

# PPP LOANS: A NEW JOURNEY FOR LENDERS & BORROWERS

## INTERPRETING CURRENT SBA 7(A) PROCEDURES TO PREPARE FOR LIFE, POST-DISBURSEMENT

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Your team worked 80-100 hour weeks trying to process as many Payroll Protection Program, or “PPP” loans as possible before the rapidly depleting funds were exhausted. As the second round comes to a close, you sit back and take a deep breath, having secured financing to help many of your clients, old and new. Now what? With any new government program, the guidance on what comes next for lenders is limited. The most important function of the PPP is the forgiveness of the entire balance if certain requirements are met. This article explores the role of the lender in the post-funding process, drawing information from the current Small Business Administration or “SBA” 7(a) loan procedures and the PPP guidelines currently available. The existing SBA processes provide a solid outline of what to expect, however given the 6 month payment deferment, coupled with a short amortization and the lack of collateralization and personal guaranty, the expectation is that the life of the PPP loan is going to be very different.

### When can the processing fees be expected?

Requests can start on May 22, 2020, but don’t expect the reimbursement immediately. The initiation of the process for a lender to receive their processing fee is contingent upon the lender submitting a “1502 report” to the SBA advising them of the fully disbursed loan. The SBA will not begin accepting 1502 reports until May 22, 2020. The CARES Act states that the reimbursement is to be made not more than 5 days after disbursement. The PPP loan procedures state that on the third business day after the 1502 report is submitted they will begin the processing fee process, provided the lender has taken the requisite initial steps. However, given the short time frame for processing fee requests, and volume of requests to be submitted, it would be unlikely that the SBA will be able to initially meet the 5 day timeline.

### What is the process for obtaining the processing fees?

**Step 1: Create an Account with the Lender’s Fiscal Transfer Agent (“FTA”).** This account is *separate* from the E-Tran portal to which the loan applications were submitted through. If you were previously established as an SBA 7(a) lender, you can use the same account. If you are new to SBA loans, you will need to create this account by e-mailing the required information to Colson Services.

**Step 2: Provide Automated Clearing House (“ACH”) information.** As soon your FTA account is established, the lender must provide ACH credit information for the account in which they want the fees deposited. The account must be in the name of and owned by the lender. For lenders who already had an FTA account, review your ACH information to ensure they are in compliance with the PPP restrictions.

**Step 3: Submit 1502 reports.** A 1502 report can contain a singular loan or multiple loans. The 1502 report can be submitted via e-mail, uploaded to the FTA, or through Secure File Transfer Protocol (“SFTP”). SFTP submission will require additional steps though before being used. There will be a fourth option but it has not yet been released as of the date of this publication (May 21, 2020).

Most importantly, the 1502 report must be submitted by the later of May 29, 2020 or 10 calendar days after disbursement. If the 10<sup>th</sup> calendar day is a weekend or holiday, the period ends at the end of the next business day. Thus, this means that there will be a large influx of reports submitted between May 22, 2020 and May 29, 2020. There is no indication on what occurs if the 1502 reports are not submitted by the deadline or if extensions can be requested.

**Step 4: Confirm full disbursement.** After submitting each 1502 report the lender must confirm that the loans in the report have been fully disbursed. This is a small step, but one that has the ability to impede the issuance of the processing fee.

### **Could a processing fee be denied or asked to be returned?**

Yes. If the PPP loan is not disbursed, cancelled before disbursement, disbursed but cancelled and repaid before the safe harbor date, or if the loan was disbursed but SBA reviews the loan and determines the borrower was not eligible, the SBA can deny a lender's request for the processing fee. However, if the processing fee was already disbursed to the lender and the SBA waits more than 1 year after the disbursement to review the loan and determines a borrower was not eligible, the processing fee cannot be requested back from the lender. If requested less than 1 year after disbursement, the lender is required to repay the processing fee but the loan remains guaranteed by the SBA.

Additionally, if the lender is found to be in noncompliance with the SBA rules on PPP loans, the lender may forfeit the processing fees on the subject loans and waive the SBA's guarantee of said loans.

