



Not Challenged by the Paycheck Protection Program Yet? Lenders Meet Your Additional Expectations

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Since late March, lending institutions have been directing their resources and attention to issuing more than 4.4 million loans totaling more than \$511 billion under the Paycheck Protection Program (“PPP”), delivering the economic relief promised by the CARES Act. Lenders have faced the same dizzying changes in guidance and rules from the Small Business Administration (SBA) while helping their borrowers work through these changes themselves.

The returns promised to the lenders under the CARES Act in taking on this effort included the receipt of processing fees from the SBA, a healthy SBA guaranty to support these loans, and a quick repayment of a significant portion of the principal through the forgiveness grants by the SBA. While many lenders saw an opportunity to gain new customers, or at least retain existing customers, in the effort, the prospect of hastily made loans earning 1% interest was not the driver for lenders to participate in the program. If a borrower can maximize their loan forgiveness, the amount even subject to the 1% may be minimal, leaving lenders looking to the processing fee as the primary (or possibly only) direct financial benefit for their efforts.

On May 22, 2020, the SBA issued both an Interim Final Rule on Loan Forgiveness (“Loan Forgiveness Rule”) and an Interim Final Rule on SBA Loan Review Procedures and Lender Reporting (“Loan Review Rule”) which together provide information outlining the review process and the responsibilities of lenders in reviewing the loans that were issued. The Loan Review Rule in particular presents a new risk to lenders receiving (or retaining) the processing fees they expect.

Procedural Clarity Around the Review Process

- Lenders will have 60 days following the receipt of a complete loan forgiveness package to issue its decision concerning forgiveness to the SBA and, if the loan is to be forgiven, request payment of the forgiveness amount from the SBA. Of note, the lender must specifically make this request for payment at the same time it sends its decision to the SBA.
- The lender's decision can be any of the following:
 - Approval in whole;
 - Approval in part;
 - Denial; or
 - Denial without prejudice if there is a pending SBA review of the loan.
- The lender must notify the borrower if it denies the loan forgiveness application and the borrower then has 30 days to request that the SBA review the lender's decision.
- Following receipt of the lender's decision, the SBA has 90 days, subject to any review of the loan by the SBA, to remit payment to the lender.
- If the SBA initiates a review, the SBA will notify the lender and the lender must notify the borrower of the review. The lender may not approve any application for loan forgiveness for such loan until SBA notifies the lender in writing that SBA has completed its review.
- If the forgiveness amount paid by the SBA to the lender exceeds the current balance of the loan, for example where the borrower has already started repaying the loan, the lender must pay this excess amount to the borrower.
- The SBA can review any loan at any time and borrowers are required to retain specified information for a period of six years after the date the loan is forgiven or repaid in full to enable the SBA's review.
- Borrowers will have opportunity to respond to the SBA if the SBA requests additional information concerning eligibility or loan forgiveness. Lenders will be required to contact the borrower in writing to request the additional information (or

the SBA may do this directly).

- A separate rule will be issued addressing an appeal process for borrowers who the SBA determines are ineligible for a PPP loan, for the loan amount received, or for the forgiveness amount claimed.

What remains unclear?

- What happens to the lender 60-day decision period and the SBA 90-day remittance period if the SBA reviews a loan? The Forgiveness Rule indicates that the 60- and 90-day timelines described above only apply when the SBA is not reviewing the loan but neither rule specifies the timeline if the SBA is reviewing the loan, for forgiveness purposes or otherwise.

What did we expect?

- We knew lenders would be the front-line reviewers for loan forgiveness purposes: collecting the applications and supporting documentation for transmission to the SBA and reviewing the calculations and request made.
- The SBA can review any borrower's eligibility under the PPP (and the un-modified portions of the 7(a) loan program), including the certifications made and information provided. While the SBA had previously indicated it would review loans of \$2 million or greater, this did not foreclose the SBA from reviewing other loans and borrowers.
- The SBA can review the calculation of the loan amount requested/issued, use of the loan proceeds in terms of permitted uses under the PPP, and the amount claimed for forgiveness.
- If a borrower is ineligible to receive a PPP loan, the loan will not be forgiven.
- If the SBA determines the loan amount or the amount requested for forgiveness is not accurate, the lender will be instructed to deny forgiveness in whole or in part.

- If the borrower is an ineligible borrower or not entitled to receive the original loan amount, the SBA may seek repayment of the outstanding balance or pursue other remedies.

What didn't we expect and where is a new burden for lenders?

To keep its processing fee, a lender essentially needs to confirm that the borrower was eligible for the PPP loan. The Loan Review Rule indicates that a lender will not be eligible for a processing fee, and that the processing fee can be clawed back, if the SBA determines the borrower was not eligible for the PPP loan. For the fees to be clawed back, the SBA must make its determination of ineligibility within one year of the date the loan proceeds were disbursed. For lenders, this means the only benefit for their efforts may be the 1% interest rate.

Prior guidance and interim final rules have expressly indicated that lenders are allowed to rely on the certifications of the borrower about these considerations although lenders were expected to perform a good faith review of the borrower's calculations (the same standard to be applied to the lender's review of the loan forgiveness application). The Loan Review Rule expressly preserves the SBA guaranty of the loan so long as the lender complied with the requirements of Section III.3.b. of the first Interim Final Rule originally posted on April 2, 2020.^[1] If a lender fails to satisfy these requirements the SBA will seek repayment of the processing fee from the lender and may determine that the loan is not eligible for a SBA guaranty.

However, even if a lender satisfies these requirements, it may still lose its processing fee if the SBA later determines a borrower is ineligible.

The concept of "ineligibility" is broadly described as "based on the provisions of the CARES Act or applicable rules or guidance available at the time of the borrower's loan application, or the terms of the loan application." This brings in everything from whether the borrower met one of the applicable size standards, the application of the affiliation rules, whether the borrower was eligible for a 7(a)

loan (except as modified by the CARES Act), the accuracy of the certifications made in the application (including the necessity certification!), the calculation of payroll costs, and many other potential considerations.

To help lenders minimize the risk of losing processing fees we recommend lenders consider reviewing their PPP loans, or portions of the portfolio based certain defined thresholds or risk factors (i.e., including at least those that will be reviewed by the SBA due to the loan size), to identify those for which the processing fee could be at risk. Additionally, as we know that the SBA will demand repayment of a PPP loan if the SBA determines that a borrower was not eligible for a PPP loan or for the loan amount disbursed, identifying those loans that may be at risk of being called is a valuable exercise, particularly where the lender has extended other credit to the borrower.

The possibility of losing processing fees combined with the threat of borrowers not being able to repay the PPP loan upon demand by the SBA is a real risk that lenders should assess. Our team of attorneys is ready to help lenders conduct a risk assessment of their current PPP loan portfolio to determine if any borrowers may be ineligible for a PPP loan and to provide assurance that the lender satisfied its responsibilities under the CARES Act and the interim final rules.

For more information, contact [Shannon Kuhl](#), [Rebecca Moore](#), or any attorney in Frost Brown Todd's [Financial Services](#) Industry Team.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

[\[1\]](#) III.3.b. of the Interim Final Rule originally posted on April 2, 2020 provides that "Each lender shall: i. Confirm receipt of borrower certifications contained in Paycheck Protection Program Application form issued by the Administration; ii. 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; iii. 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 iv. Follow applicable BSA requirements."

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