

PPP Loan Eligibility and Good Faith Certification How Can Companies Prepare and Respond to SBA Loan Review?

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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 AND RELATED REGULATIONS AND GUIDANCE OF BOTH.

LOAN FORGIVENESS APPLICATIONS WILL BE MADE TO YOUR LENDER WHO HAS AUTHORITY TO ADMINISTER THE PPP. IT WILL BE IMPORTANT TO COORDINATE LOAN FORGIVENESS CALCULATIONS WITH YOUR LENDER.

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

THIS DOCUMENT SHOULD NOT BE USED AS A BASIS TO MAKE ANY DECISIONS OR TAKE ANY ACTIONS RELATED TO A PPP LOAN, GOOD FAITH CERTIFICATIONS OR LOAN FORGIVENESS. BORROWERS SHOULD CONSULT THEIR BANK AND THEIR OWN ADVISORS BEFORE MAKING ANY DECISIONS OR TAKING ANY ACTIONS RELATED TO THESE MATTERS.

Discussion Agenda

1. Overview of PPP Eligibility and Good Faith Certification Guidance
2. Preparing & Documenting Good Faith Certification of Eligibility for a PPP Loan
3. Addressing Access to Other Forms of Liquidity
4. Bank and SBA Loan Review Process
5. Q & A

Guidance Overview

Cares Act – March 27, 2020

(G)(i) CERTIFICATION – An eligible recipient applying for a covered loan shall make a good faith certification -

- (I) “That the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.
- (II) Acknowledging that the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments

PPP Interim Final Rule – April 2, 2020

On the Paycheck Protection Program application, an authorized representative of the applicant must certify in good faith to all of the below.

- i. The applicant was **in operation on February 15, 2020** and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.
- ii. **Current economic uncertainty** makes this loan request **necessary** to support the ongoing operations of the applicant.
- iii. The funds will be **used to retain workers and maintain payroll** or make **mortgage interest payments, lease payments, and utility payments;**
I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable such as for charges of fraud.

FAQ #17 - April 6, 2020

Question:

I filed or approved a loan application based on the version of the PPP Interim Final Rule published on April 2, 2020. **Do I need to take any action based on the updated guidance in these FAQs?**

Answer:

No. Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application. However, borrowers whose previously submitted loan applications have not yet been processed may revise their applications based on clarifications reflected in these FAQs.

FAQ #31 - April 23, 2020 (1 of 2)

Question:

Do businesses owned by large companies with adequate sources of liquidity to support the business' ongoing operations qualify for a PPP loan?

Answer:

- In addition to reviewing applicable affiliation rules to determine eligibility, **all 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.
- Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, **before submitting a PPP application, all borrowers should review carefully the required certification** that **“current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”**

FAQ #31 - April 23, 2020 (2 of 2)

- 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**. For example, 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.
- Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

FAQ #37 - April 28, 2020

Question:

Do businesses **owned by private companies** with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

Answer:

See response to FAQ #31.

FAQ #39 - April 29, 2020

Question: Will SBA review individual PPP loan files?

Answer:

Yes. In FAQ #31, SBA reminded all borrowers of an important certification required to obtain a PPP loan. To further ensure PPP loans are limited to eligible borrowers in need, the SBA has decided, in consultation with the Department of the Treasury, **that it will review all loans in excess of \$2 million**, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application. Additional guidance implementing this procedure will be forthcoming.

FAQ #46 - April 29, 2020 (1 of 2)

Question:

How will SBA review borrowers' required good-faith certification concerning the **necessity of their loan request**?