### **Should the loans be treated any differently from a loan maintenance and servicing perspective?**

Yes and no. With any SBA 7(a) loan, lenders must service "no less diligently than their non-SBA portfolio, and in a commercially reasonable manner, consistent with prudent lending standards, and in accordance with Loan Program Requirements." 13 C.F.R. 120.535(2). Because there are no set PPP requirements published beyond basic guidance, the most prudent approach to servicing a PPP loan would be to treat it as any other commercial loan, with SBA and known PPP requirements applied.

**Reporting:** The SBA requires lenders to submit monthly 1502 reports on all of their PPP loans until they are paid in full. These reports will include the status of the loan, balance and changes are reflected, such as forgiveness reductions.

**Fees:** SBA 7(a) loans are generally intended to be low cost loans that help create or expand small businesses without the imposition of excess fees and costs associated with other non-government guaranteed loans. To accomplish this, an upfront guarantee fee is paid by the lender (and reimbursed from the borrower) to originate the loan and then the lender is required to pay annual fees to the SBA for the life of the loan. In lieu of these guarantee fees, the PPP has provided for a processing fee paid to the lenders at the time of disbursement. Because these loans are only held for a period between 8 weeks and 2 years, it can be presumed that the standard servicing fees regularly imposed on a borrower will be included in the processing fee, keeping these loans simple and low cost for the borrower as intended. This leaves the question: What ongoing fees and costs are permitted moving forward?

With standard SBA 7(a) loans, lenders are permitted to recover all out-of-pocket expenses from applicants but not the costs of underwriting. 13 C.F.R. §120.221(c). Out-of-pocket expenses include recording fees, photocopying, delivery charges, and other costs related to closing. A lender is also permitted to charge for hourly legal fees for consultation with a borrower at origination, if the borrower agrees to the fees in writing. An example would be for a consultation to discuss the overall financial plan and collateralization.

Additionally, a late fee may be charged of no more than 5% of the regular loan payment after at least 10 days of default. 13 C.F.R. §120.221(d). Please note, any late fee is not guaranteed by the SBA and is only recoverable from the borrower by the lender.

Because PPP loans are not collateralized there should be little upfront recording, appraisal, or other out-of-pocket costs incurred. Due to the relative haste in which PPP loans were originated, it is unlikely there was much, if any, hourly consultation fees incurred for strategizing the loan and developing a business plan for repayment. However, if there were out-of-pocket costs and borrower agreed to hourly consultations, those may be recoverable through a PPP loan. Otherwise, fees associated with PPP loans should only occur upon default and recovery attempts with late fees and litigation costs. These fees would be carried by the lender until either the purchase by the SBA or the final wrap-up request submitted to the SBA, both processes of which are discussed in more detail below after default.

**Credit Reporting:** For a standard SBA 7(a) loan, during the entire servicing period, the lender must submit credit reporting for the business, but not for the individual borrowers. If there is any charge-off or cancellation of the debt, the SBA will handle the issuance of the 1099-C and report the charge-off for both the lender and the SBA. These requirements have not been confirmed in relation to the PPP loans, however they are likely to be the same.

## **What can you expect with regards to the loan forgiveness process?**

PPP loans under the CARE Act are unprecedented in that up 100% of the loan can be forgiven in a short period of time. Now that the second round of funding is completed, the SBA has published the “Loan Forgiveness Application” for use by borrowers in requesting forgiveness. However, no additional guidance has been provided to lenders for how to process these applications.

With standard SBA 7(a) loans, the lender is given autonomy to evaluate loss mitigation options. However, where principal forgiveness is requested with a standard SBA 7(a) loan, a lender must first obtain SBA approval before agreeing to the forgiveness. For this request, a borrower would need to provide hardship affidavits, accounting records, bank statements, profit and loss statements, proof of hardship, etc.

A forgiveness request under the PPP is only slightly different in that there is no need to prove hardship and very little lender oversight, unless the request is before the covered period (8 weeks after disbursement) expires. The CARES Act specifically outlines what documents will be required but leaves room for “any other documentation the Administrator determines necessary.” Currently, the forgiveness application itself does not require the submission of “other documentation” beyond those specifically listed. However, the application does require the borrower to keep written records, likely for later audit purposes, of information on each individual employee, job offers, hiring and firing, and safe harbor reduction documentation.

