

PPP Loan Program New Legislation Update

DVFBC

January 21, 2021

Mario O. Vicari
mvicari@kmco.com
www.kmco.com

Kreischer
Miller

PEOPLE | IDEAS | SOLUTIONS



Delaware Valley
FAMILY BUSINESS
CENTER

www.dvfbc.com

Center
for Private
Company
Excellence

A Kreischer Miller Knowledge Venture

DISCLAIMER

THIS DOCUMENT IS A HIGH-LEVEL SUMMARY AND DISCUSSION OF PARTS OF THE PAYCHECK PROTECTION PROGRAM OF THE CARES ACT, THE PAYCHECK PROTECTION FLEXIBILITY ACT, ECONOMIC AID ACT AND RELATED REGULATIONS AND GUIDANCE FROM THE TREASURY AND SMALL BUSINESS ADMINISTRATION.

SBA AND TREASURY CONTINUE TO ISSUE REGULATIONS AND GUIDANCE RELATED TO THE PAYCHECK PROTECTION PROGRAM.

LOAN APPLICATIONS, LOAN FORGIVENESS APPLICATIONS AND LOAN NECESSITY QUESTIONNAIRES SHOULD BE COORDINATED WITH YOUR LENDER WHO HAS AUTHORITY TO ADMINISTER THE PPP.

THIS DOCUMENT SHOULD NOT BE USED AS A BASIS TO MAKE ANY DECISIONS OR TAKE ANY ACTIONS RELATED TO A PPP LOAN, LOAN APPLICATION, LOAN FORGIVENESS OR LOAN NECESSITY QUESTIONNAIRE.

BORROWERS SHOULD CONSULT THEIR BANK AND THEIR OWN ADVISORS BEFORE MAKING ANY DECISIONS OR TAKING ANY ACTIONS RELATED TO THESE MATTERS.

Discussion

- PPP Legislative Changes Timeline
- Loan Necessity Questionnaire & FAQ #53
- PPP Tax and Accounting Update
- PPP as Amended by the Economic Aid Act
- PPP Second Draw Loans
- Q&A

PPP Legislative Changes Timeline

- December 9, 2020 – FAQ #53
- December 27, 2020 – Economic Aid Act
- January 6, 2021
 - Interim Final Rule on Paycheck Protection Program as Amended by the Economic Aid Act
 - Interim Final Rule on Second Draw Loans
- January 8, 2021
 - Borrower Application Form (New) – SBA Form 2483
 - Second Draw Borrower Application Form – SBA Form 2483
 - SBA Procedural Notice on Repeal of EIDL Advance Deduction Requirements
- January 13, 2021 - SBA Procedural Notice on First Draw Paycheck Protection Loan Increases
- Future – “Consolidated rule governing all aspects of loan forgiveness and loan review”

Loan Necessity Questionnaire & FAQ #53

PPP Loan Necessity Questionnaire

SBA Form 3509

- Issued October 26 seeking approval from Office of Management and Budget
 - Open for public comment until November 25
 - Received hundreds of comment letters related to the unfairness of the use of the form to the borrower and inconsistency with the good faith certification requirements of the CARES Act
 - Form 3509 was not changed and is in active use by the SBA
 - Applies to borrowers with an original principal amount of \$2 million or greater
- Purpose
 - “To facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate the good-faith certification that you made on your PPP Borrower Application that economic uncertainty made the loan request necessary.”
 - Follows the Good Faith Certification Requirements for PPP Loan Eligibility as outlined in FAQ #31 – April 23, 2020:
 - “Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”

PPP Loan Necessity Questionnaire

SBA Form 3509

- Loan Forgiveness & Loan Necessity Questionnaire Process
 - Lender has 60 days to complete the review of borrower's Loan Forgiveness Application
 - After lender completes review of borrower's Loan Forgiveness Application, lender transmits the application to the SBA
 - Lender receives notification from SBA to request SBA Form 3509 from borrower
 - Lender must notify borrower to complete Form 3509 within 5 days of SBA's request
 - Borrower has to return the completed Form 3509 to lender within 10 days of notice
 - Lender has 5 days to upload borrower's completed Form 3509 after receipt from borrower
 - Failure to complete the form and provide the required supporting documents may result in SBA's determination that you were ineligible for either the PPP loan, the PPP loan amount, or any forgiveness amount claimed, and SBA may seek repayment of the loan or pursue other available remedies.
- 2 Sections – 21 Questions
 - Business Activity Assessment – 8 Questions
 - Liquidity Assessment – 13 Questions

