

NEW PPP LOAN FORGIVENESS AND LOAN REVIEW INTERIM FINAL RULES: SBA MAY REVIEW ANY PPP LOAN, REGARDLESS OF SIZE, CONCERNING FORGIVENESS, USE OF PROCEEDS AND ELIGIBILITY

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The SBA released a set of interim final rules to provide additional guidance and clarity to borrowers and lenders both for loan forgiveness and for [SBA loan review procedures](#) under the Paycheck Protection Program (“PPP”). The loan forgiveness interim final rule supplements the guidance provided by the actual [PPP loan forgiveness application](#) previously published by the SBA, providing timing information and allocating responsibilities as between the lender and the borrower. The SBA loan review procedures interim final rule sheds little additional light on what borrowers should expect, but does provide additional guidance for lenders with respect to their role in the review process.

With respect to the SBA review process, the interim final rule makes clear that the SBA may choose to review any PPP loan, regardless of size, concerning not only forgiveness amounts and use of proceeds, but also eligibility in the first instance. The SBA previously announced a safe harbor of sorts for any borrower of less than \$2 million regarding the “necessity” certification. The SBA included in its [Frequently Asked Questions FAQ #46](#) that “[a]ny borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.” No mention was made of this safe harbor, or the related statement in [FAQ #46](#) that if a borrower repays a PPP loan after a determination by the SBA that the borrower did not meet the “necessity” eligibility requirement, there would be no further administrative enforcement or referrals to other agencies. Presumably the SBA will apply these principles in its review of all PPP loans.

If the SBA determines that a borrower may have been ineligible or that the loan may not be forgiven, it will notify the lender and the lender will be required to notify the borrower and request whatever additional documentation the SBA requests. The SBA also may notify the borrower directly. A borrower may appeal the SBA’s determination that the borrower is ineligible for a PPP loan or ineligible for the loan amount or the loan forgiveness amount claimed by the borrower. The SBA intends to issue a separate interim final rule to address the appeal process.

The interim final rule makes clear that the SBA can review any loan at any time at its discretion, including after forgiveness or repayment. Consistent with the forgiveness application, the SBA made clear in the interim final rule that borrowers should maintain their PPP loan documentation for at least six years after the PPP loan is forgiven or repaid.

The loan forgiveness interim final rule provides additional confirmations and clarifications. Lenders will make the initial determinations regarding loan forgiveness based on borrowers' forgiveness applications and must conduct good faith reviews of borrowers' calculations and supporting documentation. Lenders then make their decisions on forgiveness and submit them to the SBA. The SBA can accept those decisions or impose their own. The interim final rule also provides additional detail around eligible non-payroll costs and clarifies several aspects of forgivable payroll costs.

For a more detailed analysis of these interim final rules, see our analysis [here](#).

As the official guidance on the PPP continues to evolve, borrowers should stay tuned for further refinements and continue to document their positions and interpretations of the existing rules and FAQs.

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