Currently, the list of documents required for submitting for forgiveness on a PPP loan is limited to (1) documentation verifying the number of full-time employees and their rates for the 8 weeks following the disbursement of the loan, which includes tax filings with the IRS and state income, payroll and unemployment insurance filings; (2) documentation on covered utilities, mortgage, or rent; and (3) a certification, sworn to be true and correct, stating that the funds were used for the purposes intended. Without this outlined documentation, the loan will not be forgiven. Once the application is submitted, the Administrator will purchase the expected forgiveness amount within 15 days of receipt of the application.

## **When can lenders start submitting applications for forgiveness?**

As early as 7 weeks after disbursement of the funds. Practically speaking, one would assume you would need to wait until the end of the 8 week covered period to submit an application for forgiveness because a borrower is required to provide documentation of their payments and payroll during the full 8 week covered period. However, where the lender feels the situation warrants it, a singular loan or pool of loans can be submitted as early as 7 weeks after disbursement. Requesting forgiveness early will require more coordination with the borrower and additional assessments from the lender than would be required if the lender were to wait.

At the end of the 7<sup>th</sup> week after disbursement, the lender can request the reasonably expected forgiveness amount for the full 8 week period from the SBA. This request is referred to as an “advance purchase”. To request an advance purchase of the forgiveness amount, a report must be submitted to the SBA that includes (1) the borrower’s application for the loan, any supporting documentation; (2) the lender’s loan guaranty form for the PPP with supporting documentation; (3) *a detailed narrative explaining the assumptions used to calculate the forgiveness along with basis for those assumptions, any alternative assumptions considered and why those weren’t used*; and (4) any documents used to factor forgiveness which would include same documents needed under a standard forgiveness application by the borrower.

If the lender were to wait until the end of the covered period and submit only the documents and certifications from the borrower, no lender assessment and assumption documentation would be required. If the lender does not submit an application for advance purchase, the lender can submit a borrower’s request for forgiveness as soon as the borrower provides the necessary documentation. Because the borrower’s required documentation needs proof of expenditures during the covered period, these requests should be expected to be received as early as 8 weeks after disbursement. With both advance and standard forgiveness requests, the SBA will purchase the requested forgiveness amount within 15 days of submission, no questions ask, reportedly.

## **How do lenders calculate the loan forgiveness?**

A benefit of the PPP loans is that the lender will not have to perform the forgiveness calculations, or even review the documentation, unless the lender is submitting an advance forgiveness request that requires lender assumption documentation. With PPP loans, the borrower will do their own calculations, verifications, and documentation regarding the forgiven amounts. The lender needs only to submit the application to the SBA for review. As the lender, you are inevitably going to get questions and request for guidance. However, be sure to note in the communication with the borrower that the information being provided is not legal advice.

There is currently no guidance on whether forgiveness requests can be submitted multiple times, or appealed by borrowers. Assuming there is only one application permitted, the borrower may want to strategize when they submit their application for forgiveness. With a PPP loan, a borrower can only have 25% of the *forgiven* amount be used for rent/mortgage//utilities, not 25% of the *loan* amount. There may be a change in guidance in the future to clarify, however, the purpose of the PPP loan is to protect payroll so it is unlikely that this will be modified. If the borrower is likely to re-hire (or offer to re-hire but the employee declines) and/or increase salaries again before June 30, 2020, they may want to wait until after June 30, 2020 to apply.

If the loans were disbursed in the first round, 8 weeks will be around the end of May and the borrowers may be able to submit documentation early. If the loans were disbursed in the second round, the earliest the covered period would expire is June 22, 2020 so it may be most advantageous for the borrower to wait to see if they are able to rehire (or offer to rehire) before June 30, 2020. Given the low interest rate, the difference in applying immediately and waiting may not be terribly burdensome, given a borrower could risk forgiveness if done prematurely or incorrectly.