Problems with the Loan Necessity Questionnaire

- Uncertainty at the time of the PPP loan application is the main factor related to eligibility in the CARES Act
 - The form does not address uncertainty
 - Only addresses business activity and liquidity as outlined in FAQ 31
- Asks for very specific & limited information to assess eligibility for a PPP loan
 - Does not allow the borrower to state their case or submit documentation
 - Only allows borrower comments in 6 specific questions limited to 1,000 characters
- Applies specific bright line tests against very subjecting guidance of the CARES Act and FAQ #31
- Asks after-the-fact information when the loan was supposed to be based on conditions that existed at the time of the loan application

FAQ #53 – December 9, 2020

Why Are Some Borrowers Receiving a Loan Necessity Questionnaire?

FAQ #53 Makes 4 Key Points that are (Generally) Favorable to Borrowers:

1. “This certification is required to have been made in good faith at the time of the loan application, even if subsequent developments resulted in the loan no longer being necessary.”
2. “In its review, SBA may take into account the borrower’s circumstances and actions both before and after the borrower’s certification.”
3. “After a borrower submits its completed questionnaire, SBA may request additional information, if necessary, to complete its review. When additional information is requested, borrowers will have an opportunity to provide a narrative response to SBA explaining the circumstances that provided the basis for their good-faith loan necessity certification.”
4. “SBA’s assessment of a borrower’s certification will be based on the totality of the borrower’s circumstances through a multi-factor analysis.”

Considerations for Completing PPP LNQ

- Pay Attention to Timing
 - 10 days to respond or you lose forgiveness
 - Get the LNQ completed before you file for loan forgiveness
- Be Strategic
 - Only 6 places on the form to provide your own commentary
 - Business Activity Assessment – Questions 3, 4, 5, & 8
 - Liquidity Assessment – Questions 12 & 13
 - Abbreviate and use the spaces wisely to state the important and most compelling facts of your case
- Dates Matter
 - The date you received your loan proceeds and when you started spending the funds in relation to the rule change on April 23 (FAQ #31) may matter
 - If you took action, altered your plans, brought back and paid workers based on existing PPP guidance in the CARES Act prior to the change in the rules on April 23, you should state so on your LNQ
 - THIS MAY BE A MATERIAL FACT IN YOUR FAVOR

Taxation and Accounting for PPP Loans

Taxation of PPP Loans

- Federal Income Tax
 - Final clarification in The Economic Aid Act
 - No amount shall be included in gross income by reason of loan forgiveness.
 - No deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied by reason of the exclusion of loan forgiveness from gross income.

- PA Income Tax
 - PA does not adopt the IRS code for PA Income Tax.
 - The PA Department of Revenue has informally indicated that PPP loan forgiveness will be included in taxable income in the year when it is recognized for book income purposes.

Year-End Accounting for PPP Loans

Generally 2 Approaches:

- PPP Loan as Debt
 - Recorded on the balance sheet as a loan
 - When the debt is legally released (forgiven by SBA) it is taken into income in that period
 - Most conservative - most common approach

- PPP Loan as a Grant
 - Record as deferred liability
 - Recognize loan forgiveness income when “conditions have been legally met or explicitly waived by the donor”
 - “In cases where conditions are met over time or in stages, income should be recognized as the qualifying expenses are incurred and other PPP loan requirements such as full-time employee equivalent (FTE) headcount requirements are substantially met.”
 - Very subjective approach – not common

