

Lender Obligations Under the Revived Paycheck Protection Program

Hinshaw Alert | 10+ min read

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On December 28, 2020, former President Trump signed the Consolidated Appropriations Act. Over 5,000 pages in length, the Act included revisions and additions to the Paycheck Protection Program (PPP).

The new PPP will: (1) accept applications from eligible borrowers for PPP loans that did not receive a PPP loan under the earlier program—known as a “First Draw Loan”; (2) permit qualifying businesses that received a PPP loan under the earlier program to receive a second PPP loan—known as a “Second Draw Loan”; (3) allow existing PPP borrowers not eligible for a Second Draw Loan to spend any remaining PPP funds on permitted expenses, which include additional forgivable expenses; and (4) change PPP rules for existing PPP borrowers, new PPP borrowers, and Second Draw Loan borrowers in areas of eligibility, forgivable expenses, and loan forgiveness.

Below, we discuss the obligations of PPP lenders under the revived PPP.

Lenders and First Draw Loans

Loan Underwriting

Each lender’s underwriting obligation under the PPP is limited to the obligations described below and to reviewing the applicant’s Paycheck Protection Borrower Application Form—Small Business Administration (SBA) Form 2483—or the lender’s form.

Information Requirements. As part of its underwriting obligations, a PPP lender for a First Draw Loan must confirm:

- receipt of the borrower’s certifications contained in the PPP Borrower Application Form issued by the SBA or in the lender’s form;
- receipt of information demonstrating that a borrower was either an eligible self-employed individual, independent contractor, or sole proprietorship with no employees, or, had employees for whom the borrower

- paid salaries and payroll taxes on or around February 15, 2020; and
- the dollar amount of average monthly payroll costs for 2019 or 2020 by reviewing the payroll documentation submitted by the borrower with its application.

A lender must receive from a borrower such documentation as is necessary to establish the borrower's eligibility, such as payroll records, payroll tax filings, or Form 1099-MISC, Schedule C or F, income and expenses from a sole proprietorship, or bank records. If a borrower cannot provide this information, it must provide other supporting documentation sufficient to demonstrate the qualifying payroll amount.

BSA Requirements. Federally insured depository institutions and credit unions should follow their existing Bank Secrecy Act (BSA) protocols when making PPP loans to either new or existing customers that are eligible borrowers. Unless otherwise indicated by the lender's risk-based approach to BSA compliance, existing customers will not have to be re-verified.

Lenders that are not presently subject to the BSA requirements must establish an anti-money laundering (AML) compliance program equivalent to that of a comparable federally regulated institution. This program may include a customer identification program (CIP) that includes identifying and verifying a PPP borrower's identity—such as date of birth, address, and taxpayer identification number. Further, if the PPP borrower is a company, the lender must collect any applicable beneficial ownership information. Such lenders may rely on the CIP of a federally insured depository institution or credit union with an established CIP used as part of its AML program.

As with lenders subject to BSA requirements, these lenders must also identify and report certain suspicious activity to the Financial Crimes Enforcement Network.

Lender Reliance or Borrower Documentation

A lender may rely on any certification or documentation submitted by an applicant for a PPP loan that: (1) is submitted in compliance with all applicable requirements related to a PPP loan; and (2) includes the applicant's attestation that it has accurately provided the certification or documentation to the lender in accordance with the applicable requirements related to PPP loans.

An enforcement action may not be taken against a lender that relies on such a certification or documentation. In addition, the lender will not be subject to any penalties relating to PPP loan origination or loan forgiveness, if the lender: (1) acts in good faith relating to loan origination or forgiveness based on that reliance; and (2) complies with all other relevant federal, state, local, and other statutory and regulatory requirements applicable to the lender and related to the PPP loan.

For loan forgiveness, the lender does not need to independently verify the borrower's reported information if the borrower: (1) submits documentation supporting its request for forgiveness; and (2) attests that it accurately verified the payments for eligible costs.

Lender Fees

For processing PPP loans made on or after December 27, 2020, the SBA will pay to lender, based on the balance of the financing outstanding at the time of disbursement of the loan, the following amounts:

- For loans of not more than \$50,000, an amount equal to the lesser of 50% or \$2,500;
- For loans of more than \$50,000 and not more than \$350,000, five percent;
- For loans of more than \$350,000 and less than \$2 million, three percent; and
- For loans of at least \$2 million, one percent.

The SBA will pay the fee not later than five days after the lender reports the disbursement of the PPP loan. The SBA will not be able to require that the fee be repaid by the lender unless the lender is found guilty of an act of fraud in connection with the PPP loan.

A lender will not receive a processing fee: (1) prior to full disbursement of the PPP loan; or (2) if the PPP loan is cancelled before disbursement.

