



MAY 28, 2020 • NO. 11

SBA Announces Guidance on Lender Responsibilities in Connection with PPP Loan Eligibility and Forgiveness

On May 22, 2020, the U.S. Small Business Administration (the “SBA”) posted Interim Final Rules on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities (the “Lender Responsibilities Rule”) under the Paycheck Protection Program (the “Paycheck Protection Program” or the “PPP”). The Lender Responsibilities Rule was published by the SBA in conjunction with another set of Interim Final Rules regarding Loan Forgiveness (the “Forgiveness Rule”), and, to the extent that the Lender Responsibilities Rule and the Forgiveness Rule interrelate, they are intended to be read together. Both the Lender Responsibilities Rule and the Forgiveness Rule were effective immediately upon their publication. The Lender Responsibilities Rule will be of significant interest to any originator or owner of loans originated under the Paycheck Protection Program.

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) includes Title 1, (the “Keeping American Workers Paid and Employed Act”), which adds a new program, the Paycheck Protection Program, to Section 7(a) of the Small Business Act of 1953, as amended (the “Small Business Act”). The PPP is administered by the SBA. The legislation modifies certain existing limitations on the SBA’s current loan program under section 7(a) of the Small Business Act. The SBA and the U.S. Department of the Treasury have published numerous Interim Final Rules to provide additional guidance on the PPP (collectively, the “Interim Final Rules”).

The PPP, the Interim Final Rules, and other relevant guidance from the SBA and the Department of Treasury establish the

basis for originators of PPP loans to assign and sell participations in those PPP loans to other SBA-approved lenders. A nascent secondary market in PPP loans has emerged, and any owners of PPP loans (whether originators or secondary market purchasers) should be aware of their responsibilities and potential liabilities when structuring the terms of their secondary-market transactions. In particular, selling originators and secondary market purchasers should consider the allocation of responsibilities and risks related to the forgiveness process as set forth in the Lender Responsibilities Rule.

SBA’s Oversight Posture on Eligibility and Forgiveness

The explanatory provisions of the Lender Responsibilities Rule acknowledge that PPP loans are 100 percent guaranteed by the SBA and that up to the full amount of each such Loan may qualify for forgiveness. The Lender Responsibilities Rule further provides that the Small Business Act grants authority to the SBA to conduct investigations that extend to determining whether the recipient of a PPP loan is an eligible borrower in accordance with the PPP and the Interim Final Rules and whether the loan recipient has violated any relevant regulation or guidance under the Small Business Act or the PPP.

Eligibility to receive a PPP loan and to have that loan forgiven are determined based upon the borrower’s certifications and documentation submitted by the borrower and reviewed by the lender. Accordingly, the Lender Responsibilities Rule also makes clear that, in light of the structure of the PPP, it is appropriate to adopt additional procedures and criteria pursuant to which the SBA will determine if a PPP borrower has

acted contrary to the eligibility and forgiveness requirements of the PPP.

In this regard, the Lender Responsibilities Rule states that the SBA may review individual PPP loans of any amount as it determines necessary or appropriate at any time. In doing so, the SBA will review whether the borrower was eligible for the PPP loan under the rules in effect at the time of the borrower's PPP Loan application or signing of loan documents, and the information, certifications, and representations in the Borrower's Application Form (SBA Form 2483) or the lender's equivalent form, and the Loan Forgiveness Application Form (SBA Form 3508) or the lender's equivalent form.

The Lender Responsibilities Rule also states that the SBA will review the accuracy of the certifications made by borrowers, the calculation of the amount of each PPP loan and the use of the proceeds of each such loan for permitted purposes. The SBA's stated purpose for this scope of review is to determine "whether an action by the borrower has resulted in its receipt of a PPP loan that did not meet program requirements." The SBA considers such a review as "essential to ensure that PPP loans are directed to the entities Congress intended, and that PPP loan proceeds are used for the purposes Congress required, including the CARES Act's central purpose of keeping workers paid and employed." Through this process, the SBA will determine whether the PPP borrower is an eligible borrower and whether the borrower is eligible for forgiveness of all or a part of the PPP loan or should be required to repay the loan.

Eligibility Review Requirements

The Lender Responsibilities Rule clarifies that the SBA may undertake a review of the eligibility of any PPP borrower at any time in the SBA's discretion, but that the SBA intends, in particular, to exercise that discretion in conjunction with PPP loan forgiveness determinations. The Lender Responsibilities Rule reiterates that the Loan Forgiveness Application Form requires that the borrower must retain information pertinent to the PPP loan for six years after the later of the date the loan is forgiven or fully repaid, and that SBA personnel, including those of the SBA's Office of Inspector General, must be allowed full access to all such information upon request.

Further, the Lender Responsibilities Rule provides that lenders must comply with the SBA's existing requirements for records retention, with reference to the applicable SBA regulations requiring lenders to comply with appropriate regulatory standards. For regulated entities, that will largely mean complying with the financial institution regulatory requirements.

Finally, the Lender Responsibilities Rule states that the SBA may request, directly from any PPP borrower or indirectly through the lender, such information as it may require in reviewing the appropriateness of a PPP loan. The SBA will provide the PPP borrower an opportunity to provide the information. If, after review of the information provided, the SBA determines that the PPP borrower was ineligible for the PPP loan (based on the PPP requirements in effect at the time the PPP loan was applied for or when the loan documents were signed), it will direct the lender to deny the loan forgiveness application and may also seek full repayment of the outstanding balance of the PPP loan or pursue other available remedies (which could include pursuing criminal charges). The Lender Responsibilities Rule provides that such a determination of ineligibility and/or denial of forgiveness in whole or part may be appealed by a PPP borrower, but states that the criteria for any such appeal will be addressed in rules to be released subsequently.