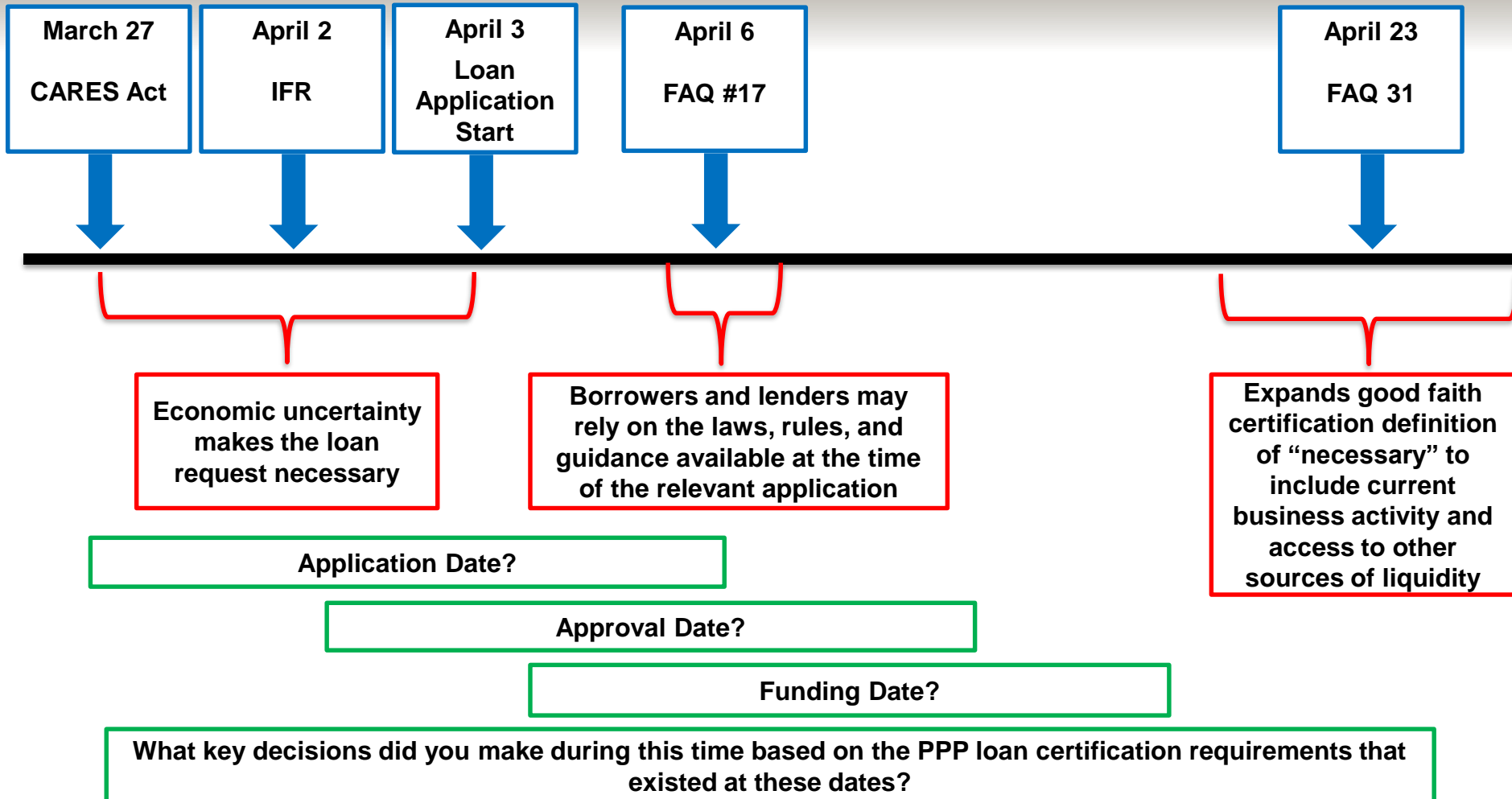
Answer:

- When submitting a PPP application, all borrowers must certify in good faith that “current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the Department of the Treasury, has determined that the following **safe harbor will apply to SBA’s review of PPP loans with respect to this issue**:
 - **Any 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 has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns

FAQ #46 – May 13, 2020 (2 of 2)

- Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor 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 has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form.
- If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, 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 borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

Guidance Timeline - March 27 to April 23



Preparing & Documenting Good Faith Certification of Eligibility

Documentation Borrower Must Maintain But Not Submit – Other

All records relating to the Borrower's PPP loan, including:

- documentation submitted with its PPP loan application,
- documentation supporting the Borrower's certifications as to the necessity of the loan request and its eligibility for a PPP loan,
- documentation necessary to support the Borrower's loan forgiveness application
- documentation demonstrating the Borrower's material compliance with PPP requirements.

The Borrower must retain all such documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.

