



**Covid-19**

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**Coronavirus / COVID-19  
Response Team**

MILLER   
JOHNSON  
Attorneys

1

MILLER   
JOHNSON  
Attorneys

**Assessing PPP Options in  
Light of Evolving Guidance**

» Erik Daly  
Laci Reséndiz

MILLER   
JOHNSON  
Attorneys

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3

## Today's Topics

- Overview of PPP and Key Terms
- Evolving Guidance on PPP Loan Certifications
- Options for Businesses Who Have Received a PPP Loan
- Best Practices To Protect Against Enforcement or Other Actions

4

## Paycheck Protection Program (PPP): Conceptual Overview

- Small business loans that may be wholly or partially forgiven
  - Support cash flow to cover payroll costs (at least 75% of loan) and rent, mortgage interest and utility payments
  - Loans may be forgiven (wholly or partially) based on use of funds and employee / wage retention
  - Available to businesses with 500 or fewer employees (maybe more depending on industry and other factors)
  - Also available to self-employed/“gig economy” workers and 501(c)(3) non-profit organizations
  - Available until June 30, 2020 (or until funds exhausted)

## PPP: Executive Summary of Terms

- Temporary form of Section 7(a) SBA loan
- Size of loans to equal 250% of borrower’s average monthly payroll costs
  - Maximum loan size is \$10 million
- Personal guarantees and collateral not required
- No “credit elsewhere” testing (\*sort of\*)
- No principal, interest or fee payments for six months
- No fee to apply or process; no pre-payment penalties
- PPP loans forgivable to the extent used for certain expenses during eight weeks post-loan, subject to employee retention and compensation conditions
- At least 75% of loan spend must be toward “payroll costs”

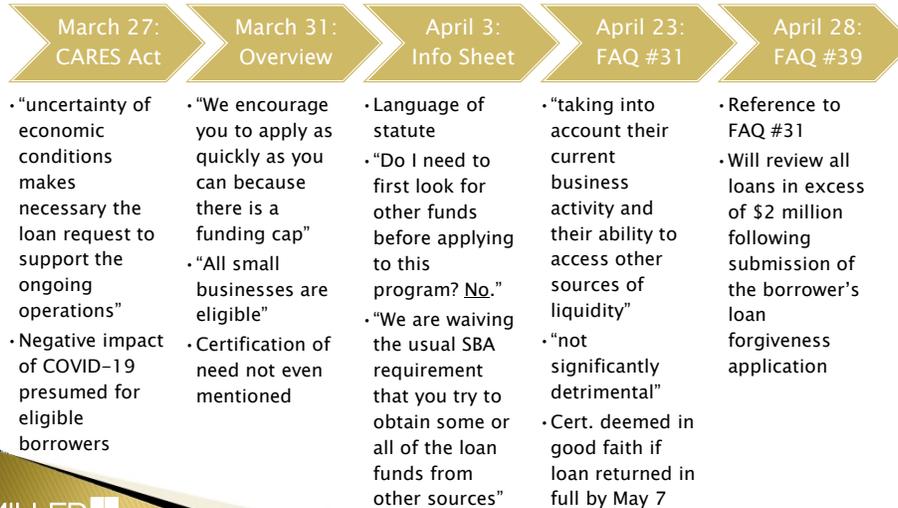
## Additional PPP Appropriations

- Additional PPP appropriations approved by Congress on April 23
- Increased PPP funding from \$349 billion to \$659 billion via CARES Act amendments
  - Initial \$349 billion was exhausted on April 16
- No statutory changes to PPP terms or conditions (other than additional funding)
  - However, since the CARES Act became law, a steady flow of new rules, FAQs and guidance promulgated by the SBA and Treasury Department have shifted key considerations

## Looking Back...

- To date, the SBA has issued and/or published...
  - seven interim final rules regarding various aspects of the PPP
  - thirteen rounds of FAQ updates, totaling 42 questions to-date
  - borrower and lender application forms
  - program “fact sheets” for borrowers and lenders
  - a summary of the applicable affiliation rules
  - a “Top-Line Overview” of the PPP
  - and more...
- Members of Congress have also issued statements of intent or published summaries
  - Some of these summaries included inaccurate statements and information that contradicted the statute (sometimes significantly)

## Evolving Guidance on PPP Loan “Need” Certification



## Recent SBA Guidance and FAQs

- **FAQ #31:** While directed at “large companies with adequate sources of liquidity,” reminds all borrowers to assess their “economic need” for a PPP loan under the standard established by the CARES Act and PPP rules and regulations.
  - Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
  - Borrowers must make this certification in good faith, taking into account their current business activity and ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to their business.
  - A borrower may return its PPP loan “in full” by May 7 if it believes its certification was invalid based on this latest guidance.