Forgiveness Review Requirements

The Lender Responsibilities Rule imposes several reporting requirements on lenders for determining appropriateness of the borrower's request for forgiveness of PPP loans. Lenders are required to confirm:

- receipt of the borrower certifications contained in the Loan Forgiveness Application Form;
- receipt of supporting documentation that supports payroll and nonpayroll costs; and
- borrower's calculations of specific line items in support of the request for PPP loan forgiveness—including the determination of any limitation on forgiveness of nonpayroll costs, which is capped at 25 percent.

The Lender Responsibilities Rule acknowledges that the provision of an accurate calculation of the loan forgiveness amount is the responsibility of the relevant PPP borrower; however, the SBA requires the lender to perform a *good-faith* review in a reasonable period of time to determine if the borrower has made accurate calculations and provided the required supporting documentation. In this regard, the Lender Responsibilities Rule provides that a lender may rely on a borrower's representations and should work with a borrower to clarify any errors or miscalculations identified. The SBA also advises lenders to determine the reasonableness of their review based on the source of underlying documentation—where a lack of objective third-party sources may require more extensive review of calculations and data.

Lenders must issue a decision to the SBA on the appropriateness of full or partial PPP Loan Forgiveness within 60 days of

receipt of a completed Loan Forgiveness Application Form from a borrower. That decision can be (in whole or part) an approval, a denial or a denial without prejudice pending the SBA's review, and the information used to make the decision must be included with a decision to approve. In the case of a decision to deny without prejudice, the borrower will be given the opportunity to ask the lender for reconsideration. The lender must confirm to SBA that the information provided by the lender to the SBA accurately reflects the lender's records and that it made its decision in accordance with the Lender Responsibilities Rule. The SBA goes on to confirm that "the lender does not need to independently verify the borrower's reported information if the borrower submits documentation supporting its request for loan forgiveness and attests that it accurately verified the payments for eligible costs."

After the lender determines that the borrower is or is not entitled to PPP loan forgiveness, in whole or in part, the lender must provide the SBA with its reasoning together with the information supporting the determination, and the SBA reserves the right to review the lender's decision in its sole discretion. The SBA reserves the right to review the lender's decision in the SBA's sole discretion and, within 30 days of notice of the decision from the lender, the effected borrower may request that the SBA review the decision.

To the extent that a lender has received notice at any time that the SBA is reviewing a PPP loan, the lender is precluded from issuing a forgiveness determination while the review is pending. Thereafter, forgiveness may be granted to the extent that the SBA has not denied eligibility or forgiveness and to the extent otherwise supported by required documentation.

At the time of the forgiveness determination, the lender *must* request payment of the forgiven amount from the SBA. The SBA will, subject to any ongoing review of the loan or application, remit the appropriate forgiveness amount to the lender not later than 90 days after the lender issues its decision to the SBA.

If the SBA undertakes a review of a loan file, it will notify the lender in writing and the lender must then notify the borrower within five business days of the receipt of notice. The lender will be required to provide relevant information to the SBA to assist it in its review including the Borrower Application Form and the Loan Forgiveness Application Form as well as the borrower's worksheet for calculating forgiveness.

Lender Fees and Clawback, Denial of Liability on Guaranty

The Lender Responsibilities Rule provides that if the SBA determines that a PPP borrower is an ineligible loan recipient, the lender may not receive or retain a processing fee for that PPP loan. The SBA retains the right to clawback such fees for a period of one year from the disbursement of any PPP loan to a recipient that the SBA determines is ineligible. If the lender has not satisfied the lender's responsibilities for underwriting PPP loans as set forth in the Interim Final Rules released on April 2, 2020 or the documentation requirements in the lender application (SBA Form 2484), the SBA may deny liability on its guaranty of that PPP loan and/or may seek repayment of the processing fee for that loan.

This additional guidance reinforces the important role of the lender in the forgiveness process and further clarifies the steps that need to be taken by the lender and the consequences if the SBA or the lender determine that the PPP loan borrower was not eligible or has not satisfied the forgiveness requirements. The ramifications of this guidance will impact borrowers, lenders and buyers of PPP loans in secondary market transactions.

For additional information, please contact:

Martin Teckler, Washington, D.C. Office
Partner, Finance, Restructuring, and Bankruptcy
202.420.2590 | mteckler@blankrome.com

Grant E. Buerstetta, New York Office
Partner and Co-Chair, Finance, Restructuring, and Bankruptcy
212.885.5454 | gbuerstetta@blankrome.com

Kevin J. Baum, Philadelphia Office
Partner and Co-Chair, Finance, Restructuring, and Bankruptcy
215.569.5612 | baum@blankrome.com

Christopher A. Manion, Philadelphia Office
Partner, Finance, Restructuring, and Bankruptcy
215.569.5521 | cmanion@blankrome.com

Shlomo Troodler, Philadelphia Office
Partner, Finance, Restructuring, and Bankruptcy
215.569.5338 | troodler@blankrome.com

Kevin M. O'Malley, Los Angeles Office
Of Counsel, Finance, Restructuring, and Bankruptcy
424.239.3482 | omalley@blankrome.com