## **Forgiveness amount has been purchased but unforgiven amounts remain, what now?**

After the SBA purchases the forgiven amount, that forgiveness should be reflected on the borrower's account immediately. Under the terms of the loan, a borrower would generally be required to continue paying the agreed monthly payment amounts. However, a lender may have the ability to assist borrowers moving forward after forgiveness. With standard SBA 7(a) loans, so long as the principal balance is not being affected, the lender has autonomy in modifying the terms of the loan. Thus, if standard SBA 7(a) guidelines are to apply to PPP loans, a lender is can work with the borrower to adjust the terms of the note to lower the payments moving forward without obtaining SBA pre-approval. However, if there is any modification, the SBA will need to be notified of the final terms.

Because the remaining principal balance and the accruing interest are fully guaranteed by the SBA, the lender will continue to service the loans in conformity with standard servicing practices as discussed above. Servicing will continue until the loan is either paid-off or wrapped-up following the purchase by the SBA after a default by the borrower.

## **How do you handle the deferred interest at the end of the 6 month deferment period?**

With a standard SBA 7(a) loan, interest accruing during the deferment period can be handled in 4 ways: (1) The borrower can pay the interest during the deferment period; (2) the interest can be paid in a lump sum at the end of the deferment period; (3) after deferment, the interest can be paid in installments for a period of time with each monthly payment; or (4) when payments resume, the payment can be first applied to accrued interest and then to principal. Until contrary guidance is provided to the lenders, how interest is handled at the end of the deferment period is on the individual lenders to decide how they would like to proceed. However, a review of the loan documents should be completed to ensure application of payments are applied in conformity with those terms as well.

## **What happens if the borrower defaults?**

Upon default by the borrower, the SBA requires lenders to make a good faith attempt to work with the borrower to assist them in curing the default. If the lender is unable to work with the borrower to cure, under a standard SBA

7(a) loan, the lender must enforce the note starting the processes of acceleration, liquidation, and litigation. With a PPP loan though, there is no collateral to liquidate and no personal guarantee by the individual borrowers to sue for recovery. As a result, the lender is limited in what “liquidation” and litigation they can use to enforce. The following are the steps in the process that may ultimately result in the pre-purchase and transfer of the loan to the SBA upon default. If at any time in this process the borrower reinstates or an agreement is reached after default, the loan must be put back into the standard performing status and servicing continues.

**Step 1: Acceleration.** Under a standard SBA 7(a) loan, a lender decides when to accelerate a loan. While the SBA suggests the loan be accelerated upon default and requires it prior to purchase, a lender is not required to immediately accelerate the loan upon default and failure to cure. However, once the loan is deemed accelerated, the loan must then be classified as being in liquidated status.

The act of accelerating a debt can have legal implications requiring action within a certain amount of time. If the local jurisdiction has a short statute of limitations period post acceleration, you may be starting a clock prematurely limiting future recovery. That said, because the PPP loans are fully guaranteed by the SBA, beyond customer relationships, there is no foreseeable benefit in waiting to accelerate on this short term PPP loans after default.

**Step 2: Demand.** After acceleration, the lender must notify the borrower using first class and certified mail (or other traceable delivery service) of the acceleration and demand payment in full. If the borrower does not respond to letters or calls, the lender must make a good faith attempt to locate the borrowers for collection, including skip tracing. While not currently required under PPP guidelines, it is anticipated a demand will be required before proceeding forward as a demand is standard servicing practice. If no response is received, the lender moves forward with liquidation and litigation.

**Step 3: Liquidation.** With standard collateralized SBA 7(a) loans, the lender must draft and submit a “liquidation plan” which entails a site visit, review of collateral, a review of the borrower’s ability to repay, a litigation strategy, and overall plan for the recovery of the amounts owed. As PPP loans are not collateralized and there are no personal guarantees, it is likely the liquidation plan will be heavily modified to be aimed more toward attempts to compromise and a review of any documentation received by the borrower. However, it would not be surprising if the SBA tasks lenders with site visits and asset searches on a defaulted borrower prior to repurchase of a PPP loan.

