



# The CARES Act: Paycheck Protection Program Manual

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\*All the information contained in this manual is advisory in nature and is not intended to offer any legal or tax advice. Because this is a rapidly changing environment, all of the information included in this Manual is accurate as of **April 5, 2020** so keep in mind information may become inaccurate as more regulatory guidance unfolds. Any definitive guidance must be coming from the SBA, Treasury, your governing regulator, along with other governmental agencies.

## The CARES Act and the Paycheck Protection Program (PPP)

On March 27<sup>th</sup>, 2020, the House of Representatives passed the largest economic bill in U.S. History, with President Trump signing it into law: Coronavirus Aid, Relief, and Economic Security (CARES) Act. On April 2<sup>nd</sup>, the Interim Final Rule implementing Sections 1102 and 1106 of the CARES Act was released. Section 1102 of the Act temporarily adds a new product titled the “Paycheck Protection Program” (PPP; Program) to the U.S. Small Business Administration (SBA’s; Administrator’s) 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The PPP and loan forgiveness are intended to provide economic relief to small businesses nationwide who are adversely impacted under the COVID-19 Emergency Declaration issued by President Trump on March 13, 2020. The Interim Final Rule applies to applications submitted under the PPP through June 30, 2020, or until funds made available for this purpose are exhausted.

This Manual primarily encompasses Section 1102 of the CARES Act as well as some other miscellaneous topics that are also of interest to the financial industry.

### Summary of Final Rule

Section 1102 of the CARES Act creates a new loan type for the U.S. Small Business Administration (SBA) to oversee and implement, known as the Paycheck Protection Program to be added to the existing Small Business Act. The Program authorizes the SBA to 100% guarantee all PPP loans. The SBA was required to provide guidance to PPP lenders within 30 days of enactment of the CARE Act.

The PPP authorized up to \$349 billion in forgivable loans to small businesses to pay their employees during the COVID-19 crisis. Unlike typical SBA disaster loans currently available, the PPP loans are not tied directly to establishing losses suffered during the national disaster—a presumption of negative impact from COVID-19 exists. No collateral or guarantees are required. The other eligibility requirements of the SBA loan participation (e.g.- average annual receipts) are not applicable, and this Program is available to:

- (i) New businesses not otherwise able to avail themselves to the SBA loan programs, and
- (ii) Provides much “friendlier” terms than traditional SBA loan programs.

All loan terms will be the same for everyone, with the interest rate on loans set a 1.000%, or 100 basis points. Additionally, these loans carry a 0% risk rate.

The loan amounts will be forgiven ***if***:

- The loan proceeds are used to cover payroll costs, and most mortgage interest, rent, and utility costs over the 8-week period after the loan is made; and
- Employee and compensation levels are maintained.

Payroll costs are capped at \$100,000 on an annualized basis for each employee. At this time, it remains unclear from the current guidance whether or not LLC, partnership or other distributions are considered towards payroll costs. No more than 25% of the forgiven amount may be applied for non-payroll costs. Loans payments will be deferred for six months; however, interest will continue to accrue during the six-month deferment.

Loan maturity will be two years as determined by the SBA and the U.S. Department of Treasury.

For additional loan forgiveness parameters, refer to Section Loan Forgiveness Parameters below.

## Loan Terms

Loans are guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans, with certain changes, including but not limited to:

- Guarantee percentage is 100%;
- No collateral will be required;
- No personal guarantees will be required;
- The interest rate will be 100 basis points or one percent;
- All loans will be processed by all lenders under delegated authority and lenders are responsible to determine eligibility of the borrower and appropriate use of loan proceeds;
- No up-front guarantee fee is payable to SBA by borrower;
- No lender's annual service fee ("on-going guaranty fee") is payable to SBA;
- No subsidy recoupment fee is applicable; and
- No fee payable to SBA for any guarantee sold into the secondary market is applied.

## Eligibility Requirements

### Lenders

The Act authorizes the SBA and the U.S. Department of Treasury to extend authority to make PPP loans to additional lenders beyond those already certified to make regular SBA 7(a) loans. This means that lenders do not have to currently be certified SBA lenders to participate in the PPP. All current SBA 7(a) lenders are automatically approved to make PPP loans on a delegated basis.

***\*Note: Additional lenders approved by Treasury are only permitted to make PPP loans, not regular SBA 7(a) loans. But additional lenders must have necessary qualifications to process, close, disburse, and service PPP loans.***

There is, however, no requirement for any Bank to make PPP loans. Also, the PPP requirements temporarily supersede any conflicting Loan Program Requirement ([13 CFR 120.10](#)).

Lenders must comply with the applicable lender obligations set forth in the Interim Final Rule but will be held harmless for borrowers' failure to comply with program criteria.

### *Eligible Lenders*

The following types of lenders have been determined to meet the criteria and are eligible to make PPP loans unless they are currently designated in Troubled Condition by their primary federal regulator or are subject to formal enforcement action with their primary federal regulator that addresses unsafe or unsound lending practices:

- Any federally insured depository institution or federally insured credit union;
- Any Farm Credit System institution (other than Federal Agricultural Mortgage Corporation per 12 USC 2002(a) that applies the requirements under the Bank Secrecy Act;
- Any depository or non-depository financing provider that originates, maintains, and services business loans or other commercial financial receivables and participation interest with a compliance program compliant with BSA and has been in operation since February 15, 2019 with more than \$50 million in business loans or commercial financing receivables during a consecutive 12 month period in the last 36 months.

SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness. For additional guidance on certifications, refer to Section Application Certification below.

Lenders who are not currently certified can begin making loans as soon as they are approved and enrolled in the Program. The Lender must submit [SBA Form 2484](#) (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically per the program requirements and maintain the forms and supporting documentation in its files. New lenders seeking enrollment will have to submit their application to the SBA at: [DelegatedAuthority@sbc.gov](mailto:DelegatedAuthority@sbc.gov).

Additionally, Lenders must submit once an application is approved, all materials and documentations to E-Tran, the SBA's loan guaranty origination and servicing solution found here: [https://eweb.sba.gov/gls/dsp\\_login.cfm?SB=Y](https://eweb.sba.gov/gls/dsp_login.cfm?SB=Y).

### Approved Loan Purpose

Borrowers may use the proceeds from PPP loans ***for specific purposes only***:

- Payroll costs, including benefits;
- Interest on mortgage obligations, incurred before February 15, 2020;
- Rent, under lease agreements in force before February 15, 2020; and
- Utilities, for which service began before February 15, 2020.

Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of:

- Salary, wages, commissions or similar compensation:
  - Capped at \$100,000 on an annualized basis for each employee;
- Cash tips or the equivalent:
  - Capped at \$100,000 on an annualized basis for each employee
  - Based on employer records of past tips, or, in the absence of such records, a reasonable, good-faith employer estimate of such tips;
- Employee benefits including:
  - Vacation, parental, family, medical or sick leave;
  - Allowance for separation or dismissal;
  - Payments required for the provisions of group health care benefits including insurance premiums; and
  - Payment of any retirement benefit;
- State and local taxes assessed on compensation of employees; and
- For a sole proprietor or independent contractor, capped at \$100,000 on an annualized basis for each employee:
  - Wages
  - Commissions
  - Income
  - Net earnings for self-employment

The Act expressly excludes the following:



- Any compensation of an employee whose principal residence is outside of the United States;
- The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;
- Federal and employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including:
  - The employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes; and
  - Income taxes required to be withheld from employees; and
- Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Unpublished: [Public Law 116-127](#)).

Additionally, independent contractors are not counted as employees for purposes of PPP loan amount calculations. Independent contractors have the ability to apply for a PPP loan on their own.

***\*Note: Payroll costs for independent contractors or sole proprietors are wages, commissions, income or net earnings from self-employment or similar compensation.***

***\*Note: It remains unclear from the current guidance whether or not LLC, partnership or other distributions are considered towards payroll costs. Conservatively, the definition of payroll costs in the statute encompass compensation, including salary, wages, commissions or similar, as earnings. If payments are not subject to employment or self-employment taxes, it's inconclusive as to whether to treat those as payroll costs for the purposes of a PPP loan.***

***\*Note: With the way the Interim Final Rule is written, there remains an issue as to whether gross or net earnings are applicable and whether that changes between max loan amount calculations and forgiveness calculations. Conservatively, financial institutions are going to want to limit loans to those where it is clear, but this potentially excludes business types (general partnerships) and tax reporting structures, which would appear to run counter to the intent of the Interim Final Rule. Without further guidance, it is important to financial institutions to verify with their CPA, Legal Counsel or other tax professionals when determining eligible applicants, maximum loan amount and forgiveness calculations.***

### Approved Loan Amount

Loans under the PPP can be up to two months of the borrower's average monthly payroll costs from the last year plus an additional 25% of that amount. That amount is subject to a \$10 million cap. If the borrower is a seasonal or new business, it will use different applicable time periods for their calculation. Payroll costs will be capped at \$100,000 annualized for each employee. For calculation requirements, refer below to Section Loan Amount Calculations.

### Borrowers

The Program is available to small businesses that were in operation on February 15<sup>th</sup>, 2020 and had either:

- Employees for which it paid salaries and payroll taxes; or
- Paid independent contractors, as reported on Form 1099-MISC.

Eligible borrowers are:



- Ones who have 500 or fewer employees whose principal place of residence is the United States; or
- They are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for the industry.

“Employees” for this purpose include full-time, part-time, and “other” employees.

A borrower eligible for a PPP loan includes any for-profit business concern, nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax- exempt veterans’ organization described in section 501(c)(19) of the IRC, or Tribal business concern described in section 31(b)(2)(C) of the Small Business Act with 500 or less employees, unless the applicable industry has a higher size standard under the SBA rules. Certain businesses (food services and accommodation) with more than 500 employees are eligible if they have no more than 500 employees at **each physical location**.

The loan program is also available to sole proprietors, independent contractors, and self-employed individuals (subject to additional requirements) in operation on February 15, 2020. These businesses must also submit such documentation as necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. If such documentation is unavailable, the borrower must provide other supporting documentation, such as bank records sufficient to demonstrate the qualifying payroll amount.

***\*Note: Small businesses and sole proprietorships could apply for PPP loans beginning April 3, 2020.***

***\*Note: Independent contractors and self-employed individuals can apply beginning April 10, 2020.***

In calculating the number of employees, businesses generally need to be including the employees of any affiliates. As a result, there is the potential portfolio companies of private equity companies and other businesses with common controlling ownership are not eligible for loans.

Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in the SBA’s Standard Operating Procedures (SOP) [50 10, Subpart B, Chapter 2](#), except nonprofit organizations authorized under the Act are eligible.

### *SBA Size Standards Breakdown*

The SBA’s size standards determine whether or not a business qualifies as small. Size standards define the largest size a business can be to participate in government contracting programs and compete for contracts reserved or set aside for small businesses. Size standards vary by industry and are generally based on the number of employees or the amount of annual receipts the business has. Small business size regulations are found here: [Title 13 Part 121 of the Electronic Code of Federal Regulations](#).

There are common terms used in determining whether a business is classified correctly as small.

- **Affiliates:** The business has to include the employees or receipts of all affiliates when determining the size of a business. Affiliation with another business is based on the power to control, whether exercised or not. The power to control exists when an external party has 50 percent or more ownership. It may also exist with considerably less than 50 percent ownership by contractual arrangement or when one or more parties own a large share compared to other parties. The SBA’s compliance guide for size and affiliation details more information.
  - The SBA determines affiliation in accordance with [13 CFR 121.103](#).

- **Annual receipts:** This is the “total income” (or “gross income”) plus the “cost of goods sold.” These numbers can normally be found on the business’ IRS tax return forms. Receipts are averaged over a business’ latest three complete fiscal years or (except in the Business and Disaster Loan Programs) five complete fiscal years to determine the average annual receipts. If a business hasn’t been in business five years, multiply its average weekly revenue by 52 to determine its average annual receipts.
  - The SBA calculates annual receipts in accordance with [13 CFR 1121.104](#).
- **Employee Calculation:** This is the average number of people employed for each pay period over the businesses’ latest 12 calendar months. Any person on the payroll must be included as one employee regardless of hours worked or temporary status. The number of employees of a concern in business less than 12 months is the average for each pay period that it has been in business.
  - The SBA calculates number of employees in accordance with [13 CFR 121.106](#).

Qualifying as small is one of the basic requirements a business needs to meet before it can compete for government contracts that are set aside for small businesses. Business owners can find out if their business qualifies as small by using the [Size Standards Tool](#), or by referencing the SBA’s [table of small business size standards](#). Both the tool and the table help businesses determine small business classification requirements according to individual NAICS codes.

When calculating the size of a business, the business must include the annual receipts and the employees of their affiliates. When another person or business can control the business, they are an affiliate. This is true even if they do not exercise control.

In addition to meeting the numerical standards for small, the business must:

- Be a for-profit business of any legal structure (except for the PPP exception for approved nonprofit designations);
- Be independently owned and operated;
- Not be nationally dominant in its field;
- Be physically located and operated in the U.S. or its territories.

Businesses outside of the United States may still be counted as small if they have an operation in the U.S. that makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labors, and for PPP purposes, have employees whose principal place of residence is in the United States.

The CARES Act waives the normal strict SBA affiliation rules for the PPP loan for:

- Businesses with no more than 500 employees that is assigned a NAICS code beginning with 72;
- Businesses operating as a franchise that is assigned a franchise identifier code by the SBA; and
- Businesses that receive financial assistance from a company licensed under section 301 of the Small Business Investment Act.

Businesses not provided a waiver to the SBA affiliation rules by the CARES Act are required to determine if a waiver under existing law applies.