What Should Your Documentation Look Like

- ❑ SBA has yet to issue guidance on what it will require when it reviews a borrower's loan to determine whether the borrower acted in good faith related to eligibility for a PPP loan
- ❑ SBA has said it will review loans for good faith certification when the forgiveness application is submitted to SBA by the bank and has 90 days to do so (although SBA has reserved the right to review any borrowers loan at any time)
- ❑ Based on the # of loans to review, it is unlikely that you will have a face to face interaction to explain your position.
- ❑ Documentation should:
 - be clear and concise as to your conclusions related to compliance with the requirements in the guidance and demonstrate that you acted in good faith based in following the guidance
 - be organized and easy to read
 - cover the things contained in the certification requirements (or new requirements that the SBA provides guidance on)
 - Provide sufficient detail to support your arguments and conclusions

Good Faith Certification Documentation

Necessity of the Loan Request at the Time of the Application

1. BORROWER MUST DEMONSTRATE AND DOCUMENT:

- Borrower acted in good faith
- regarding the necessity of the loan request
- based on economic need for a PPP loan (new in FAQ #31)
- under the standard established by the CARES Act and the PPP regulations
- at the time of the loan application

2. COMPONENTS OF BORROWERS DOCUMENTATION

- Existence of Economic Uncertainty caused by COVID-19
- Affect on Current Business Activity caused by COVID-19
- Access to other sources of liquidity sufficient to support your ongoing operations in a manner that is not significantly detrimental to the business
- Intended use of funds consistent with the goals of PPP to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments

- Economic Uncertainty**
- Current Business Activity**
- Other Sources of Liquidity**
- Use of Funds**

Conditions & Impact Analysis

Document the Conditions & Impact of COVID-19 on Your Business

AT THE TIME OF YOUR PPP LOAN APPLICATION:

- ❑ Document your business conditions
- ❑ Develop an analysis that thoroughly documents the impact of the pandemic on your business
- ❑ This should include:
 - the uncertainties and risks you were faced with
 - state of your business conditions and activities
- ❑ This analysis will be different for every company and will be case specific
- ❑ It should include specific details of the key things going on in the business that illustrate the impact of the pandemic
 - Specific metrics
 - Internal and external data/reports, etc.

Conditions & Impact Analysis - Examples

- Effect of mandated closures on the business and its ability to operate
- Effect on customers, market segments, geographic markets, suppliers, employees
- Customer losses, delays, closings, shutdowns or cancellations
- Requests for price reductions or extended payment terms
- Supply chain disruptions, delays and closures
- People issues, including distancing measures, people not coming to work, etc.
- Layoffs, reductions or other personnel actions
- Sales and booking details and trends
- Project shutdowns/demobilization costs
- Order cancellations/bidding cancellations or deferrals
- Receivables and collection risks and deterioration
- Working capital deterioration
- Production levels and trends
- Cash balances and cash flow trends
- Potential debt covenant breaches/bank pressure/default risks/loss of lines of credit
- Potential risks to bonding relationship and capacity, ability to bid work

Decision Processes

Document Your Decisions & How They Related to Your PPP Loan

- ❑ Document your analysis and the many alternative courses of action you considered to address the potential significant threats and adverse impacts on your business, including why you chose your course of action
- ❑ Document the specific planning and actions you took when considering your PPP loan, such as layoffs, pay reductions, etc. that would have been necessary without the PPP funds
- ❑ Document your planned use of the funds and the decisions you made based on receiving the funds
- ❑ Document your thinking and decision process regarding the availability and use of other sources of liquidity and why you concluded that those sources would have been insufficient or inappropriate to use in lieu of PPP funds to support your business operations and to maintain employment and compensation levels
 - This should include your analysis of the risks and limitations associated with lines of credit and other forms of debt and cash reserves as well as inability of a private company to access capital markets

Decision Processes, continued

- ❑ Demonstrate the seriousness and intensity of your deliberations during this time related to the severity of the situation and the level of uncertainty and risk you faced. Assemble documentation consisting of:
 - Meeting agendas
 - Meeting notes
 - Action steps
 - Board meetings and resolutions, etc.

