

ALERT

Treasury Releases Application and Guidance on Paycheck Protection Program

April 1, 2020

As discussed in prior Wiley alerts, the \$349 billion Paycheck Protection Program (PPP) – a critical part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) that was signed into law on March 27, 2020 – authorizes lenders to make fully-guaranteed (and potentially completely forgivable) loans to small businesses to cover payroll and overhead costs for the next two months.

Yesterday, the U.S. Department of Treasury released the application that businesses will need to complete to obtain these loans. Treasury also issued guidance for borrowers and lenders in connection with the application process.

As expected, the application is short (two pages) and requires only basic information about the business: (i) identification (name, address, EIN, phone, email, and primary contact), (ii) average monthly payroll, and (iii) number of employees. The only other items on the application are seven Yes/No questions, and a number of representations and certifications that the business must confirm are accurate.

The guidance is limited, so applicants (and lenders) will need to refer to the PPP legislation to interpret certain provisions. However, the guidance does provide some information about the application process (some of which is helpful, some of which is ambiguous):

- *When can an application be submitted* – starting April 3, 2020 for small businesses and sole proprietorships; starting April 10, 2020 for independent contractors and self-employed individuals

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Practice Areas

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- *Interest rate for the unforgiven portion of the loans* – 0.50% fixed rate (the legislation allowed for up to 4% interest)
- *Maturity date* – Two years (the legislation allowed for up to 10 years)
- *Limitation on overhead expenses* – The U.S. Small Business Administration (SBA) has stated that they anticipate that not more than 25% of the forgiven amount may be for non-payroll costs
- *Nonprofit eligibility* – The CARES Act defined an eligible nonprofit organization as a “501(c)(3)” organization. However, the application itself uses the term “Nonprofit” and the guidance states that “All businesses – including nonprofits” can apply for a PPP loan, without limiting the term to 501(c)(3)s. So, there may be confusion as to whether other nonprofits are eligible for the program.
- *Definition of payroll* – The application says that “most Applicants will use the average monthly payroll for 2019,” but the CARES Act says to use average monthly payroll “incurred during the one-year period before the date on which the loan is made” (i.e., April/May 2019 – March/April 2020 for loans made over the next couple of months). Also, the instructions do not include a definition of “payroll” (the summary of this definition can be found here) or state that compensation paid to foreign employees must be excluded, which could have a significant impact since that figure serves as the basis for the loan amount.
- *Certifications / SBA affiliation* – The certifications must be made by the applicant and all owners of at least 20% of the applicant. False certifications are subject to fines and/or imprisonment. The application includes terms (such as “common management” and “Affiliate”) that are used in the SBA affiliation context, but the guidance did not provide any clarity on how these rules would apply.
- *Lenders* – Currently, SBA-certified lenders, and all FDIC banks and credit unions are eligible to make PPP loans. It is expected that a broad set of additional lenders, such as fintechs, will be available once they are approved by the SBA.

What can I do now?

- Select a lender – reach out to your bank or local lender. A list of SBA lenders can be found here.
- Review the PPP application.
- Determine whether SBA affiliation rules may affect your ability to qualify as a “small business.” If so, compile documents or other information – and possibly consider changes of ownership structure – to satisfy these requirements.
- Gather payroll records for the past 12 months.
- Consider whether any amendments are needed to your existing loan documents to permit a PPP loan.
- Contact your primary Wiley attorney, or one of the authors of this alert, should you need any further guidance.

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