#### Additional Borrower Ineligibility

Additionally, a borrower could be ineligible for a PPP loan if:

- Borrower is engaged in any activity that is illegal under federal, state or local law;

- The borrower is a household employer (individuals who employ household employees such as nannies or housekeepers) ([13 CFR 120.100](#));
- An owner of 20% or more of the equity of the applicant is:
  - Incarcerated, on probation or parole
  - Presently subject to an indictment, criminal investigation, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or
  - Has been convicted of a felony within the last five years
- Borrower or any business owned or controlled by the borrower or any of their owners has ever obtained a direct or guaranteed loan from SBA or any other Federal Agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.

***\*Note: Marijuana is still considered a Schedule I drug and remains illegal under the Controlled Substances Act (CSA). Cultivation and distribution of marijuana remain federal felonies. Refer to our FAQ Q15 for additional commentary.***

### **Additional Affiliate Guidance**

#### Non-Profits, Veterans, and Tribal Concerns

In most cases, a borrower will be considered together with its affiliates for purposes of determining PPP eligibility. Under SBA rules, entities may be considered affiliates based on factors including stock ownership, overlapping management, and identity of interest. An entity is generally eligible for PPP if it, combined with its affiliate(s), is a small business under section 3 of the SBA ([15 U.S.C. 632](#)) or:

1. Has 500 or fewer employees whose principal place of residence is in the United States or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry; and
2. Is a tax exempt nonprofit organization, a tax-exempt veteran organization, a Tribal business concern or any other business concern.

***\*Note: Section 1102 of the Act provides that provisions applicable to affiliations under SBA requirements apply with respect to nonprofit organizations and veterans' organizations in the same manner as all other small business entities.***

In order to help potential borrowers identify other businesses with which they may be deemed to be affiliated under the common management standard, the Borrower Application Form, [SBA Form 2483](#) (released April 2, 2020) requires applicants to list other businesses with which they have common management. The information supplied by the applicant in response to that information request should be used by applicants as they assess whether they have affiliates that should be included in their number of employees reported on SBA Form 2483.

#### **Faith-Based Organizations**

Churches, including temples mosques, synagogues, and other houses of worship, integrated auxiliaries of churches, and conventions or associations of churches all qualify for PPP and EIDL loans if they meet the requirements of [Section 501\(c\)\(3\) of the IRC](#), and all other PPP and EIDL requirements. Such organizations ***are not*** required to apply for the IRS to receive tax-exempt status.

SBA's size standards are found at [13 CFR 121.201](#). The CARES Act states that a non-profit organization qualifies as small and is eligible for assistance if:

- (1) It has no more than 500 employees; or
- (2) The NAICS code associated with its primary industry has a higher employee-based size standard.

Some industries—including religious organizations—are currently listed in the size standards table with a monetary cap on annual receipts rather than an employee-based size standards cap. For nonprofit organizations whose primary industry is listed with a monetary cap on annual receipts, the size standard table cannot be used to determine eligibility for the PPP program. Faith-based nonprofit organizations that do not fall under a primary industry that is listed with an employee-based size standard must have 500 employees or fewer to be considered small.

Qualified faith-based organizations are exempt from the SBA's affiliation rules, including those in [13 CFR part 121](#) where the application of the affiliation rules would substantially burden those organizations' religious exercise. This exemption is brought about by the [Religious Freedom Restoration Act \(RFRA\) \(P.L. 103-141\)](#) which provided that the government could not substantially burden a person's exercise of religion unless the government could demonstrate that the application of the burden to the person was both furthering a compelling government interest and the least restrictive means of furthering that compelling governmental interest were in place. A substantial burden is one that includes both government action that compels a person to violate their sincere religious beliefs or to suffer a penalty. The affiliation, if applied to these faith-based organizations, would impose a substantial burden by denying an important benefit (participation in a program for which they would otherwise be eligible under the CARES Act) because of the exercise of sincere religious belief (affiliation with other religious entities).

As such, the SBA's affiliation rules do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization or entity that is based on a sincere religious teaching or belief, or otherwise constitutes a part of the exercise of religion. This includes any relationship to a parent or subsidiary and other applicable aspects of organizational structure or form.

A faith-based organization seeking loans under the PPP may rely on a reasonable, good-faith interpretation in determining whether its relationship to any other person, group, organization or entity is exempt from the affiliation rules, and the SBA will not assess and will not require participating lenders to assess the reasonableness of the faith-based organization's determinations.

In short, faith-based organizations, including houses of worship, are eligible to receive SBA loans under the PPP and EIDL programs. **This is regardless of whether they provide secular social services.** Only the same limitations that apply to all other recipients of these loans (such as loan forgiveness only covering up to a maximum of 25% of the total loan to the recipient) will be applicable. The Establishment Clause of the PPP does not place any additional restrictions on how faith-based organization may use the loan proceeds received through either the PPP or EIDL loan programs. No specific process or detailed filing is necessary to claim the benefit of the affiliation exemption. If the applicant believes they qualify for this exemption, they should submit with their loan application a separate sheet stating such (as [Addendum A](#)).

Receipt of a loan through any SBA program does not (1) limit the authority of religious organizations to define the standard, responsibilities and duties of membership, nor (2) does it limit the freedom of religious organizations to select individual to perform work connected to that organization's religious exercise. Lastly, it does not constitute as a waiver of any rights under federal law, including rights protecting religious autonomy and exercise under the RFRA.

## Program Requirements

### Application Process

Borrowers are required to complete the Paycheck Protection Program loan application and submit the application with the required documentation to an approved lender that is available to process the application by June 30, 2020. The application can be found here: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>. Additionally, the borrower will need to provide lenders with payroll documentation.

The Lender must submit [SBA Form 2484](#) (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically per the program requirements and maintain the forms and supporting documentation in its files.

Borrowers under the PPP are not required to try to obtain some or all of the loan funds from other sources (i.e.- the SBA is waiving the Credit Elsewhere requirement). Only one loan can be taken out under this Program.

Once a borrower determines their eligibility, under the PPP, the maximum loan amount is the lesser of \$10 million or an amount that the borrower will calculate using a payroll-based formula specified in the Act.

Additionally, the Lender must process and submit their loan guarantee requests through the SBA's E-Tran system. Assistance can be provided by calling 1-833-572-0502 to reach SBA's Lender Customer Service Line.

### Application Certification

On the PPP application, an authorized representative of the applicant must certify in good faith to all of the following:

- That 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 Form 1099-MISC;
- Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicants;
- The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments and utility payments. The applicant must certify that they understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold them legally liable as for charges of fraud. Not more than 25% of loan proceeds may be used for non-payroll costs;
- Documentation verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, covered utilities for the eight-week period following this loan to be provided to the lender;
- Acknowledgment that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments and covered utilities, and that no more than 25% of the forgiven amount may be for non-payroll costs;
- That during the period beginning February 15, 2020 and ending December 31, 2020 the applicant has not and will not receive another loan under this Program;
- That the applicant certifies that any information provided in the application and supporting documents and forms is true and accurate in all material respects. The applicant is also certifying that they know making false statements to obtain the guaranteed loan from SBA is punishable under law, including 18 USC 1001 and 3751 by imprisonment of not more than five years and/or a fine up to \$250,000, and under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000, and, if submitted to a

federally insured institution under 18USC 1014, by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000; and

- The applicant acknowledges that the lender will confirm the eligible loan amount using tax documents they submitted and that they affirm these tax documents are identical to those submitted to the Internal Revenue Service. Applicant also acknowledges they understand and agree that the lender can share tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

## Loan Amount Calculations

The following methodology is approved within the Act as a method for applicants to determine loan amount, and for lenders to verify those determinations:

**Step 1:** Aggregate payroll costs (defined in detail below) from the last twelve months for employees whose principal place of residence is the United States.