For a loan that was cancelled or voluntarily terminated and repaid after disbursement (including if a borrower repaid the PPP loan proceeds to conform to the borrower's certification regarding the necessity of the PPP loan request), the SBA will not require the lender to repay the processing fee unless the lender is found guilty of an act of fraud in connection with the PPP loan.

A lender must report through E-Tran Servicing or SBA Form 1502 any PPP loans that have been cancelled before disbursement or that have been cancelled or voluntarily terminated and repaid after disbursement.

Sale of PPP Loans Into the Secondary Market

A PPP loan may be sold on the secondary market at a premium or a discount to par value.

Prior SBA Consent of Loan Pledges for Borrowings From an FRB or Advances by an FHLB

A pledge of a PPP loan to a Federal Reserve Bank (FRB) or Federal Home Loan Bank (FHLB) does not require the prior written consent of, or notice to, the SBA.

Promissory Note Form

A lender may use its own promissory note or an SBA form of promissory note.

In the promissory note, a lender may address any terms and conditions, including those relating to amortization and disclosure, that are not inconsistent with CARES Act Section 1102 and Small Business Act Section 7A, the PPP Interim Final Rules and guidance, and SBA Form 2484.

Separate SBA Authorization Document

The SBA does not need a separate SBA Authorization in order to guarantee a PPP loan. However, a lender must execute SBA Form 2484—the Lender Application Form, PPP Loan Guaranty—in order to issue PPP loans and receive a loan number for each originated PPP loan.

Electronic Submission and Disbursement Reporting

Form 1502, made available by the SBA, is intended to be used in the reporting process through which a PPP lender reports on PPP loans and collects the processing fee on fully disbursed loans owed to the lender.

Lenders must electronically upload the form information within 20 calendar days after a PPP loan has been approved or is increased. On the form, lenders must also report whether PPP loan proceeds have been fully disbursed.

Loan Terms and Conditions

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

- There is a 100% guarantee.
- No collateral or personal guarantee is required.
- The interest rate will be one percent, calculated on a non-compounding, non-adjustable basis.

Credit Elsewhere Test

Normally, the SBA provides business loans to applicants for which the desired credit is not otherwise available on reasonable terms from non-federal sources—the “credit elsewhere test.” However, when evaluating an applicant’s eligibility, lenders will not be required to apply the credit elsewhere test, as set forth in Small Business Act Section 7(a)(1)(A) and the SBA’s regulations.

Fee Waivers

With respect to SBA fees, there will be no:

- Up-front guarantee fee payable to the SBA by the borrower;
- Lender's annual service fee (ongoing guaranty fee) payable to the SBA;
- Subsidy recoupment fee; or
- Fee payable to the SBA for any guarantee sold into the secondary market.

Agent Fees

Agent fees may not be paid out of the proceeds of a PPP loan. If a borrower has knowingly retained an agent, such fees must be paid by the borrower.

A lender is only responsible for paying fees to an agent for services for which the lender directly contracts with the agent. 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 percent for loans of not more than \$350,000;
- .5 percent for loans of more than \$350,000 and less than \$2 million; and
- .25 percent for loans of at least \$2 million.

Multiple Draws Prohibited

The lender must make a one-time, full disbursement of the PPP loan within 10 calendar days of the approval of the loan. A loan is approved when the loan is assigned a loan number by the SBA.

Lenders are not responsible for delays in disbursement because of a borrower's failure to timely provide required loan documentation, including a signed promissory note. Loans for which funds have not been disbursed because a borrower has not submitted required loan documentation within 20 calendar days of loan approval shall be cancelled by the lender.

Lender and Second Draw Loans

Lenders

A lender must submit SBA Form 2484-SD (Paycheck Protection Program Lender's Application—Second Draw Loan Guaranty) electronically and maintain the forms and supporting documentation in its files.

A lender approved to make First Draw Loans may make Second Draw Loans under the same terms and conditions applicable to the former, except as otherwise provided in this section.

The lender must disburse the proceeds of the loan within 10 calendar days of approval.

Loan Underwriting

Each lender's underwriting obligation under the Second Draw Loan is limited to the items described below and to reviewing the PPP Second Draw Borrower Application Form, SBA Form 2483-SD, or the lender's form.

Information Requirements. In satisfying its underwriting obligations, a PPP lender must confirm:

- receipt of the borrower's certifications contained in Second Draw Borrower Application Form or the lender's form;
- receipt of information demonstrating that a borrower was either an eligible self-employed individual, independent contractor, or sole proprietorship with no employees or had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020; and
- the dollar amount of average monthly payroll costs for 2019 or 2020—whichever was used to calculate loan amount—by reviewing the payroll documentation submitted by the borrower with its application.

Revenue Reduction. For a Second Draw Loan greater than \$150,000 or a loan of \$150,000 or less where the borrower provides documentation of revenue reduction, the lender must confirm the dollar amount and percentage of the borrower's revenue reduction. The lender must perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents.

