Lender requirements for the Paycheck Protection Program under the CARES Act

April 3, 2020

On Thursday, April 2, 2020, the Small Business Administration (SBA) released the Interim Final Rule (Rule) under the CARES Act (Act) Paycheck Protection Program (PPP). Included in the Rule are the highly anticipated details about PPP lender eligibility requirements and underwriting guidelines. The Rule provides additional helpful information for prospective lenders, such as the fees that will be paid for processing PPP loans, loan terms and conditions, and information about selling the loans on the secondary market.

PPP lender eligibility

Under Section 1102 of the Act, and pursuant to the Rule, "SBA 7(a) lenders are automatically approved to make PPP loans on a delegated basis." As permitted by the Act, the SBA and Treasury may permit delegated authority to additional lenders that are "qualified to process, close, disburse and service" SBA-guaranteed loans.

Under the Rule, the following lenders are eligible unless they are designated as being in Troubled Condition by their primary federal regulator, or unless they are subject to a formal enforcement action with their primary federal regulator that addresses unsafe or unsound lending practices:

- "Any Federally insured depository institution or credit union;
- Any Farm Credit System institution ([except] 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 the Rule; and
- Any depository or non-depository financing provider that:
  - [O]riginates, maintains, and services business loans or other commercial financial receivables and participation interests;
  - [H]as a formalized compliance program;
  - [A]pplies the requirements under the BSA as a federally regulated financial institution, or the BSA requirements of an equivalent federally regulated financial institution;
  - [H]as 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) [related to the regulation and examination of bank service companies] and is in good standing with the appropriate Federal banking agency."

Eligible federally insured depository institutions, federally insured credit unions, and the Farm Credit System institutions (the first two categories listed above) may submit SBA Form 3506 to become automatically qualified to make loans with delegated authority.

Underwriting PPP loans

Lenders will be obligated to review the borrower's PPP application form and supporting documentation to establish eligibility (such as payroll processor records, Form 1099-MISC, or payroll tax filings), or income and expenses from a sole proprietorship. Alternative documentation will be accepted for borrowers that do not have such documentation.

Additionally, the Rule describes that lenders will be expected to:

1. Confirm receipt of borrower certifications contained in the SBA's PPP application form.
2. 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.
3. 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.
4. Follow applicable BSA requirements.

The Rule explains and clarifies BSA requirements and expectations in further detail, including BSA guidance and expectations for lenders that do not presently have BSA requirements.

A lender should also confirm that it does not have an equity interest in the prospective borrower; a factor the Rule confirms (among others) would render a borrower ineligible.

PPP lender fees

For processing PPP loans, the SBA will pay lenders the following fees:

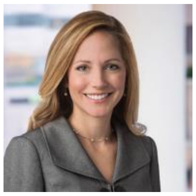
- 5 percent for loans of not more than US$350,000.
- 3 percent for loans of more than US$350,000 and less than US$2,000,000.
- 1 percent for loans of at least US$2,000,000.

Terms and conditions

Among other terms and conditions, the Rule sets forth that PPP loans "will be guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans" but with some changes: among other things, no collateral or personal guarantees will be required, the loans will have an interest rate of 1 percent or 100 basis points and lenders will be permitted to rely on certifications of the borrower to determine the eligibility of the borrower and the use of loan proceeds. Lenders are also permitted to rely on borrower documentation for loan forgiveness.

Interested lenders that are not already SBA 7(a) lenders should act quickly to obtain delegated authority because applications for the PPP program are starting to be accepted today (April 3, 2020). The Rule includes other helpful information that should be reviewed by prospective lenders; it also promises further guidance regarding topics such as the SBA affiliation rules (which the Rule did not change) and loan forgiveness.

Contacts



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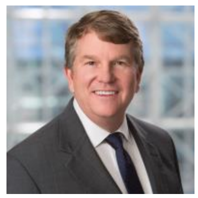

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