**Step 2:** Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year.

**Step 3:** Calculate average monthly payroll costs (divide the amount from Step 2 by 12).

**Step 4:** Multiply the average monthly payroll costs from Step 3 by 2.5.

**Step 5:** Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an EIDL COVID-19 loan (because it does not have to be repaid).

***\*Note: If the applicant is a seasonal employer, as determined by the SBA, the average total monthly payments for payroll will be the 12-week period beginning February 15, 2019, or at the election of the eligible recipient, March 1, 2019 and ending June 30, 2019. An agricultural or seasonal borrower could choose between measuring the average total monthly payment from February 15, 2019 and 12 weeks after or, from March 1, 2019 through June 30, 2019. It is in the best interest of the borrower to calculate both and determine which one is higher depending on their individual seasonality. This is only for maximum loan amount calculation. The Interim Final Rule does not have the same provision for forgiveness calculation, putting a burden on the borrower to strategically apply for the PPP loan at the right time to maximize the forgiveness based on the 8-week period.***

Reference: <https://www.congress.gov/bill/116th-congress/house-bill/748/text#HB774EEF7D0A34671AE7C32877C38ACF2>

### Calculation Examples

#### 1. Example 1—No employee makes more than \$100,000

Annual payroll: \$120,000

Average monthly payroll: \$10,000

Multiply by 2.5 = \$25,000



***Maximum Loan Amount is \$25,000***

**2. Example 2—Some employees make more than \$100,000**

Annual payroll: \$1,500,000

Subtract compensation amounts in excess of an annual salary of \$100,000: \$1,200,000

Average monthly qualifying payroll: \$100,000

Multiply by 2.5 = \$250,000

***Maximum Loan Amount is \$250,000***

**3. Example 3—No employees make more than \$100,000, outstanding EIDL loan of \$10,000**

Annual payroll: \$120,000

Average monthly payroll: \$10,000

Multiply by 2.5 = \$25,000

Add EIDL loan of \$10,000 = \$35,000

***Maximum Loan Amount is \$35,000***

**4. Example 4—Some employees make more than \$100,000, outstanding EIDL loan of \$10,000**

Annual payroll: \$1,500,000

Subtract compensation amounts in excess of an annual salary of \$100,000: \$1,200,000

Average monthly qualifying payroll: \$100,000

Multiply by 2.5 = \$250,000

Add EIDL loan of \$10,000 = \$260,000

***Maximum Loan Amount is \$260,000***

**Loan Underwriting Requirements**

Every lender is required to take the following steps in underwriting a PPP loan application:

1. Confirm receipt of borrower certifications contained in Paycheck Protection Program Application form issued by the Administration;
2. Confirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;
3. Confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentation submitted with the borrower's application; and
4. Follow applicable BSA requirements:

- a. Federally insured depository institutions and credit unions must follow existing BSA protocols when making PPP loans to either new or existing customers who are eligible borrowers under the PPP.
  - i. This includes BSA/AML, OFAC, CIP, EDD, Beneficial Ownership and other bank internal policies and procedures.

Each lender's underwriting obligation is limited to the items above and reviewing of the Paycheck Protection Application Form.

Additionally, there can be no prepayment penalties or fees on these loans. No collateral can be required. And no personal guarantee can be required.

***\*Note: Many financial institutions are trying to determine whether there are any conditions upon which to collateralize these PPP loans, albeit indirectly, with the intent to protect the bank's capital and liquidity. Conservatively, a strict reading interpretation of the Interim Final Rule would seem that financial institutions cannot be requiring PPP borrowers to open deposit accounts with their institutions for purposes of accessing the funds and additionally, those funds need to be provided outright and cannot be held like a draw line of credit. Participation in this Program and subsequent forgiveness requires certification that the "Lender has complied with the applicable lender obligations set forth in...the Paycheck Protection Program Rule." [https://content.sba.gov/sites/default/files/2020-04/PPP%20Lender%20Application%20Form\\_0.pdf](https://content.sba.gov/sites/default/files/2020-04/PPP%20Lender%20Application%20Form_0.pdf)***

***The guaranty and collateral prohibitions are very explicit:***

***"(J) WAIVER OF PERSONAL GUARANTEE REQUIREMENT.—During the covered period, with respect to a covered loan—***

***"(i) no personal guarantee shall be required for the covered loan; and***

***"(ii) no collateral shall be required for the covered loan."***

Reference: <https://www.congress.gov/bill/116th-congress/house-bill/748/text#H85FE66BEEED24E2FA023534AC55F1E76>

***However, the question remains of how financial institutions are to protect their interests when participating in this Program. Requiring a deposit account, a draw type scenario or a savings account with a controlled disbursement runs a risk of being interpreted as circumventing the Interim Final Rule, both by requiring additional fees in connection with the PPP loan (i.e.-any fees charged on a deposit account) and requiring access to an asset that the bank could set-off in the event of default.***

***Yet, the other position is that banks should be afforded the right to open a separate account or a control account to assure Program compliance with the guaranty. The control account would need to require no fees, and there is the argument on whether or not the right of offset in the event of default would even be permissible or not. Using the loan proceeds as collateral is still a form of collateral—but financial institutions are being left with little recourse if the borrower uses the PPP funds for an unauthorized purpose.***

***An additional issue is, if the borrower defaults or there is a remaining balance that is not used towards the PPP loan purpose (which would not be forgiven), there is the potential for banks to apply those funds towards the outstanding balance, thus lowering the amount the borrower would owe the bank on any***

**amount not forgiven by the SBA. If the borrower knowingly misuses the funds, the penalty is on the borrower, but not without ramifications to the financial institution who is left holding the debt.**

**So, while there is no indication within the Interim Final Rule that the bank is required to monitor for misuse, it is an argument that it is a risk too great for financial institutions not to monitor. With either interpretation, financial institutions remain at risk of being in violation of the Interim Final Rule by requiring a controlled account, yet they are not required to monitor the use of the funds to begin with.**

**An additional question unaddressed in the Interim Final Rule is whether this Program is subject to the normal guaranty process for the SBA, meaning would the bank have to ensure compliance with the guarantee guidelines? Generally, financial institutions need to ensure that the borrower follows the guarantee requirements, whereby for calculation purposes for legal lending limits, the bank would receive a higher percentage for guaranteed amounts. Financial institutions run the risk of immediately or potentially being in non-compliance with their lending limits, depending on the amount of outstanding loans to that borrower.**