**Step 4: Litigation.** If non-litigation liquidation avenues are exhausted, a lender is required to submit a litigation plan and pursue those avenues of enforcement. Again, due to the lack of collateralization, the lender is limited on enforcement. If the business remains open, the lender may sue the business, but not the individual guarantors, for repayment. However, if the borrower’s business is closed, there is little likelihood of recovery as secured creditors would have priority in any proceeds. With PPP loans, litigation by the lender is almost certainly not going to be a viable liquidation and recoupment option by lenders after default. If this is true, the lender will move forward with requesting the SBA’s purchase of the remaining amounts owed and wrap-up the loan.

**Step 5: Request for Purchase.** With a standard SBA 7(a) loan, a lender can request the SBA purchase the guaranteed amount if the default is more than 60 days old, the loan is classified as in liquidation status (i.e. accelerated), the loan has been liquidated, and the lender submits the requisite purchase package. We anticipate the process being the same for PPP loans, with the possible exception or reduction of the liquidation requirement. This implies that the purchase request may be completed immediately upon default and acceleration. However, we cannot confirm without additional guidance from the SBA.

The purchase package must be submitted within 180 calendar days from the date of maturity of the loan or liquidation, if applicable. 13 C.F.R § 120.524(a)(8). Failure to do so would waive the repurchase from the SBA. Extension requests are permitted on a case by case basis if ongoing liquidation and compromise negotiations continue. We anticipate the same or similar guidance from the SBA on PPP loans.

**Step 6: Wrap-Up.** After all liquidation and compromise options (see below) are exhausted, the lender will submit a wrap-up report to the SBA outlining the loan, default, liquidation, result of any compromise, and any litigation. The wrap-up report must be submitted within 30 calendar days from when liquidation is completed or upon request from the SBA. For loans that do not have ongoing compromise discussions, the wrap-up report should be submitted at the same time as the purchase request. If not with the purchase request, this wrap-up report is the last opportunity a

lender will have to request reimbursement for recoverable amounts from the SBA. Thus, if additional fees are anticipated, the lender may want to hold back on the submission of the wrap-up report. Failure to timely submit the report will waive reimbursement for those remaining recoverable amounts and would reflect poorly on the lender with the SBA.

**Step 7: Transfer and Custody of Original Loan Documents.** For standard SBA 7(a) loans, after the wrap-up is approved, all remaining amounts owed are referred to the Treasury for servicing and recovery efforts. However, the original loan documents will remain in the custody of the lender in a custodial capacity for the benefit of the Treasury. In order to facilitate the transfer to the Treasury, the lender will be required to execute an assignment or endorsement of the loan documents to the SBA. This transfer cannot occur until after the SBA requests its completion and must be completed within 5 business days of the request.

#### **After default, can the lender negotiate a compromise on the amounts owed with the borrower?**

Possibly, with SBA approval. A PPP loan is offered with the notion of being able to forgive the debt as early as 8 weeks after disbursement. However, many loans may only be eligible for partial forgiveness, or none at all, if there continues to be a lack of business during the covered period and after. So, what can be done for those borrowers whose business does not recover quickly or at all?

Under the standard SBA 7(a) loans, the SBA deems a compromise appropriate when a business has closed or where there is a continuing ongoing concern. For PPP loans, both of these situations are very likely to occur, even after forgiveness due to additional rounds of closures and restrictions within the borrower's jurisdiction.

Due to the lack of collateralization or personal guarantee with PPP loans, the most likely avenue for recoupment on a PPP loan with a borrower in default are negotiations on a compromised amount to be paid. SBA 7(a) loan procedures allow a lender to compromise with a borrower in reducing the amounts owed to settle the debt but any agreement would need to be approved by the SBA. Discussions to compromise can occur at any step after the loan is classified as liquidated in the default process outlined above.

To compromise on the amounts owed under a standard SBA 7(a) loan, the loan must be in liquidation status, the borrower cannot be in bankruptcy (unless the bankruptcy court approves the compromise), the full amount owed cannot reasonably be recovered, collection is not barred due to bankruptcy discharge or the running of the applicable statute of limitations, and the borrower has not engaged in fraud or other financial misconduct. It is likely that this process will also be imposed for those borrowers who are unable to pay on the PPP loans after the application of forgiveness, if any.

