NATIONAL MULTIFAMILY HOUSING COUNCIL

Frequently Asked Questions for SBA PPP Issues

The information provided herein is general in nature and is not intended to be legal advice. It is designed to assist our members in understanding this issue area, but it is not intended to address specific fact circumstances or business situations. For specific legal advice, consult your attorney.

1. What is the Paycheck Protection Program and how is it supposed to work?

The Paycheck Protection Program ("PPP") is a key component of the CARES Act. It is designed to provide short-term (two year) loans to small businesses to provide urgently needed capital to struggling small businesses to meet payroll and mortgage (other than principal), rent, utilities, and other interest on pre-existing debt. The main goal is to pay payroll, and at least 75 percent of any PPP loan must be spent on payroll. This is a loan until and unless the loan (or portions of the loan) are forgiven – essentially, they become a grant of funds to the businesses that receive them. Loans are provided by local banking institutions that receive funds from the Small Business Administration ("SBA"), which oversees the PPP.

The PPP has proven to be extremely popular – the original $349 billion appropriated in the CARES Act was soon exhausted, and Congress subsequently approved a second tranche of $310 billion for the program. The PPP is also controversial because many large national corporations – Shake Shack, Ruth's Chris Steakhouse and others – obtained loans in the early days of the program, arguably making it more difficult for "Main Street" businesses to obtain funds. At least partially in response to these controversies, the SBA and other federal agencies have issued regulatory guidance that has increased confusion among businesses that have received or are still seeking PPP funds, as discussed below.

Multifamily housing providers should work with their legal and financial advisors to determine whether participation in the PPP is appropriate for them, and to weigh the risks and benefits it offers.

2. Are multifamily housing providers eligible to participate in the PPP?

Yes, according to the CARES Act, but SBA guidance has muddied the water. SBA guidance implementing the PPP ("Interim Final Rule") incorporates by reference prior SBA rules providing that several types of businesses were ineligible for its loans, including apartment buildings, passive real estate businesses owned by developers and landlords that do not actively use or occupy assets.

Despite the SBA's Interim Final Rule, the CARES Act clearly seeks to make multifamily housing providers eligible for PPP loans. To address the urgent financial needs caused by the COVID-19 virus and subsequent shutdown orders, Section

1102 (a)(D)(i) of the CARES Act expanded the scope of eligible PPP recipients, saying that *any* small business that meets the program's other qualifications may receive PPP loans:

> *"[I]n addition to small business concerns, any business concern . . . shall be eligible to receive a covered loan if the business concern . . . employs not more than . . . 500 employees . . .".*

Notably, the SBA has issued its own FAQs explaining its PPP policies and, consistent with the CARES Act, its FAQ 3 sets out that small businesses are broadly eligible. [1] Notwithstanding these clear statements, however, SBA's first Interim Final Rule to implement the PPP program, released in early April, reinstated the preexisting limits on eligibility for PPP assistance.[2] Several lawsuits have been filed, and at least one initial decision indicates that the eligibility restrictions adopted in the Interim Rule are inconsistent with the intent of Congress to "provid[e] temporary paycheck support to as many displaced and suffering American workers as possible." *DV Diamond Club of Flint, LLC v. U.S. Small Business Administration*, Case 4:20-cv-10899-MFL-DRG, slip. op. at 27-28 (E.D. Mich. May 11, 2020) (concluding that the Interim Rule's eligibility requirement, which excluded adult entertainment business, was not consistent with broad scope of coverage reflected in the CARES Act). Notwithstanding the uncertainties created by the Interim Rule, there are at least some anecdotal reports that real estate management companies have obtained PPP funding.

3. How do I know if my firm is a "small business" eligible to participate in the PPP?

SBA's FAQ 3, 4 and 5 explain that in addition to small businesses under section 3 of the Small Business Act (15 U.S.C. 632), a business is eligible for a PPP loan if it meets the employee-based size standards (i.e., has fewer than 500 employees), or meets the revenue-based size standards, or meets other criteria such as a qualifying 501(c)(3) nonprofit corporation, tax-exempt veteran's organization, or Tribal business concern.

If the small business has affiliated businesses, the business must also apply the SBA affiliation rules and include the size of applicable affiliates in its calculations.

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1 SBA's FAQ may be found at https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf

2 The Interim Rule can be found at https://www.sba.gov/sites/default/files/2020-04/Interim-Final-Rule-04%2024%2020.pdf. There have been several supplemental Interim Final Rules covering other topics in the PPP program.

