CMBS and the SBA’s Paycheck Protection Program (PPP)

Does a CMBS loan prevent borrowers from obtaining a PPP loan?

SBA’s Paycheck Protection Program (PPP) Overview
The CARES Act legislation established a new Small Business Administration (SBA) loan program – the “Paycheck Protection Program” (“PPP”) – that directs potentially forgivable loans to businesses with fewer than 500 employees. The PPP’s main goal is to incentivize small businesses to keep their workers on the payroll and it does this by providing the necessary funds to businesses so that they do so. The potential for loan forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels. Loan proceeds also may be used for other allowable expenses, including rent, mortgage interest payments, and utility costs.

To apply for funds, small businesses must contact an SBA-approved bank or other approved SBA lender to submit an application. There is high demand for the program and the rapid rollout has caused some confusion for lenders and applicants. While the initial $349 billion fund was exhausted on April 16, Congress approved $320 billion in additional funds on April 23.

Click here for a complete list of Treasury’s resources on the PPP, including program terms and eligibility guidelines. CREFC’s counsel Steptoe & Johnson has published a useful guide on navigating the PPP.

This document seeks to provide potential PPP borrowers with a general understanding of PPP and CMBS borrowers’ use of the program. It does not replace borrowers’ review of their loan documents and a discussion with their loan servicers, but instead identifies some common questions and presents basic information that may be useful in guiding conversations as it relates to the PPP.

CMBS Borrowers, Special Purpose Entities, and PPP Loans
CREFC and its members have received questions on whether CMBS loan documents preclude CMBS borrowers from receiving the PPP loans. CMBS loan documents differ across lenders, so it is important for borrowers to review and understand their own loan documents first and then, if questions persist, contact their servicer to discuss the options available to address their particular situations and whether a waiver is necessary under the specific loan documents.

For most CMBS loans, the borrower is a Special Purpose Entity (SPE) created specifically to own and operate the property and borrow the funds. As such, the SPE itself may not have any employees or a payroll but instead may contract out the management or operations of the property to an affiliate or third-party management company.

Will CMBS loan documents prevent borrowers from obtaining a PPP loan?
• It depends on the CMBS loan documents. Most CMBS loan documents contain limitations only on the SPE borrower incurring any additional debt or loans. In some agreements, the SPE borrower may incur unsecured debt to a specified threshold (e.g., 2%-4% of the loan amount), which may be further limited to certain type of debt or creditors (e.g., payables to trade creditors), without consent or penalty. Each loan agreement should be reviewed for the specific limitations.
• **It depends on who is obtaining the PPP loan.** Although the SPE borrower itself may be limited by the loan document, in some cases the SPE’s owner or affiliate may be able to qualify for a PPP loan without jeopardizing the limitations on additional debt by the SPE borrower in the CMBS loan documents. In all cases, borrowers should understand their organizational structure and restrictions in their CMBS loan documents. If CMBS borrowers are concerned about limitations, they should communicate with their servicer immediately.

• **Waivers can be granted.** If CMBS loan documents prohibit the SPE from obtaining additional debt and would thus prevent the SPE borrower from receiving a PPP loan, the servicer may consider granting a consent or waiver to the borrower under specified circumstances and conditions as outlined in the borrower’s loan documentation. If the SPE borrower incurs prohibited debt without a waiver, that debt could cause a default under the loan contract and perhaps trigger liability for the sponsor guarantor under its recourse carve out guaranty.

• **Borrowers should review their loan documents carefully.** If necessary, borrowers should communicate with their servicers as soon as possible. Note that standard servicing agreements may require that a fee be assessed by the servicer for analyzing and granting a waiver. See CREFC’s: A CMBS Borrower’s Quick Guide for Communicating with Your Servicer in Cases of Need.

**Sample Borrower Question Checklist: Will a PPP loan affect my CMBS loan?**

1. Does my CMBS loan have a special purpose entity (SPE) as the borrower?
   a. Does the SPE itself qualify for the PPP loan under the SBA PPP guidelines?
   b. Does the SPE have eligible employees?
   c. Does the SPE have an eligible payroll?
   d. Do my CMBS loan documents prevent the SPE from borrowing additional funds?

2. Will the SPE or another legal entity in my organization apply for PPP funds?
   a. What is the relationship of the SPE to other legal entities in my organization?
   b. Can a non-SPE entity in my organization qualify for PPP funds?
   c. Do my CMBS loan documents prevent non-SPEs in my organization from borrowing more money?
   d. If a non-SPE associated with the borrower gets a PPP loan, what are the SBA’s restrictions on the use of the PPP funds?

3. Should I discuss my concerns with my CMBS servicer?
   a. After analyzing my CMBS loan documents, do I need a waiver from the CMBS servicer to apply for PPP fund?
   b. Can the CMBS servicer consent to waiving requirements related to additional debt for the SPE? What was the servicer’s answer?
   c. The SPE borrower is not applying for PPP. Instead, the SPE owner/parent company is getting a PPP loan. Will this cause any problems with my CMBS loan?
**Additional Information for CMBS Borrowers**

For more macro questions regarding requests for CMBS relief and other issues in the time of COVID-19, we urge borrowers to review and follow the guidance presented in [CREFC’s: A CMBS Borrower’s Quick Guide for Communicating with Your Servicer in Cases of Need](#).

PPP applicants must file an application through an agent or directly with an SBA approved lender. Asking for a PPP loan from your servicing contact likely is not the correct application process. While the servicer’s company may be accepting loan applications, another division may be handling that intake.