

Ten Things to Consider After Your Paycheck Protection Program Application Has Been Approved

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Below are ten items that small businesses already approved for loans under the Paycheck Protection Program (the “PPP”) should consider to help maximize the benefits of the program. This article reflects the regulations and guidance provided by the SBA as of date listed above. We encourage all applicants to continue to monitor for additional guidance and clarification as it becomes available from the SBA.

1. **Deadline for funding the loan.** The SBA has issued additional guidance providing that lenders must make an initial disbursement of the PPP loan proceeds within ten days after a borrower’s application has been approved, meaning that the eight week “covered period” for borrowers to spend the proceeds for purposes of forgiveness will begin at the time of the initial disbursement. This additional guidance from the SBA confirms that borrowers will not be able to defer the start of their covered period to a later date. Borrowers should be aware that some lenders may choose to structure the loan as a line of credit. Under a line of credit structure the lender will make an initial advance of a partial amount of the loan proceeds, with additional advances of the loan proceeds to follow over the course of the covered period.

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- 2. Set up a separate account.** To better track and document the uses of the PPP loan proceeds, borrowers should consider having the funds disbursed to a deposit account separate from their normal operating accounts. The funds can then be applied toward permitted uses as such costs are incurred during the covered period. This could make it easier to comply with the restrictions on the use of loan proceeds and demonstrate and document the use of the proceeds for purposes of forgiveness, both of which are discussed in greater detail below. Additionally, to the extent the entire loan proceeds are not spent during the covered period, the remaining amount of the funds left in the account could be applied to pay down the unforgiven portion of the loan. For some borrowers it might not be realistic to switch accounts used for payroll and other expenses for an eight week period; in that case, proceeds from the segregated account could be deposited into a main operating account just prior to the permitted use cost needing to be paid during the covered period.
- 3. Using the loan proceeds.** In the Interim Final Rule issued by the SBA on April 2, 2020, the SBA placed further restrictions on the use of the loan proceeds compared to what was permitted under the Act. ***The loan proceeds may only be used for payroll costs, mortgage interest payments for obligations, rent payments, utility payments and interest payments on other debt obligations incurred prior to February 15, 2020, and of those costs, at least 75% of the proceeds of the loan must be applied to payroll costs.*** This is to be distinguished from the previously announced cap on eligible costs for forgiveness. Consequently, borrowers should consider developing a plan to make sure adequate controls are in place to maximize the potential usefulness of the loan proceeds and also to prevent the loan proceeds from being misapplied. As discussed above, holding the loan funds in a separate account may be a convenient way to ensure these funds are not used for purposes not permitted by the SBA.
- 4. Retain documentation.** When applying for forgiveness, borrowers will need to provide supporting documentation for all eligible expenses. To support their payroll costs calculations, borrowers should retain any payroll processor records and payroll tax filings during the covered period. Additionally, borrowers should retain any cancelled checks, payment receipts, transcripts of accounts and other documentation verifying payments on mortgage obligations, lease and rent payments and utilities. To the extent that a borrower uses a separate account for the loan proceeds, the bank records from that account will also be useful in establishing how the proceeds were used. Borrowers are also encouraged to reach out to their lenders on what specific documentation each lender may require when the borrower submits its request for forgiveness.

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- 5. Reversing workforce cuts.** For any borrowers that have already reduced their workforce levels, now is the time to plan for when those employees can be brought back. A borrower's eligible forgiveness amount is subject to reduction in the event the borrower reduces its full time employee equivalents or if the borrower reduces by more than 25% of the total wages paid to any employee that makes less than \$100,000. To the extent any reductions in FTEs or total wages occur prior to April 26 and are reversed prior to June 30, 2020, the borrower may still be eligible for the entire forgiveness amount. Borrowers should note that the 25% loan proceed cap on uses for non-payroll costs may make it difficult for a borrower to maximize the use of the loan proceeds and the eligible forgiveness amount without paying the equivalent of eight weeks of the borrower's average payroll costs during the covered period.

To maximize the forgiveness amount, any borrowers that do need to make wage cuts during the covered period may consider prioritizing wages cuts for employees making an annual salary above \$100,000 first because (a) any amounts paid in excess of \$100,000 annually already do not count towards the total payroll costs calculation during the covered period and (b) pay cuts for employees making over \$100,000 annually are excluded from the wage reduction forgiveness penalty. Additionally, any reduction in wages that does not constitute a 25% decrease or more in total salary or wages will not impact the eligible forgiveness amount.

- 6. Unauthorized uses of the loan proceeds.** The SBA has clarified that borrowers will be required to repay any funds used for unauthorized purposes. If any borrower knowingly uses the loan proceeds for unauthorized purposes, borrowers may be subject to additional charges or penalties. Additionally, any shareholder, member or partner that misuses the loan proceeds for unauthorized uses may be subject to additional liability.
- 7. Applying for forgiveness.** A borrower will apply for forgiveness directly with its lender. Borrowers will be required to submit documentation supporting their forgiveness calculations. Lenders will review the request for forgiveness and supporting documentation and then submit the request for forgiveness to the SBA. We expect for there to be some lead time between when a borrower submits its request for forgiveness and when the SBA finally processes the request. Therefore, borrowers should consider applying for forgiveness as soon as possible to ensure the forgiveness is fully processed before the 6 month payment deferment ends.

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- 8. Other programs and benefits that may be impacted.** Borrowers should also consider what other programs or benefits may not be available to borrowers who receive PPP loans. No employer may receive a PPP loan and also claim the Employee Retention Credit under the CARES Act. If an employer takes the tax credit and later obtains a PPP loan, the tax credit will be recaptured and required to be repaid to the IRS. Additionally, the deferral of payroll taxes provided for in the CARES Act is not available to any employer that has had a PPP loan forgiven.

While borrowers under the PPP are not prohibited from claiming tax credits for qualified sick leave and family leave under the Families First Coronavirus Response Act (the “FFCRA”), any sick leave or family leave for which a credit is allowed under the FFCRA will not count towards the total payroll costs calculation for purposes of determining the total forgiveness amount.

On April 9, 2020, the Federal Reserve provided more information regarding the implementation of the Main Street Lending Program, which will allow expanded access to credit for many small- and medium-sized businesses. The Federal Reserve has already indicated that the Main Street Lending Program will also be available to borrowers receiving PPP loans. Koley Jessen will be providing additional information on the Main Street Lending Program as it becomes available.

- 9. Keep an eye out for additional guidance.** Since the Interim Final Rule was published on April 2, 2020, the SBA has been issuing additional guidance and clarification on the implementation of the Paycheck Protection Program on almost a daily basis. This will likely continue while the final details of the implementation of the program are worked out. In particular, we expect the SBA to provide additional guidance on how the forgiveness provisions will be administered.
- 10. Changes in regulations.** The SBA has clarified that borrowers and lenders may rely on the laws, rules and guidance available at the time the application was submitted. Therefore, any borrower that has already had its application approved will not need to amend or correct its application to account for any subsequent changes in the regulations promulgated by the SBA.

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