Paycheck Protection Program as Amended by the Economic Aid Act

Paycheck Protection Program as Amended

January 6, 2020 – IFR – SBA-2021-0001 – Paycheck Protection Program as Amended

- This rule consolidates the interim final rules (and important guidance) issued to date governing borrower eligibility, lender eligibility, and PPP application and origination requirements for new PPP loans, as well as provides general rules relating to loan increases and loan forgiveness. This rule is not intended to substantively alter or affect PPP rules that were not amended by the Economic Aid Act.
- This interim final rule is intended to govern new PPP loans made under the Economic Aid Act, as well as applications for loan forgiveness on existing PPP loans where the loan forgiveness payment has not been remitted, and should not be construed to alter or affect the requirements applicable to PPP loans closed prior to its enactment, unless the provisions apply retroactively consistent with specific applicability provisions of the Economic Aid Act as identified in this rule.
- This interim final rule, Treasury exercises its authority under section 1109 of the CARES Act to allow borrowers of first draw PPP loans to use 2019 or 2020 to calculate their maximum loan amount.
- “SBA also intends to issue a consolidated rule governing all aspects of loan forgiveness and loan review as well to provide a single reference point for lenders and borrowers.”

“First Draw” Loan Changes - Overview

- Program is reopened until March 31, 2021
- Borrowers Who Have Not Yet Applied for a PPP Loan - Same Basic Rules Apply
 - Good Faith Certification of Eligibility
 - Use of Funds
 - Covered Period 8 – 24 Weeks
 - No more Alternative Covered Period
 - At Least 60% for Payroll Costs
 - Loan Forgiveness/Loan Review
 - No more than 500 employees (or relevant SBA Size Standard)
 - NAICS Code 72 Businesses with more than one physical location must have no more than 500 employees per location
 - Loan amount is lesser of 2.5x average monthly “Payroll Costs” or \$10M
 - Can use 2019, 2020 or LTM to calculate loan amount
- Changes
 - Calculation of Loan Amount
 - Eligible/Ineligibly Borrowers
 - Expanded Allowable Cost Categories
 - Modifying an Existing First Draw Loan

New Eligible Borrowers

- Expansion of Eligible Borrowers
 - 501(c)(6) Nonprofits (such as chambers of commerce)
 - Destination marketing organizations (with fewer than 300 employees)
 - Housing cooperatives (with fewer than 300 employees)
 - News organizations
 - Nonprofit public broadcasters

Ineligible Borrowers

- Ineligible Borrowers
 - Businesses Not in Operation on Feb 15, 2020
 - Business Permanently Closed
 - Business in Bankruptcy
 - Companies who receive Shuttered Venue Operator Grant
 - Publicly traded companies
 - Hedge Funds & Private Equity Firms
 - Lobbying Organizations
 - Household Employers
 - Entities affiliated with Peoples Republic of China
 - Entities registered under the Foreign Agents Registration Act
 - Ownership by President or member of Congress

Additional Allowable Costs

- Covered Operations Expenses
 - Payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses

- Covered Property Damage Costs
 - Costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation

- Covered Supplier Costs
 - Expenditures made by a borrower to a supplier of goods for the supply of goods that
 - A. are essential to the operations of the borrower at the time at which the expenditure is made; and
 - B. is made pursuant to a contract, order, or purchase order -
 - i. in effect at any time before the covered period with respect to the applicable covered loan; or
 - ii. with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan

Additional Allowable Costs

- Covered Worker Protection Expenditures
 - A. Operating or capital expenditures to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency with respect to the COVID–19 expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19;
 - B. Such expenditures may include the purchase, maintenance, or renovation of assets that create or expand;
 - i. a drive-through window facility;
 - ii. an indoor, outdoor, or combined air or air pressure ventilation or filtration system;
 - iii. a physical barrier such as a sneeze guard;
 - iv. an expansion of additional indoor, outdoor, or combined business space
 - v. an onsite or offsite health screening capability; or
 - vi. other assets relating to the compliance with the requirements or guidance described in subparagraph (A), as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and (ii) the purchase of—(I) covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation; (II) particulate filtering face piece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or (III) other kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and (C) such expenditures do not include residential real property or intangible property.

Expansion of Definition of “Payroll Costs”

- Group Life
- Disability
- Vision
- Dental

Economic Injury Disaster (EIDL) Loans

- EIDL Loans are available
- Repeals the CARES Act requirement to deduct EIDL loan amounts from PPP loan forgiveness
- The SBA has indicated that any EIDL advance amounts previously deducted from a borrower's forgiveness will be remitted to the lender, along with interest. (Contact your lender on how to get an EIDL refund.)

