



Will Your PPP Loan Be Reviewed by the SBA? - The Latest Guidance

06.08.2020

Since its implementation under the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”), there has been a lot of attention on the Small Business Administration (“SBA”) Paycheck Protection Program (“PPP”). Both borrowers and lenders have asked for clarity around the SBA’s process for reviewing PPP loan and forgiveness applications. In particular, borrowers want to know if only certain loans — such as those given to larger companies or those that exceed a certain dollar amount — are subject to SBA review. Unfortunately for borrowers, the short answer is “no.”

This eAlert provides a brief summary of the main points of additional regulations and guidance issued to date relating to the SBA review process for PPP loan and loan forgiveness applications. Because the rules and guidance are constantly in flux, and due to changes to the PPP made by the newly enacted Paycheck Protection Program Flexibility Act (see our *eAlert* regarding the latest guidance on PPP loan forgiveness), readers should visit the websites of the SBA and Department of the Treasury for more complete and up-to-date information.

Additional Guidance Regarding SBA Review of PPP Loans

On May 22, 2020, the SBA issued additional guidance on their procedures for reviewing PPP loan and loan forgiveness applications and related borrower and lender responsibilities (see SBA’s Interim Final Rules published at 85 FR 33010 on June 1, 2020). The key takeaways are as follows:

1. The SBA may audit any PPP loan “as the SBA Administrator deems appropriate.”
2. The SBA Administrator is authorized to audit:
 - Whether a borrower is eligible for a PPP loan under the CARES Act, SBA rules or guidance available at the time of the borrower’s application or the terms of the borrower’s application;

- Whether a borrower calculated the loan amount correctly and used the proceeds for allowable uses specified under the CARES Act (i.e. payment of payroll costs, interest on mortgage obligations, rent, utilities, and interest on any other debt obligations incurred before February 15, 2020); and
 - Whether a borrower is entitled to loan forgiveness in the amount claimed on the forgiveness application.
3. The SBA may audit a loan of any size “at any time in the SBA’s discretion.” So even though prior guidance of the SBA and Department of Treasury offered a “safe harbor” for loans less than \$2 million (which presumed that a borrower’s certification regarding need for the loan was made in good faith),^[1] it now appears that no borrower is safe from SBA scrutiny.
 4. If the SBA determines that a borrower is ineligible for a PPP loan or the loan forgiveness amount claimed by the borrower, the loan forgiveness application will be denied. The SBA may also seek repayment of the outstanding PPP loan balance or pursue “other available remedies.” The Interim Final Rule does not specify what these other remedies may be, which has further exacerbated borrower anxiety about applying for a PPP loan and loan forgiveness.
 5. If the SBA conducts an audit, it will notify the lender in writing. The lender will then have five business days to notify the borrower in writing.
 6. If audited, the borrower will be able to respond to the SBA’s questions and given the opportunity to provide additional information. The SBA may deal directly with the borrower or indirectly through the lender.
 7. SBA audit decisions are appealable. The SBA intends to issue a separate interim final rule addressing the appeal process.

Due to the large number of PPP loans that were issued (as of May 30, 2020, more than 4.4 million businesses have received PPP loans in both rounds of funding) and limited resources of the SBA, it is likely that borrowers who took out larger loans will be audited. Many business groups have been lobbying aggressively for a true “safe harbor” for which loans under \$1 million will be considered eligible and not reviewable by the SBA. However, thus far they have been unsuccessful in these efforts. Because of this, and based on the latest SBA guidance, **all borrowers are at risk of an audit and enforcement action**, although as indicated above it is unclear as to what enforcement action may entail. This has caused concern among many borrowers, especially those who may have made innocent mistakes when they applied, because rules and guidance were unclear at the time. This may explain why a significant amount of PPP loan funds remain available (as of last week, there is more than \$120 billion remaining).

To prepare for an audit by the SBA, it is important that borrowers maintain all documentation relating to their PPP loan and loan forgiveness applications, including all of the items referenced in item 2 above. This includes both documents that are required to be submitted as part of the loan forgiveness application, as well as documents that borrowers are required to maintain for six years after the date the loan is forgiven or repaid (see our latest *eAlert* regarding PPP loan forgiveness). If borrowers have not already compiled this documentation, they should do so now rather than wait for the SBA to initiate an audit because this will likely be a time consuming task. It is also a best practice for borrowers to maintain the PPP funds in a separate account so that they can easily show how such funds are spent.

Miscellaneous Updates

Since our last *eAlert* on PPP loans published on May 8, 2020, the SBA has issued additional guidance on select issues, including (1) allowing for loan increases for a partnership that received a PPP loan that did not include any partner compensation or for a seasonal employer that received a PPP loan before the alternative criterion for determining the maximum loan amount [85 FR 29842 published on May 19, 2020]; (2) establishing eligibility of certain electric cooperatives as PPP borrowers that are tax-exempt under

Section 501(c)(12) of the Internal Revenue Code [85 FR 29847 published on May 19, 2020]; (3) treatment of entities with foreign affiliates, which clarified that a borrower is considered together with its U.S. and foreign affiliates for purposes of counting the number of employees and determining eligibility for the PPP loan, except if the affiliation rules aren't applicable^[2] [85 FR 30835 published on May 21, 2020]; (4) requirements for PPP loan forgiveness [85 FR 33004 published on June 1, 2020 (see our eAlert PPP and Loan Forgiveness: Latest Guidance and Changes Under the PPP Flexibility Act)]; and (5) eligibility of certain telephone cooperatives as PPP borrowers that are tax-exempt under Section 501(c)(12) of the Internal Revenue Code [Interim Final Rule posted by the SBA and Department of Treasury on June 5, 2020].

[1] See Paycheck Protection Program Loans FAQ 46, published by the SBA on May 13, 2020.

[2] The SBA clarified that the reference in its guidance to employees who reside in the U.S. is relevant to the calculation of payroll for purposes of determining the PPP loan amount and to the calculation of loan forgiveness. The SBA further indicated that due to "reasonable borrower confusion" based on SBA guidance on this issue, it will not find any borrower that applied for a PPP loan prior to May 5, 2020 ineligible based on the borrower's exclusion of non-U.S. employees from the calculation of employee headcount.