO BOTH BORROWERS AND LENDERS NEED TO KNOW AND DO?

### What are the loan terms and conditions?

Loans will be guaranteed under the PPP under the same terms, conditions, and processes as other 7(a) loans, with certain changes including but not limited to:

- The guarantee percentage is 100 percent.
- No collateral will be required.
- No personal guarantees will be required.
- The interest rate will be 100 basis points or one percent.
- All loans will be processed by all lenders under delegated authority and lenders will be permitted to rely on certifications of the borrower in order to determine eligibility of the borrower and the use of loan proceeds.

### Are there any fee waivers?

- There will be no up-front guarantee fee payable to SBA by the Borrower;
- There will be no lender's annual service fee ("on-going guaranty fee") payable to SBA;
- There will be no subsidy recoupment fee; and
- There will be no fee payable to SBA for any guarantee sold into the secondary market.

### Who pays the fee to an agent who assists a borrower?

Agent fees will be paid by the lender out of the fees the lender receives from SBA. Agents may not collect 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:

- One (1) percent for loans of not more than \$350,000;
- 0.50 percent for loans of more than \$350,000 and less than \$2 million; and
- 0.25 percent for loans of at least \$2 million.

### Can PPP loans be sold into the secondary market?

Yes. A PPP loan may be sold on the secondary market after the loan is fully disbursed.

### Can SBA purchase some or all of the loan in advance?

Yes. A lender may request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of week seven of the covered period. 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 loan disbursement. The Administrator will purchase the expected forgiveness amount of the PPP loan(s) within 15 days of the date on



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which the Administrator receives a complete report that demonstrates that the expected forgiveness amount is reasonable.

**Our team is ready to help you address these issues and any others you may have during this difficult time. Please reach out to your regular Robins Kaplan contact or email us [here](#).**