## Recent SBA Guidance and FAQs (cont.)

- **FAQ #37:** Clarifies that FAQ #31 guidance also applies to “businesses owned by private companies with adequate sources of liquidity.”
- **FAQ #39:** Memorializes previous statement by Secretary Mnuchin that all PPP loans greater than \$2MM will be subject to review prior to forgiveness determination.
  - “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 \$2MM, 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.” (This guidance has not yet arrived.)

## Other Recent Developments

- Litigation challenging SBA/Treasury rulemaking (e.g., applicants involved in bankruptcy proceedings)
- DOJ reportedly analyzing information from largest loan-originating banks to identify possible signs of fraud
- Lawmakers floating potential new legislation / amendments to limit forgiveness for certain businesses and make other changes to PPP scheme
- Over half (\$175 billion) of “second round” of PPP funding (\$310 billion) was committed as of May 1, 2020 (i.e., during the first five days of the second funding round)
- Treasury Sec. sends “top deputy” to coordinate with SBA

## Options for Businesses Who Have Received a PPP Loan

Option 1: Return funds in full by May 7	Option 2: Certification may be reviewed under more stringent standard
<ul style="list-style-type: none"> <li>• Conservative, “safer” route from a legal perspective</li> <li>• Financially unattractive or unfeasible</li> <li>• Funds likely already earmarked, commitments made</li> <li>• Short turn-around time to make decision</li> <li>• Limited relief/protection</li> </ul>	<ul style="list-style-type: none"> <li>• Financially preferable</li> <li>• Risk a finding that certification was not made in good faith</li> <li>• Risk other aspects of application being put under microscope</li> <li>• Consequences unpredictable, but number of defenses likely available</li> <li>• “Audit-ready” recordkeeping</li> </ul>

## Best Practices To Prepare for Enforcement or Other Actions

- Evaluate and document economic impact
  - What immediate negative impacts have already arrived?
  - Are KPIs and/or leading indicators pointing to worsening?
  - Are customers delaying payments or cancelling orders?
- Evaluate and document assessment of other options
  - What requirements would a new lender or investor impose?
  - Does the business have available cash or debt capacity?
  - If so, would using this liquidity on payroll significantly limit the flexibility of the business to respond to future problems?
  - Would the business opt to lay off workers or decrease comp?
  - Has “discretionary” spending already been trimmed?

## Best Practices To Prepare for Enforcement or Other Actions

- Keep thorough records
  - Loan applications and related information
  - Review internal communications for consistency
  - Contemporaneous support for certifications
  - Do not want to be reconstructing analysis after-the-fact
- Plan response
  - Draft declaration/affidavit
  - Enforcement Action, FCA, Loan Forgiveness Denial
  - Multiple avenues of scrutiny: SBA, Treasury, Special Inspector, Congressional committees, etc.
  - Identify similarly-situated companies to coordinate response?

## PPP: Enforcement and FOIA Reminders

- Application is very clear that if PPP funds are procured or utilized impermissibly, then the government retains the ability to pursue hefty fines, civil and/or criminal charges
- False Claims Act will also incentivize enforcement
- Fine print of application states the following information may need to be provided in response to a FOIA request:  
*“other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity”*



**Erik Daly**

616.831.1723

dalye@millerjohnson.com



**Laci Reséndiz**

616.831.1734

resendizl@millerjohnson.com

millerjohnson.com

45 Ottawa Ave SW  
Suite 1100  
Grand Rapids, MI 49503

100 W Michigan Ave  
Suite 200  
Kalamazoo, MI 49007

17