**In conclusion, there are two schools of thought:**

- (1) Conservatively, provide to the borrower the entire balance into their account or provide them a check; or**
- (2) In the interest of bank protections, open a control account with zero fees knowing that all monies must be disbursed and cannot be used to pay down any remaining principal.**

**The latter is not expressly addressed and remains an interpretation and may run the risk of being found to circumvent the Program requirements, negating loan forgiveness. Financial institutions will need to ensure, regardless of the method used, that its policies and procedures document frequency of monitoring accounts, ensure no fees are applicable to these accounts, and have procedures for when funds are used for unauthorized purposes. These procedures would need to be consistently applied among all PPP borrowers for fair lending considerations. And due to the nature of the COVID-19 environment, with the increased use of remote employees, having these policies and procedures in writing and consistent is going to be paramount.**

## **Program Fees**

The SBA will pay lender fees for processing PPP loans in the following amounts:

- Five (5) percent for loans of no more than \$350,000;
- Three (3) percent for loans of more than \$350,000 and less than \$2,000,000; and
- One (1) percent for loans of at least \$2,000,000.

An agent is an authorized representative of the lender and can be:

- An attorney;
- An accountant;
- A consultant;
- Someone who prepares an applicant's application for financial assistance and is employed and compensated by the applicant;

- Someone who assists a lender with originating, disbursing, servicing, liquidating or litigating SBA loans;
- A loan broker; or
- Any other individual or entity representing an applicant by conducting business with the SBA.

Agent fees will be paid by the lender out of the fees the lender receives from the SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that any agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) cannot exceed:

- One (1) percent for loans of not more than \$350,000;
- 0.50 percent for loans of more than \$250,000 and less than \$2 million; and
- 0.25 percent for loans of at least \$2 million.

Additionally, lenders are prohibited from requesting reimbursement for lender fees from the SBA until five days after the disbursement of the covered loan to the borrower has occurred.

### Secondary Market

PPP loans are permitted to be sold on the secondary market *after* the loan is fully disbursed. A PPP loan may be sold at a premium or a discount to par value. SBA will be issuing guidance regarding any advance purchase for loans sold in the secondary market.

### Loan Forgiveness Parameters

The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. What that means is that the borrower will not be responsible for any loan payment ***if the borrower uses all of the loan proceeds for forgivable purposes*** described below under Section Approved Loan Purposes. However, employee and compensation levels *must* be maintained.

The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan.

But again, not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs.

Additionally, the borrower be responsible to repay the money if they do not maintain staff and payroll:

- Number of Staff: Forgiveness will be reduced if borrower decreases full-time employee headcount
- Level of Payroll: Forgiveness will be reduced if borrower decreases salaries and wages by more than 25% for any employee that made less than \$100,000 annualized in 2019.
- Re-Hiring: Borrower has until June 30, 2020 to restore their full-employment and salary levels for any changes made between February 15, 2020 and April 26, 2020.

### Requests for Loan Forgiveness

The **borrower** must submit a request to the lender that is servicing the loan for loan forgiveness. The request must include documents that verify the number of full-time equivalent employees and pay rates, as well as the payments on eligible mortgage, lease and utility obligations. The borrower additionally has to certify that the documents are

true and that the borrower used the forgiveness amount to keep employees and make eligible mortgage interest, rent and utility payments.

The lender is required to make a decision on the forgiveness within 60 days of receipt.

Lenders are free to rely on the documentation submitted by the borrower for loan forgiveness requests as long as the borrower attests to its accuracy of verified payments for eligible costs.

### PPP Funds Misuse and Ramifications

If the borrower uses PPP funds for unauthorized purposes, the SBA will direct the borrower to repay those amounts. If the borrower knowingly used the funds for unauthorized purposes, the borrower would also be subject to additional liability such as charges for fraud.

If a shareholder, member or partner of the borrower uses PPP funds for unauthorized purposes, the SBA will also have recourse against the shareholder, member or partner for the unauthorized use.

### SBA Purchase Requests

Additionally, a lender may request the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of week seven of the covered period. The expected forgiveness amount is the amount of the loan principal the lender reasonably expects the borrower to expend on payroll costs, covered mortgage interest, covered rent and covered utility payments during the eight-week period after loan disbursement. At least 75% of the expected forgiveness amount shall be for payroll costs.

To submit a PPP loan or pool of PPP loans for advance purchase, a lender must submit a report requesting advance purchase with the expected forgiveness amount to the SBA. The report must include:

- The Paycheck Protection Program Application Form ([SBA Form 2483](#)) and any supporting documentation submitted with the application;
- Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty ([SBA Form 2484](#)) and any supporting documentation;
- A detailed narrative explaining:
  - the assumptions used in determining the expected forgiveness amount,
  - the basis for those assumptions,
  - alternative assumptions considered,
  - why alternative assumptions were not used;
- Any information obtained from the borrower since the loan was disbursed that the lender used to determine the expected forgiveness amount, which should include the same documentation required to apply for loan forgiveness such as:
  - payroll tax filings,
  - cancelled checks, and
  - other payment documentation;
- Any additional information the Administrator may require determining whether the expected forgiveness amount is reasonable.

The expected forgiveness amount cannot exceed the total amount of principal on the PPP loan or pool of PPP loans. The SBA will purchase the expected forgiveness amount of the PPP loan(s) within 15 days of the date on which the

Administrator receives a complete report that demonstrates that the expected forgiveness amount is indeed reasonable.

## PPP Loan Considerations

### Regulation B/ECOA

There are Regulation B considerations that financial institutions implementing PPP loan programs must be considering:

- Adverse Action requirements: Regulation B defines adverse action in relations to extensions of credit as a refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer and the applicant expressly concerns. With that being said, financial institutions must ensure that they are following the timing requirements of the PPP in regard to decisions on applications within 30 days of application, or before the end of the Program, whichever is earlier. Adverse actions on applications for PPP purposes includes:
  - Taken adverse action on a complete application;
  - Taken adverse action on an incomplete application;
  - Made a counteroffer to an application for credit and the applicant does not accept the counteroffer; or
  - Notice of incompleteness.

Additionally, financial institutions are prohibited from discouraging applications, specifically on a prohibited basis. Financial institutions need to ensure that they have objectively outlined their policies and procedures from both a Regulation B and a Fair Lending perspective. See generally:

**(b) Discouragement.** A creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application. <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/4/#b>

Lastly, PPP prohibits the requirement of personal guaranties, so financial institutions need to make sure that their programs do not attempt to circumvent this by requiring additional borrowers in violation of Reg B, and potentially PPP as well.

If a financial institution chose not to participate in the PPP, there is a strong argument that no adverse action requirements are applicable:

(2) The term [adverse action] does not include:

...

