



JUNE 4, 2020

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The Small Business Administration Publishes PPP Interim Final Rule Providing Details about Lender Responsibilities and Potential Liability

The Small Business Administration (SBA) published yet another Interim Final Rule on June 1, 2020¹ addressing various aspects of Paycheck Protection Program (PPP) loans. The June 1 rule provides additional detail about the review procedures that must be used to evaluate an application for loan forgiveness. The rule also establishes various lender responsibilities and confirms that the lender may be liable for obtaining repayment in certain instances.

The Rule includes a number of important topics for lenders, including: (i) the processes that lenders should use when reviewing applications for forgiveness; (ii) lender obligations to notify borrowers that the SBA is auditing a loan; and (iii) lender liability for a loan issued to an ineligible borrower.

PROCESSES TO EVALUATE LOAN FORGIVENESS

Although the SBA had previously published the loan forgiveness application form, the June 1 Rule provides additional detail about SBA's expectations for managing forgiveness applications.

For all PPP loan forgiveness applications, the lender is required to: (i) confirm receipt of the borrower certifications contained in the Loan Forgiveness Application Form; (ii) confirm receipt of the documentation verifying payroll and nonpayroll costs, as specified in the instructions to the Loan Forgiveness Application Form; (iii) confirm the borrower's calculations on the borrower's Loan Forgiveness Application; (iv) confirm that the borrower made the calculations on various lines of the Application correctly by, for example, dividing the borrower's Eligible Payroll Costs



claimed by 0.75 (to ensure that salaries were not reduced by more than 25%).

Although the June 1 Rule confirms that provision of an accurate calculation is the responsibility of the borrower, the Rule makes clear that the lender must perform a good-faith validation of borrower's calculations. As provided below, failure to check a borrower's calculations could jeopardize loan processing fees, and potentially, the SBA guaranty of the loan.

TIMING OF FORGIVENESS AND NOTIFICATION OF SBA AUDIT

The June 1 Rule confirms that lenders must render a decision on forgiveness within 60 days after receiving a complete application for forgiveness. That decision may take the form of an approval (in whole or in part); a denial; or (if directed by SBA) a denial without prejudice due to a pending SBA review of the loan for which forgiveness is sought. When the lender issues its decision to the SBA approving the forgiveness application (in whole or in part), it must include certain information, including (1) the PPP Loan Forgiveness Calculation Form; (2) PPP Schedule A; and (3) the (optional) PPP Borrower Demographic Information Form (if submitted to the lender). The lender must confirm that the information provided by the lender to SBA accurately reflects lender's records for the loan, and that the lender has made its decision in accordance with the requirements of the program and applicable rules. If, on the other hand, the lender denies an application for forgiveness, the lender must provide similar documents to SBA, with a conclusion that the application is not properly supported.

Lastly, if the SBA is reviewing a loan, then the lender must take the following steps within five business days of receiving a notice of SBA audit:

- i. Transmit the Borrower Application Form (SBA Form 2483 or lender's equivalent form) and all supporting documentation provided by the borrower to the SBA.
- ii. Transmit to the SBA the Loan Forgiveness Application (SBA Form 3508 or lender's equivalent form), and all supporting documentation provided by the borrower (if the lender has received such application). If the lender receives such application after it receives notice that SBA has commenced a loan review, the lender shall transmit electronic copies of the application and all supporting documentation provided by the borrower to SBA within five business days of receipt. The lender must also request that the borrower provide the lender with a copy of the Schedule A Worksheet to the Loan Forgiveness Application, and the lender must submit the worksheet to SBA within 5 business days of receipt from the borrower.
- iii. Provide a signed and certified transcript of account to the SBA.
- iv. Provide a copy of the executed note evidencing the PPP loan to the SBA.
- v. Provide any other documents related to the loan requested by SBA.

If the SBA has notified the lender that SBA has commenced a loan review, the lender shall not approve any application for loan forgiveness for such loan until SBA notifies the lender in writing that SBA has completed its review. Accordingly, an SBA audit arising in the context of a forgiveness application will likely delay the final forgiveness determination.

POTENTIAL LENDER LIABILITY

As we have been counseling our clients, the June 1 Rule confirms that lenders face certain liability in connection with this program, particularly if the lender failed to comply with lender obligations contained in prior interim final rules, and lender guidance. Processing fees for loans and, in certain cases, loan guaranty from the SBA may be in jeopardy.

The lender is not eligible for processing fees under the June 1 Rule if the SBA reviews the loan and determines that the borrower was ineligible for a PPP loan. For some lenders, this will serve as a departure from the existing guidance stating that lenders can rely on borrower certifications because while the processing fee may not amount to financial



liability, it does jeopardize funds that the lender relied on when deciding whether to dedicate resources to the PPP loans. If the processing fee for an ineligible loan has already been paid, it may be “clawed back” from the lender if, within one year after the loan was disbursed, SBA reviews the loan and determines that a borrower was ineligible for a PPP loan.

Importantly, SBA’s determination of borrower eligibility will have no effect on SBA’s guaranty of the loan if the lender complied with all lender obligations under section III.3.b of the Interim Final Rule published April 3, 2020, and the document collection and retention requirements described in the lender application form. The April 3 Interim Final Rule and the lender application require lenders to obtain documentation in connection with the loan application, including payroll documentation and documents verifying the numbers of employees for whom the borrower paid salaries and payroll taxes.

In the most draconian outcome, the June 1 Rule confirms what we have suspected for quite a while: if a lender fails to satisfy the lender requirements and the borrower was ineligible for the loan, the SBA may determine that the loan is not eligible for guaranty from the SBA, in addition to seeking recoupment of the processing fee.

We have been advising with lenders since the program’s inception and we are here to answer any questions. Importantly, there may be an opportunity for lenders to work with borrowers to cure any deficiencies in the application, if actions are taken in a timely manner.

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¹ The June 1, 2020 Interim Final Rule can be found here: <https://home.treasury.gov/system/files/136/PPP-IFR-SBA-Loan-Review-Procedures-and-Related-Borrower-and-Lender-Responsibilities.pdf>