Any offer to compromise will come from the borrower on an SBA form No. 1150 and include financial documentation. Unlike the loan forgiveness under a PPP loan, when considering an offer to compromise, a lender is required to make a good faith effort to verify the accuracy of the borrower's disclosures. If the borrower's offer amount is insufficient, the lender is required to make a good faith effort to come to an acceptable amount with the borrower. If an agreement is reached, the SBA's written approval is required as it will result in payment of less than the full amount owed to the lender. If no agreement is made, the offer would be declined without SBA review and the final portion of the default process is completed.

#### **Can the loans be sold on the secondary market and is there a benefit in doing so?**

Yes, a lender may sell participations in the loans or the whole loan without SBA approval. The loan must be fully disbursed and can be sold at a premium or a discount on par value. There will be no imposition of fees by the SBA upon the sale of a loan on the secondary market. With either form of transfer, notice of the sale must be immediately sent to the SBA. Additionally, the processing fee will only be paid to the originating lender. How the loan is sold will determine what limitations, if any, are imposed on the purchaser and/or original lender.

If a PPP loan is sold as a whole, the purchaser takes over the loan as if they were the original lender. The sale must be to another PPP lender. The new lender will take possession of the note, loan documents and servicing the loan after transfer. The purchaser may have the original lender act as a subservicer for the purposes of maintaining custody of the original loan documents only. Immediately upon the sale of the whole loan, the purchaser becomes

the entity responsible for all servicing, is authorized to submit forgiveness purchase requests, and is eligible for the final purchase request upon default and liquidation from the SBA.

Instead of selling a PPP loan in whole, original lenders may sell participation interests up to 100% of the principal balance. However, if participation interests are sold, the SBA requires the original lender to remain the holder of the note, loan documents, and continue servicing the loan. The original lender is also the only entity authorized to submit forgiveness purchase requests, and is eligible for the final purchase request upon default and liquidation. Moreover, late fees cannot be shared with any participant if sold on the secondary market because they are the sole property of the original lender.

In contrast to the fully guaranteed PPP loans, the standard SBA 7(a) loan can be partially guaranteed by the SBA. As a result, the sale of all or part of the loan sold on the secondary market may include guaranteed and non-guaranteed amounts. In the event of a default and eventual classification of a 7(a) loan as liquidated, a lender must immediately either repurchase the guaranteed portion or request the SBA purchase it. Because PPP loans are entirely guaranteed, this implies that upon default and acceleration of a PPP loan sold on the secondary market the repurchase of the loan will be immediately required. This is much less likely for those PPP loans sold in whole, as the purchaser is also a PPP lender and has fully stepped into the shoes of the original lender. However, for PPP loans with participation interests sold on the secondary market, the need to repurchase is more likely to occur.

In writing this article, we relied upon the SBA's published program guides for their 7(a) loans and any official available information on PPP loans. For standard SBA 7(a) loans, we used the SBA's Lender and Development Company Loan Programs Standard Operating Policies and Procedures, SOP 50 10 5(K) (April 1, 2019) and the SBA's 7(a) Loan Servicing and Liquidation Standard Operating Policies and Procedures, SOP 50 57 2 (Dec. 1, 2015). For PPP loan guidance we relied upon H.R. Res. 748, 116<sup>th</sup> Cong. (2020) (enacted); SBA FAQ for Lenders and Borrowers (May 19, 2020 version); Interim Final Rule, 83 Fed. Reg. 73 20811-20821 (April 15, 2020) (to be codified at 13 C.F.R. pt. 120); SBA Procedural Notices for Guidance on Loan Sale for Paycheck Program Loans effective on April 24, 2020 (Participation Interest Sales) and May 1, 2020 (Whole Loan Sales); and SBA Procedural Notice on Lender Processing Fee Payment and 1502 Reporting Process (May 21, 2020). If you are a lender new to SBA loans, these materials are a great reference as the PPP loan program progresses.

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