(v) A refusal to extend credit because the creditor does not offer the type of credit or credit plan requested. <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/2/#c-1-iii>

### Regulation O

There has been speculation regarding Regulation O's applicability to the PPP and without specific agency guidance, there is no mentioning in the Interim Final Rule on how to handle these situations. While there is no outright exclusion

of Regulation O to the PPP, [12 CFR 32.3\(c\)\(4\)\(ii\)](#) could imply that PPP loans are not subject to OCC regulated banks' lending limits.

(c) *Loans not subject to the lending limits.* The following loans or extensions of credit are not subject to the lending limits of 12 U.S.C. 84, or 12 U.S.C. 1464(u), as applicable, of this part.

...

(4) *Loans to or guaranteed by a Federal agency.*

(i) Loans or extensions of credit to any department, agency, bureau, board, commission, or establishment of the United States or any corporation wholly owned directly or indirectly by the United States.

(ii) Loans or extensions of credit, including portions thereof, to the extent secured by unconditional takeout commitments or guarantees of any of the foregoing governmental entities. The commitment or guarantee--

(A) **Must be payable in cash or its equivalent within 60 days after demand for payment is made;** [Emphasis Added]

(B) Is considered unconditional if the protection afforded the national bank or savings association is not substantially diminished or impaired if loss should result from factors beyond the bank's or savings association's control. Protection against loss is not materially diminished or impaired by procedural requirements, such as an agreement to pay on the obligation only in the event of default, including default over a specific period of time, a requirement that notification of default be given within a specific period after its occurrence, or a requirement of good faith on the part of the bank or savings association.

It would appear that loans guaranteed by a federal agency are not subject to lending limits. However, there is a caveat that the guarantee "must be payable in cash or its equivalent within 60 days after demand for payment is made." This verbiage poses some issues with the Interim Final Rule as there is not stipulation on when this guarantee is payable. It is important to keep in mind, however, that there is an allowance for the [OCC](#) to waive them:

(2) in subsection (d), by adding at the end of paragraph (1) the following: "The Comptroller of the Currency may, by order, exempt any transaction or series of transactions from the requirements of this section upon a finding by the Comptroller that such exemption is in the public interest and consistent with the purposes of this section."

***\*Note: It remains to be determined. Best practice is to review your Regulation O policies and procedures and receive approval from the Board of Directors on any exceptions to policies or the potential of increased credit and regulatory risk.***

### **Note Requirements and Forms Providers**

There remains a pending issue on what financial institutions are expected to use regarding the note and other loan documentation. The "[CARES Act Section 1102 Lender Agreement](#)" states that the lender is responsible for ensuring that the note and all other loan documents (notes, certifications, documentation) and additional documents are "properly executed" and that they have taken "such actions necessary to fulfill the requirements of the Paycheck Protection Program." The SBA has not issued a formal PPP note sample for lenders to use. It does, however, have the following sample note form which may be permissible to modify for the PPP program, although that has not been stated by the SBA: [https://www.sba.gov/sites/default/files/forms/tools\\_len147\\_0.pdf](https://www.sba.gov/sites/default/files/forms/tools_len147_0.pdf).



This has caused a delay or at least confusion among financial institutions on proper documentation requirements. Financial institutions need to work with their forms providers or establish clear and accurate manual workarounds and ensure that their systems allow for what is needed according to the PPP in regard to deferments and payment periods. Improper loan documentation could jeopardize the change of PPP loans being sold on secondary markets or receiving SBA buy-back funds.

## Other CARES Act Considerations

### Related Loan Assistance

The CARES Act also created a new grant program under the SBA's Office of Disaster Assistance to provide quick relief for applications awaiting processing of SBA Economic Injury Disaster Loans (EIDL). Applicants may receive up to \$10,000 to cover immediate payroll, mortgage, rent, and other specified expenses. This grant does not have to be repaid. Businesses receiving and EIDL can apply for, or refinance the EIDL into, the PPP product.

Lenders on existing SBA backed loans are encouraged to provide payment deferments and extend maturity dates to avoid balloon payments or requirements that would increase debt as a result of a deferment. SBA will pay lenders the deferred principal as well as interest for that period.

### Tax Assistance

#### Business Tax Relief

The CARES Act also provides assistance to businesses through the modification of rules related to:

- net operating losses (NOLs);
- interest expense deductions;
- alternative minimum tax credits; and
- trade or business losses of non-corporate taxpayers.

This is accomplished through amending prior tax returns to obtain tax refunds. Employers may have several tools available to them to assist with cash flow, claim tax refunds, or reduce upcoming tax payments.

#### Employee Retention Credits

Employers have the possibility to be eligible for a refundable tax credit for the employer's share of the 6.2% Social Security tax (SSI Tax Credit). The potential SSI Tax Credit is for 50% of the first \$10,000 in qualified wages (including health plan expenses) paid to each employee beginning March 13, 2020.

Eligible employers must:

- Have had operations fully or partially suspended due to a shut-down order from a governmental authority in relation to COVID-19; or
- Have had a gross receipts decline by more than 50% in a calendar quarter when compared to the same quarter in 2019
  - These employers will remain eligible until the earlier of:
    - Gross receipts exceeding 80% relative to same quarter in prior year; or
    - December 31, 2020

This tax credit is not available to an employer who receives a covered loan from the SBA.



## Payroll Tax Deferral

In addition to the SSI Tax Credit, employers can defer payment of the employer's share of the 6.2% Social Security tax on wages paid beginning March 27, 2020 and ending on December 31, 2020. An equivalent deferral is permitted for the equivalent portion of self-employed taxes. Deferment amounts can be paid in two installments, but it is not, however, allowed where the employer has a covered loan forgiven under the PPP.

## FinCEN Requirements

On April 3, FinCEN issues a notice providing additional information to financial institutions in response to COVID-19. This notice updates FinCEN's March 16, 2020 [Notice](#).

The following provides key takeaways:

### Compliance with BSA Obligations

Compliance with BSA obligations remains paramount for financial institutions to protect national security in combating money laundering and related crimes, including terrorism and its financing. FinCEN expects financial institutions to continue following a risk-based approach, and to diligently adhere to their BSA obligations. FinCEN understands the challenges that financial institutions are facing when it comes to taking actions to protect employees, their families and others in response to the COVID-19 pandemic, which has created challenges in meeting certain BSA obligations, including the timing of the requirements pertaining to certain BSA report filings.

FinCEN will continue to outreach to regulatory partners and financial institutions to ensure risk-based compliance with the BSA, and it will also be issuing new information as appropriate.

### Beneficial Ownership Information Collection Requirements for Existing Customers

One of the primary components of the CARES Act is the PPP. For eligible federally insured depository institutions and federally insured credit unions, PPP loans for existing customers will not require re-verification under applicable BSA requirements, unless otherwise indicated by the institution's risk-based approach to BSA compliance.