- ❑ Document the **CHRONOLOGY OF YOUR DECISIONS**
 - in relation to the date of FAQ #31 (4/23/20)
 - specific business decisions you made based on the timing of your PPP loan dates:
 - Application Date
 - Approval Date
 - Funding Date

Financial Analysis & Planning

Document Rigorous Analysis of Decision Processes

- ❑ Document the financial analysis and cash flow planning that you engaged in as part of your decision process to demonstrate the need to apply for the loan and the effect of the pandemic on your financial condition
- ❑ Include various scenarios that you considered in projecting cash flows, cash balances, and other key business metrics
- ❑ Consider other unique risk factors, including:
 - existing debt levels and debt service requirements
 - leverage
 - cash levels
 - and customer, supplier and market concentrations and dependencies
- ❑ Consider unique claims on capital, including:
 - existing purchase commitments
 - capital project commitments
 - shareholder redemption commitments, as well as ESOP redemptions
- ❑ Include the factors and risks that affect your access to lines of credit, including borrowing base limitations, ramifications of potential debt covenant violations and the uncertainty related to expiration and renewal of your line of credit given the current environment. This could include limitations or restrictions on your bonding lines

4. Use of PPP Funds

- ❑ Document your planned use of the PPP funds within your decisions processes in a manner consistent with the purpose of the program.
- ❑ Demonstrate how this was part of your good faith effort in applying for the loan, as well as your planning and execution related to the use of the funds.
- ❑ Emphasis should be on retaining workers and maintain wages.

Addressing Access to Other Forms of Liquidity

Access to Other Forms of Liquidity

❑ Private Company Lack of Access to Capital Markets

- Comment on lack of access to capital markets
- Comment how capital is scarce and expensive for private companies
- Comment on time, effort and cost to access new forms of capital in the context of the emergency situation you were in
- Comment on your debt capacity and ability to borrow additional money quickly and easily

❑ Existing Lines of Credit

- Not a permanent source of liquidity/availability
- Have to renew annually – what is your expiration date - will your bank renew?
- Subject to meeting quarterly/annual debt covenants
- Bank can prevent drawdowns with covenant default
- Purpose to bridge working capital needs – not to fund losses. Bank would not expect/allow borrowers to fully expend lines of credit rather than reduce costs
- Comment on how a line draw down would be “significantly detrimental” to the business since the company would have no capital reserve/access to additional liquidity if needed
- Asset-based lines present reduced line capacity due to declining volumes and receivables

Access to Other Forms of Liquidity

❑ Bonding Lines

- Important for bonding company to see capacity on the line of credit as part of bonding program for a contractor
- Lack of line capacity could cause reduction in ability to get bonds and bid work which would be “[significantly detrimental](#)” to the business
- Significantly negative effect on future revenues for a contractor by not having adequate bonding capacity

❑ New Bank Borrowing other than PPP

- Banks not lending – too much uncertainty
- Bank credit tightening rather than loosening
- Banks focused on protecting themselves from credit losses rather than making new loans
- Banks already stretched to capacity to implement government mandated PPP and directed their resources to those activities rather than making new conventional loans
- Banks increasing loan loss reserves

Access to Other Forms of Liquidity

□ Cash Levels

- Consider affect on working capital of cash spent to fund losses
- Consider level of cash relative to levels of overhead (i.e. how many months of overhead/payroll etc. does our cash balance cover?)
- Comment on prudent business practices to maintain levels of cash to support the businesses and jobs in the future and the detrimental effect of spending down the company's cash
- Comment on the risk associated with not maintaining adequate cash and working capital reserves (relative to the size of the business) and the negative affect that could have on the business and jobs over the long term
- Comment on the need to maintain cash reserves to maintain flexibility and the what it does to allow the business to survive in the middle of a pandemic
- Comment on the need to keep reasonable cash levels based on the significant economic uncertainty at that time
- Benchmark your cash and working capital levels against industry standards to determine reasonableness

Lender and SBA Review of Loans

IFR – Docket Number SBA-2020-0033 – May 23, 2020

Lender Loan Forgiveness Process – Timeline for Forgiveness

What is the timeline for the lender's decision on a loan forgiveness application?

- The lender must issue a decision to SBA on a loan forgiveness application not later than 60 days after receipt of a complete loan forgiveness application from the borrower.
- That decision may take the form of an
 - approval (in whole or in part);
 - denial; or
 - (if directed by SBA) a denial without prejudice due to a pending SBA review of the loan for which forgiveness is sought.
 - In the case of a denial without prejudice, the borrower may subsequently request that the lender reconsider its application for loan forgiveness, unless SBA has determined that the borrower is ineligible for a PPP loan.

Lender Loan Forgiveness Process – Timeline if Entitled to Forgiveness

What is the timeline for the lender's decision on a loan forgiveness application?