For a loan of \$150,000 or less where the borrower does not provide documentation of revenue reduction with its application, the lender must perform this review when the borrower provides such documentation.

If a lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue.

BSA Requirements. Lenders should follow the applicable BSA requirements [discussed above](#).

Lender Reliance on Borrower Documentation

A lender may rely on any certification or documentation submitted by an applicant for a PPP loan or an eligible recipient or eligible entity that: (1) is submitted in compliance with all applicable statutory requirements, regulations, and guidance related to a PPP loan; and (2) includes the borrower's attestation that the applicant,

eligible recipient, or eligible entity, as applicable, has accurately provided the certification or documentation to the lender in accordance with the statutory requirements, regulations, and guidance related to PPP loans.

An enforcement action may not be taken against the lender that relies on such certification or documentation related to a Second Draw Loan. In addition, the lender will not be subject to any penalties relating to loan origination or forgiveness of the Second Draw Loan, if the lender: (1) acts in good faith relating to loan origination or forgiveness of the Second Draw Loan based on that reliance; and (2) complies with all other relevant federal, state, local, and other statutory and regulatory requirements applicable to the lender and related to the Second Draw Loan.

Lender Fees

For processing Second Draw Loans, the SBA will pay to lenders the following amounts:

- for a Second Draw Loan of up to (and including) \$50,000, in an amount equal to the lesser of:
 - 50% of the balance of the financing outstanding at the time of disbursement of the loan; or
 - \$2,500; and
- for a Second Draw Loan of more than \$50,000, in an amount that is:
 - five percent of the balance of the financing outstanding at the time of disbursement of the loan for a loan up to (and including) \$350,000; and
 - three percent of the balance of the financing outstanding at the time of disbursement of the loan for a loan above \$350,000.

The SBA will pay the fee not later than five days after the reported disbursement of the PPP loan. The SBA will not be able to require that the fee be repaid by the lender unless the lender is found guilty of an act of fraud in connection with the PPP loan.

A lender will not receive a processing fee: (1) prior to full disbursement of the PPP loan; or (2) if the PPP loan is cancelled before disbursement.

If the lender has received a processing fee on a loan that was cancelled or voluntarily terminated and repaid after disbursement—including if a borrower repaid the PPP loan proceeds to conform to the borrower's certification regarding the necessity of the PPP loan request—the SBA will not require the lender to repay the processing fee unless the lender is found guilty of an act of fraud in connection with the PPP loan.

Using either E-Tran Servicing or the SBA Form 1502, a lender must report any PPP loans that have been cancelled before disbursement or that have been cancelled or voluntarily terminated and repaid after disbursement.

Sale of PPP Loans Into the Secondary Market

A PPP loan may be sold on the secondary market at a premium or a discount to par value.

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A pledge of a PPP loan to an FRB or FHLB does not require the prior written consent of, or notice to, the SBA.

Promissory Note Form

A lender may use its own promissory note or an SBA form of promissory note.

A lender may include in the promissory note any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with CARES Act Section 1102 and Small Business Act Section 7A, the PPP Interim Final Rules and guidance, and SBA Form 2484.

Separate SBA Authorization Document

A lender does not need a separate SBA Authorization for the SBA to guarantee a PPP loan. However, a lender must execute SBA Form 2484 (the Lender Application Form—PPP Loan Guaranty) to issue PPP loans and receive a loan number for each originated PPP loan.

Electronic Submission and Disbursement Reporting

The SBA has made available SBA Form 1502 to be used in the reporting process through which a PPP lender reports on PPP loans and collects the processing fee owed to the lender for fully disbursed loans. Lenders must electronically upload SBA Form 1502 information within 20 calendar days after a PPP loan has been approved or increased. The lender must also report on SBA Form 1502 whether it has fully disbursed PPP loan proceeds.

Loan Terms and Conditions

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

- There is a 100% guarantee.
- No collateral or personal guarantee is required.
- The interest rate will be one percent, calculated on a non-compounding, non-adjustable basis.

Credit Elsewhere Test

A lender will not be required to apply the credit elsewhere test—as set forth in Small Business Act Section 7(a)(1) (A) and the SBA’s regulations and as described above—when evaluating an applicant’s eligibility.

Fee Waivers

With respect to SBA fees, there will be no:

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- .25 percent for loans of at least \$2 million.

Multiple Draws Prohibited

The lender must make a one-time, full disbursement of the PPP loan within 10 calendar days of the approval of the loan. A loan is considered approved when the loan is assigned a loan number by the SBA.

Lenders are not responsible for delays in disbursement attributable to a borrower’s failure to timely provide required loan documentation, including a signed promissory note. Loans for which funds have not been

disbursed because a borrower has not submitted required loan documentation within 20 calendar days of loan approval shall be cancelled by the lender.

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