***\*Note: It is important to call out that while FinCEN has removed the requirement to re-verify existing customers for purposes of PPP loans, it does not mention an exception to the requirement to re-certify your already existing information. Compliance Alliance recommends that you follow your re-certification procedures despite the reprieve from re-verification. Additionally, as there was no mention regarding OFAC, Compliance Alliance is of the opinion that all financial institution regulatory compliance requirements remain unaltered.***

For non-PPP loans, FinCEN reminds financial institutions of FinCEN's September 7, 2008 ruling ([FIN-2018-R004](#)) offering certain exceptive relief to beneficial ownership requirements. To the extent that a renewal, modification, restructuring or extension for existing legal entity customers falls outside the scope of that ruling, FinCEN recognizes that a risk-based approach taken by financial institutions may result in reasonable delays in compliance. FinCEN will continue to assess reasonable risk-based approaches to BSA obligations and will issue further information, as appropriate, particularly as it relates to the CARES Act.

### New FinCEN COVID-19 Online Contact Mechanism

FinCEN has created a COVID-19 specific online contact mechanism, via a specific drop-down category, for financial institution to communicate to FinCEN COVID-19-related concerns while adhering to their BSA obligations. Financial

institutions that wish to communicate such COVID-19 concerns to FinCEN must go to [www.FinCEN.gov](http://www.FinCEN.gov), click on “Need Assistance,” and select “COVID19” in the subject drop-down list. Such COVID-19 related communications are strongly encouraged but not required. FinCEN will review COVID-19 related communications. FinCEN also encourages financial institutions to contact their functional regulator(s) or other BSA examining authority as soon as practicable if a financial institution has BSA compliance concerns because of the COVID-19 pandemic. Financial institutions are encouraged to keep FinCEN and their functional regulator(s) or other BSA examining authority informed as their circumstances change.

## Additional Resources

### Compliance Alliance

- [Pandemic Toolkit](#)
- [COVID-19 CARES Act Paycheck Protection Program Summary \(updated 3/30/2020\)](#)
- [Pandemic Resources](#) (List of Resources for a quick, one-stop source of regulatory guidance broken down by Agency)

### 116<sup>th</sup> Congress

- [CARES Act](#)

### U.S. Small Business Administration

- [Paycheck Protection Program Interim Final Rule](#)
- [Paycheck Protection Program Interim Final Rule on Affiliation and Faith-Based Organizations Rules](#)
- [SBA Faith Based Organizations in the Paycheck Protection Program FAQ](#)
- [SBA PPP FAQ](#)
- [SBA Note Sample](#)
- [Paycheck Protection Program](#)
- [Business Credit and Assistance](#)
- [Paycheck Protection Program Borrower Application Form](#)

### U.S. Department of the Treasury

- [Assistance for Small Businesses](#)
- [Paycheck Protection Program Borrower Application Form](#)
- [Paycheck Protection Program Lender Application Form—Paycheck Protection Program Loan Guaranty](#)
- [Paycheck Protection Program Information Sheet](#)

## The CARES Act and Paycheck Protection Program FAQ

**Q1: We are a certified SBA lender, but we do not appear on the Region 6 PLP Lenders. From what I read, if you are a certified lender, then you can participate in the PPP, correct?**

**A1:** Yes, that is correct. If your bank is a certified SBA lender, your bank can automatically make Paycheck Protection Program (PPP) loans—there are no additional application or approval process requirements.

“All SBA 7(a) lenders are automatically approved to make PPP loans on a delegated basis.”

<https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf>

Lenders who are not currently certified can begin making loans as soon as they are approved and enrolled in the Program. New lenders seeking enrollment will have to submit their application to the SBA at:

[DelegatedAuthority@sb.gov](mailto:DelegatedAuthority@sb.gov). The lender agreement can be found here: [https://www.sba.gov/sites/default/files/2020-04/PPP--Agreement%20for%20New%20Lenders%20Banks%20Credit%20Unions%20FCS\\_w%20seal.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP--Agreement%20for%20New%20Lenders%20Banks%20Credit%20Unions%20FCS_w%20seal.pdf)

## **Q2: How long will banks carry PPP loans on its books? Can SBA purchase these loans?**

**A2:** PPP loans can be sold on the secondary market, but do not have to be. If the Bank were to sell a PPP loan on the secondary market, the SBA will not collect any fee for any guarantee sold into the secondary market. The SBA will guarantee any applicable forgiveness on the secondary market and will also purchase a PPP loan or pool of PPP loans from a secondary market investor, if the investor does not approve a borrower's deferral request. A lender may request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of week seven of the covered period.

To submit a PPP loan or pool of PPP loans for advance purchase, a lender shall submit a report requesting advance purchase with the expected forgiveness amount to the SBA. The report shall include: the Paycheck Protection Program Application Form (SBA Form 2483) and any supporting documentation submitted with such application; the Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty (SBA Form 2484) and any supporting documentation; a detailed 27 narrative explaining the assumptions used in determining the expected forgiveness amount, the basis for those assumptions, alternative assumptions considered, and why alternative assumptions were not used; any information obtained from the borrower since the loan was disbursed that the lender used to determine the expected forgiveness amount, which should include the same documentation required to apply for loan forgiveness such as payroll tax filings, cancelled checks, and other payment documentation; and any additional information the Administrator may require to determine whether the expected forgiveness amount is reasonable. The Administrator will purchase the expected forgiveness amount of the PPP loan(s) within 15 days of the date on which the Administrator receives a complete report that demonstrates that the expected forgiveness amount is indeed reasonable.

## **Q3: How will the forgiveness aspect of the loan work?**

**A3:** Loan amounts must be forgiven as long as 1) the loan proceeds are used to “allowable purposes” (these include payroll costs and certain mortgage interest, rent and utility costs) over the 8-week period after the loan is made, and 2) the employee and compensation levels are maintained.

In other words, the amount of forgiveness will be reduced if the loan proceeds are not used for allowable uses, if full-time headcount declines, or if salaries and wages are decreased.

A borrower has to apply with the bank for loan forgiveness—it is not automatic. The application process requires the borrower to submit to the bank certain IRS and state filings and documentation the proceeds were used for approved uses. The bank must make a decision within 60 days of receiving an application for forgiveness. The bank has to require this documentation—forgiveness is not allowed without it. As long as the bank receives the required documentation above, there is a hold harmless provision for the bank for enforcement actions and other penalties.

As far as how the bank will be paid for the amount forgiven, the SBA will remit to the bank the total amount forgiven within 90 days after determining the amount, plus any interest accrued through the date of the SBA's payment to the bank.

**Q4: What happens to the payments that are deferred?**

**A4:** All loan payments (including principal, interest and fees) have to be deferred for at least 6 months (and at most 12 months if mandated) but interest will continue to accrue over the deferral period. The bank cannot require the borrower to begin repaying the loan before the 6-month period is up. The bank will still get paid the full, applicable processing fee despite the payment deferral. The bank cannot collect any other fee from the borrower.

**Q5: Does the SBA make payments on behalf of the borrower?**

**A5:** No, the SBA does not make payments on behalf of the borrower. The SBA does pay the bank a processing fee for originating the loan:

- Loans \$350,000 and under: 5%
- Loans greater than \$350,000 to \$2 million: 3%
- Loans greater than \$2 million: 1%

**Q6: How to banks receive any fees from the SBA?**

**A6:** Banks will only be paid processing fees based on the balance of the financing outstanding at the time of the loan disbursement. The reimbursement of the processing fee has to be made to the bank within 5 days after the disbursement of the PPP loan.