- If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the lender must request payment from SBA at the time the lender issues its decision to SBA.
- SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA.
- If applicable, SBA will deduct EIDL Advance Amounts from the forgiveness amount.

Lender Loan Forgiveness Process – Timeline if Not Entitled to Forgiveness

What is the timeline for the lender's decision on a loan forgiveness application?

- When the lender issues its decision to SBA determining that the borrower is not entitled to forgiveness in any amount,
 - the lender must provide SBA with the reason for its denial, together with (1) the PPP Loan Forgiveness Calculation Form; (2) PPP Schedule A; and (3) the (optional) PPP Borrower Demographic Information Form (if submitted to the lender).
 - The lender must confirm that the information provided by the lender to SBA accurately reflects lender's records for the loan, and that the lender has made its decision in accordance with the requirements set forth in 2.a.
 - The lender must also notify the borrower in writing that the lender has issued a decision to SBA denying the loan forgiveness application.
 - SBA reserves the right to review the lender's decision in its sole discretion.
 - Within 30 days of notice from the lender, a borrower may request that SBA review the lender's decision by reviewing the loan.

SBA Statutory 90 Day Period to Review Loans

- Enabling SBA to use the [statutory 90-day period to review the PPP loan](#) and [forgiveness documentation is an appropriate procedural protection to prevent fraud or misuse of PPP funds, ensure that recipients of PPP loans are within the scope of entities that the CARES Act is intended to assist, and confirm compliance with the PPP requirements set forth in the statute, rules, and guidance.](#)
- This protection is also important in light of the large number and diverse types of PPP lenders, many of which were not previously SBA participating lenders and which were approved rapidly in order to enable financial assistance to be provided as rapidly as feasible to millions of small businesses.
- SBA will use the 90-day period to help ensure that applicable legal requirements have been satisfied.

SBA Review of Individual PPP Loans - Timing

When will SBA undertake a loan review?

- For a PPP loan of any size, SBA may undertake a review at any time in SBA's discretion.
- SBA may review a loan if the loan documentation submitted to SBA by the lender or any other information indicates that the borrower may be ineligible for a PPP loan, or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower.
- Borrower must retain PPP documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.

SBA Review of Individual PPP Loans – Borrower Response to Questions in a Review

Will a Borrower have the opportunity to respond to the SBA's questions in a review?

- Yes, If loan documentation submitted to SBA by the lender or any other information indicates that the borrower may be ineligible for a PPP loan or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower, SBA will require the lender to contact the borrower in writing to request additional information.
- SBA may also request information directly from the borrower.
- The lender will provide any additional information provided to it by the borrower to SBA. SBA will consider all information provided by the borrower in response to such an inquiry
- Failure to respond to SBA's inquiry may result in a determination that the borrower was ineligible for a PPP loan or ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower.

SBA Review of Individual PPP Loans – Ineligible Borrower

If SBA determines that a borrower is ineligible for a PPP loan, can the loan be forgiven?

- No.
- If SBA determines that a borrower is ineligible for the PPP loan, SBA will direct the lender to deny the loan forgiveness application.
- Further, if SBA determines that the borrower is ineligible for the loan amount or loan forgiveness amount claimed by the borrower, SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate.
- SBA may also seek repayment of the outstanding PPP loan balance or pursue other available remedies.
- Section 1106(b) of the CARES Act provides for forgiveness of a PPP loan only if the borrower is an “eligible recipient.” The Administrator has determined that to be an eligible recipient that is entitled to forgiveness under section 1106(b), the borrower must be an “eligible recipient” under 15 U.S.C. § 636(a)(36)(A)(iv) and rules and guidance available at the time of the borrower’s loan application.
- **Nonrecourse Provision**, 15 U.S.C. § 636(a)(36)(F)(v), which limits SBA’s recourse against individual shareholders, members, or partners of a PPP borrower for nonpayment of a PPP loan only if the borrower is an eligible recipient of the loan.

SBA Review of Individual PPP Loans – Borrower Appeal if Deemed Ineligible

May a borrower appeal 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?

- Yes.
- SBA intends to issue a separate interim final rule addressing this process.

Thanks for your Time and Attention!

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The logo for Kreischer Miller, featuring the word "Kreischer" in a large, dark green serif font above the word "Miller" in a smaller, dark green serif font. The letters are closely spaced and have a classic, professional appearance.

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