NATIONAL MULTIFAMILY HOUSING COUNCIL

The affiliation rule at 13 CFR 121.301(f) explains how the employees of related or affiliated business are counted towards the 500 employee cap for small businesses. The issue of affiliation is very fact-specific, reflecting the complications of business arrangements. Affiliation can be established through criteria such as majority ownership, operational control, voting control, and common investments. Answers to different criteria may conflict and, working with legal counsel, each borrower must examine their own facts and balance the different presumptions the specific facts create.

4. **How do I know if my PPP loan is forgivable?**

You can't, at least not yet. Presumably, to be forgiven, a borrower must meet the requirements of the CARES Act, which provides, among other things, that at least 75 percent of the PPP loan must be used to meet payroll expenses (the balance can be spent on other business costs, such as mortgage interest (but not principal), rent, utilities, and other interest on pre-existing debt. The program also requires that borrowers begin to spend PPP funds within 10 days of receipt and must spend the funds within 8 weeks. But SBA has not yet released its rules with respect to forgiveness of PPP loans, and those rules will provide additional explanation – and maybe additional requirements – about how PPP loans will be forgiven.

5. **Are there risks involved in obtaining PPP funds?**

Yes, although new SBA guidance may reduce some of these risks. First, according to the SBA, a firm seeking PPP funding must establish "need." Specifically, applicants must certify the PPP loan is necessary to support the applicant's ongoing operations in light of current economic conditions. FAQ 31 issued by the SBA provided that to qualify, a borrower must show that it does not have the "ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business." The FAQ also states that "such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification." Perhaps responding to concerns that larger firms with the ability to raise funds from other sources had improperly requested PPP funding, FAQ 31 warned that "it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification."

In light of this guidance, which was issued after many businesses had already applied for and received their PPP funds, some firms were considering returning their funds to avoid a dispute – including possible audit and enforcement proceedings – with SBA. On May 13, 2020, however, SBA issued FAQ 46, which establishes a bright line test for satisfying the "need" requirement. According to FAQ 46, "[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." SBA advises that borrowers with loans in excess of $2 million "may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance." SBA warns that borrowers with loans in excess of $2 million (and possibly other borrowers) "will be subject to review by SBA" for compliance with the PPP rules. However, if SBA concludes that a borrower did not satisfy the "need" requirement, "SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness." If the loan balance is repaid, SBA says it "will not pursue other administrative enforcement or referral to other agencies" based on the "need" requirement.

So, for firms with PPP loans below $2 million, FAQ 46 appears to provide comfort that SBA will not second-guess the certification of need made in their application. Firms with loan balances in excess of $2 million can expect some form of review by SBA, but if SBA determines after the fact that they did not satisfy the "need" requirement, they may be asked to return the remaining loan balance and may not be eligible for forgiveness. If they return the loan balance, it appears that they will not be subject to other enforcement action. This effectively creates a notice and opportunity to cure process that will allow repayment before the imposition of any additional sanctions.

6. I applied and received PPP funds and then new guidance came out. Am I bound by that new guidance?

SBA's FAQs are updated on a regular basis, so it is very likely new guidance will come out after the borrower submits its loan application that may change the borrower's understanding of the program. SBA's FAQ 17 provides that borrowers and lenders may rely on laws, rules and guidance at the time of the relevant application. The SBA's FAQ introductory paragraphs indicate a borrower or lender may rely on its FAQs now and in the future.

7. It would be helpful to have a checklist of issues. What kinds of questions and issues should I think about in connection with the PPP?

Firms considering participating in the PPP should consider the following issues before applying for a loan:

- Whether or how COVID-19 has impacted, or could impact, either your workforce or your resident populations.
- Whether or how your organization will be impacted by an expected dramatic increase in unemployment (over 30 million people have made unemployment claims so far as a result of the coronavirus).
- Whether or how your organization's revenue will be reduced.

- Whether your company's asset value or stock investments, if any, will be reduced.
- Whether your organization has laid-off employees as a result of current economic conditions, or, but for the PPP loan, you would have laid off employees.
- Whether your organization has had to cancel publicity, sales, or other events that would have contributed to generating revenue.
- Whether or how your organization has been forced to change how it delivers services that requires changes in programming, employee activities, or training, and costs associated with those changes.
- Whether your organization has mission-based requirements or liquidity requirements to maintain a minimum level of reserves or other funds.
- Whether, based on historical precedent, such as significant declines in certain types of revenue or other business disruption during the 2008 recession, you anticipate that revenue to your organization will decline as a result of current economic conditions.