The amount of the processing fee varies based on the loan amount:

- Loans \$350,000 and under: 5%
- Loans greater than \$350,000 to \$2 million: 3%
- Loans greater than \$2 million: 1%

**Q7: Does the bank need to comply with Beneficial Ownership and BSA requirements?**

**A7:** Yes, the beneficial ownership requirements are still in effect and are not waived for PPP or other SBA loans.

Additionally, the fact sheet released by the Treasury March 31, 2020 as well as the Interim Final Rule explicitly mention BSA responsibilities.

**Q8: Should utilities, rent, leases, or internet expenses be included in the calculation or will it just be the 2.5 times average monthly payroll?**

**A8:** The Interim Final Rule states that the 2.5 multiplier used in calculating the maximum loan amount should only be multiplied against the average total monthly payroll.

**Q9: Is the SBA going to create a link to apply or calculate the loan and allow to choose a lender or put a lender in automatically?**

**A9:** Both the SBA and the Treasury have released sample application forms, but none have created online applications on their respective websites. There is no current indication that either will be doing this, and the current guidance indicates that applicants will have to apply directly through existing SBA-certified lenders or other lenders who become approved to make PPP loans specifically.

SBA Sample Application: [https://www.sba.gov/sites/default/files/2020-03/Borrower%20Paycheck%20Protection%20Program%20Application\\_0.pdf](https://www.sba.gov/sites/default/files/2020-03/Borrower%20Paycheck%20Protection%20Program%20Application_0.pdf)

Treasury Sample Application: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>

**Q10: Are financial institutions eligible businesses for PPP purposes?**

**A10:** Based on the list of ineligible businesses in the SBA regulations, banks generally would not be eligible for the PPP loan program:

"The following types of businesses are ineligible: (b) Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);"

[13 CFR 120.110\(b\)](#)

**Q11: What forms need to be completed and submitted by the lender and what by the applicant?**

**A11:** Applicant:

- SBA [Form 2483](#) (Paycheck Protection Program Application Form)
- Payroll documentation.

Lender:

- SBA [Form 2484](#) (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically in accordance with program requirements
- Maintain the borrower's forms and supporting documentation in the bank's files.

**Q12: Can a business be eligible for a PPP loan if it has more than 500 employees?**

**A12:** Yes. If it is:

- A business operating in certain industries
- Meets the applicable SBA employee-based size standards or that industry, and
- Is a small business concern as defined in section 3 of the Small Business Act ([15 USC 632](#)), and 4. Subject to SBA's affiliation rules under [13 CFR 121.301\(f\)](#) unless specifically waived in the CARES Act.

**Q13: How are churches and religious nonprofits eligible for PPP loans but not most SBA lending programs?**

**A13:** Nonprofit organizations, while generally excluded from SBA programs are authorized to be included through the CARES Act.

**Q14: Are banks and other financial businesses (finance companies, pawn shops, etc.) eligible to receive PPP loans?**

**A14:** No—both SBA [SOP 50 10 5 \(K\)](#) and [CFR 120.110](#) apply to PPP loans and preclude banks from participating. Unless a typically exempt organization was specifically allowed to participate in the PPP program under the CARES Act, like a 501(c)(3), then these usually ineligible businesses are unable to apply for PPP loans.

“The following types of businesses are ineligible:

...

(b) Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);” [CFR 120.110](#)

**Q15: Are cannabis businesses ineligible for PPP loans? What about the various tiers (MSB Tier I, II and III)?**

**A15:** Marijuana is still considered an illegal substance under the Controlled Substances Act as a Schedule I drug. The cultivation and distribution of marijuana remains a federal felony. While no specific prohibitions or guidance is provided in the CARES Act and the PPP program, it is highly likely cannabis businesses are excluded and ineligible.

Whether MSB Tiers can come into play is purely speculative at this time. Tier 1 MRBs are generally businesses that manufacture, distribute or dispense marijuana (i.e.—they physically touch the plant) and are generally a state-licensed marijuana business. This includes marijuana dispensaries, cultivators, extractors and infused product producers. Tier 2 businesses are still considered MRBs but are typically not state-licensed because they do not touch the plant. Their focus is specifically providing products and services to Tier 1 MRBs. Examples include sellers of products related to growing or consuming marijuana, industry associates, payroll providers, advertising or media providers, and some software providers. Tier 3 businesses are not specifically focused on providing services to Tier 1 MRBs, so profit is incidental to their overall business and revenue. Those generally include consultants, commercial property owners and some software or technology providers. The [Interim Final Rule](#) clearly states a borrower is ineligible if they “engaged in any activity that is illegal under federal, state or local law...”. Whether that is to be applied granularly to a Tier 3 who does not substantially engage in providing services to MRBs is unknown at this time. Financial institutions need to be aware of the risks of lending to MRBs in their entirety, particularly in the confines of the PPP Program, and need to be following their already established BSA/AML MRB policies and procedures when considering engaging these types of applicants, having a full understanding of the credit and Program risks associated.

**Q16: Are farms eligible to receive PPP loans?**

**A16:** Yes, farms are eligible to receive PPP loans and are addressed under [SBA 7\(a\) loan eligibility](#) and [CFR 120.103](#). It allows for a Memorandum of Understanding between the USDA and the SBA for farm related business loan programs. Additionally, agricultural cooperatives are eligible under [CFR 121.105](#). Farms, agribusiness and agricultural cooperatives still must meet the size and revenue standards established in the Interim Final Rule and lenders must be confirming if the farm meets that based on the Table of Small Business Standards Matched to North American Classification System Codes. This would generally mean 500 or less employees with their principal place of residence in the United States, regardless of their revenue levels.

Seasonal and agricultural applicants are permitted under the Interim Final Rule to determine their maximum loan amount by averaging the total monthly payments for payroll for the 12-week period beginning February 15<sup>th</sup>, 2019, or, at the election of the applicant, between March 1, 2019 and June 30, 2019. <https://www.congress.gov/bill/116th-congress/house-bill/748/text#HB774EEF7D0A34671AE7C32877C38ACF2>

A seasonal or agricultural borrower basically can choose between measuring the average total monthly payment from February 15, 2019 and 12-weeks after, or from March 1, 2019 through June 30, 2019. Applicants should calculate both and determine which one is higher depending on their individual seasonality. This is just for maximum loan amount calculation, so this puts on the applicant the burden to strategically apply for the loan at the right time to maximize the forgiveness based on the 8-week period.

There has been speculation as to wages paid to H-2A workers not counting towards a farm's payroll costs or number of employees, but there is not definitive guidance within the Interim Final Rule. Additionally, as "rent" is not defined in the Interim Final Rule, it is unclear whether it extends beyond rental of buildings to include equipment, land, etc. Compliance Alliance recommends financial institutions interested in farm loans to consult with the SBA and wait for additional guidance.