Modifying an Existing First Draw PPP Loan

- If a borrower received their first draw PPP loan prior to December 27, 2020, the loan amount for the first draw can be increased if changes in guidance result in an increased original loan amount.
- In addition, the following borrowers can reapply or request an increase in their first draw PPP loan amount if forgiveness has not been obtained:
 - If a borrower returned all of a PPP loan, the borrower may reapply for a PPP loan in an amount the borrower is eligible for under current PPP rules.
 - If a borrower returned part of a PPP loan, the borrower may reapply for an amount equal to the difference between the amount retained and the amount previously approved.
 - If a borrower did not accept the full amount of a PPP loan for which it was approved, the borrower may request an increase in the amount of the PPP loan up to the amount previously approved.
- Must re-apply before March 31, 2021.
- Process for how to do this has not yet been established by the SBA.

Paycheck Protection Program Second Draw Loans

Eligibility for Second Draw Loan

- Must have had a PPP “First Draw” Loan
- Have or will use the full amount of the initial PPP loan for authorized purposes on or before the expected date of disbursement of the Second Draw PPP Loan
- 300 employees or less (Note: first draw loans are available for borrowers with 500 or fewer employees)
 - Not based on FTEs – full and part-time employees count
 - NAICS Code 72 businesses (hotels, restaurants, etc.) must have 300 employees or less per physical location
- This is based on headcount and includes all full or part-time employees
- 25% reduction in “gross receipts” between comparable quarters in 2019 and 2020 or for the full year 2019 compared to 2020 (not a requirement of first draw loans)
- A second draw may be approved but for it to actually be received, the borrower will need to certify that the first draw funds have, in fact, been used
- It is not a requirement that forgiveness of the first loan has been applied for or been received
- Same affiliation rules apply as first draw loans

Calculating Loan Amount

- Lesser of \$2M or 2.5x average monthly “payroll costs” (as defined)
 - NAICS Code 72 business = 3.5x average monthly payroll costs
- Average monthly payroll based on
 - 12 month period prior to the loan application
 - 2019
 - 2020
- Note: Special Rules for Farmers and Ranchers

Calculating Decline in “Gross Receipts” for 25% Test

- “Gross Receipts” defined as all revenue in whatever form received or accrued (in accordance with the entity’s accounting method) including:
 - Sales of products or services
 - Interest, dividends, royalties
 - Rents
 - Fees or commissions
 - Reduced by returns and allowances
- Gross receipts do not include the following:
 - net capital gains or losses;
 - taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees);
 - proceeds from transactions between a concern and its domestic or foreign affiliates;
 - amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker
- First draw PPP loans and EIDL loans/advances are excluded from gross receipts
- Important to be consistent in your definition of revenues

Documentation Requirements

- For loans greater than \$150,000, documentation of revenue reduction is necessary at the time of the loan. Documentation may include relevant tax forms, including annual tax forms, quarterly financial statements or bank statements.
- For loans of \$150,000 or less, documentation is not required with the loan application, but will be required with loan forgiveness application.
- Other documentation requirements as to payroll costs will vary depending on whether the borrower is using the same payroll information as the first draw application and the same lender.

Good Faith Certification of Economic Necessity Still Applies

- Entities applying for a first or second draw are required to make a good faith certification regarding eligibility for a PPP loan:
 - “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
 - Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.
- Borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application.
 - Certification applies as of the date of the second draw loan application - not as of the date of the first draw loan application.

Loan Forgiveness & Loan Review Process

- Covered Period 8 – 24 weeks
- 60/40 split between payroll costs and nonpayroll costs still applies
- Current Loan Review Safe Harbor = \$2M
 - Likely to change for second draw loans
- SBA also intends to issue a consolidated rule governing all aspects of loan forgiveness and loan review as well to provide a single reference point for lenders and borrowers. – 45 days to provide guidance
- No “Stacking” of First and Second Draw Loans for PPP Loan Review
- Simplified Forgiveness for Loans of \$150K or less for first or second draw loans (SBA has not yet provided guidance)

Q & A



Thanks for Your Time and Attention!

Mario O. Vicari
Director
Kreischer Miller
mvicari@kmco.com
215-441-4600

KM Covid-19 Resource Center
www.kmco.com

Kreischer
Miller

PEOPLE | IDEAS | SOLUTIONS

Center
for Private
Company
Excellence

A Kreischer Miller Knowledge Venture