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Small Business Loan Relief from CARES Act

Coronavirus: Multipractice Advisory

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For many small businesses across the country, the COVID-19 pandemic has been devastating. In response to the crisis, the Coronavirus Aid, Relief, and Economic Security (CARES) Act includes several provisions offering relief to small businesses. Most important, the law appropriates \$349 billion for the new Paycheck Protection Program (“PPP”), which provides federally backed loans up to a maximum of \$10 million to qualifying small businesses and nonprofits to assist with payroll and certain other operating costs. The CARES Act also lifts some restrictions for other SBA programs, such as 7(a) and Emergency Injury Disaster Loans, and makes it easier and more attractive for lenders to participate. And finally, the CARES Act includes provisions delaying, deferring, or outright forgiving a variety of loans to small businesses.

In this Advisory, we set forth many key questions that may arise for borrowers seeking small business relief under the CARES Act and lenders interested in providing it. Several of the CARES Act provisions regarding small business loans direct the SBA or the Treasury Department to draft implementing regulations or procedures. Those implementing regulations and procedures might limit, qualify, or otherwise modify existing SBA regulations and guidance as described in this Advisory, such as the affiliation rules. Arnold & Porter will monitor those developments and update this Advisory as they occur.

This Advisory is an update of our prior Advisory dated March 30, 2020 and reflects changes or clarifications made by the SBA’s rules and guidance published in the weeks and months following passage of the CARES Act. For a full list of the rules and guidance governing the PPP, visit [here](#). In addition, this Advisory follows passage of the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116-139) and the Paycheck Protection Program Flexibility Act (“Flexibility Act”) (Pub. L. 116-142). These changes appear in bold in this Advisory.

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FOR BORROWERS

Existing Small Business Administration (SBA) Loans

I have an existing SBA business loan. Do I get any relief?

Yes. Starting no later than 30 days after the date on which the first payment is due, the SBA will pay all principal, interest, and fees on existing SBA loans for 6 months pursuant to 7(a), Community Advantage, 504, and Microloan programs. If the loan is currently in deferment, then the SBA will begin making payments after the deferment period. Borrowers who obtain new loans under those programs within six months after the enactment of the CARES Act are also entitled to have the SBA make a full 6 months of loan payments. These provisions of the CARES Act do *not* apply to loans under the PPP.

Paycheck Protection Program (“PPP”)

What is the PPP?

The PPP is designed to enable employers to maintain their payroll during the COVID-19 emergency. The PPP is an expansion of the SBA’s 7(a) loan program that authorizes financial institutions to issue loans to qualifying small businesses on the terms set forth in the CARES Act. The federal government will fully guarantee these loans.

Eligibility

Who is eligible for a loan from the PPP?

Under the CARES Act, an eligible entity includes—in addition to any business that already qualifies as a “small business concern” under existing SBA rules—any business concern, nonprofit (501(c)(3)), veterans organization (501(c)(19)), Tribal business concern, **or agricultural business concern** that was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes and employs not more than the greatest of:

- 500 employees¹;
- if applicable, the size standards in number of employees established by the Administration for their industry; or
- if the business has more than 1 physical location and is assigned a NAICS code beginning with 72 (i.e., is in the accommodation and food services industry) at the time of loan disbursement, 500 employees per physical location of the business.

In its FAQs, the SBA also made clear borrowers that do not qualify for a PPP loan based on the above criteria may nevertheless qualify based on the SBA’s “alternative size standards” set forth in SOP 50 10. According to the FAQs, to qualify under the alternative size standards, a borrower (together with any affiliates) must have a maximum tangible net worth of no more than \$15 million and average net income after federal income taxes (excluding any carry-over losses) of no more than \$5 million for the two full completed fiscal years before the date of the application for a PPP loan.

Can I be ineligible for a loan from the PPP even if I meet the requirements above?

¹ The SBA released earlier guidance raising confusion about counting the employees of foreign affiliates. Subsequent guidance makes clear that businesses, for purposes of determining the size status, must count all of their employees and the employees of their U.S. and foreign affiliates, absent a waiver of or an exception to the affiliation rules. However, the SBA will not find any borrower that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the borrower’s exclusion of non-U.S. employees from the calculation of its employee headcount if the borrower (together with its affiliates) had no more than 500 employees whose principal place of residence is in the U.S.

Yes. There are additional circumstances that can disqualify an otherwise eligible borrower. For example, the following entities are ineligible for a PPP loan:

- any entity that is engaging in illegal activity under federal, state, or local law;²
- certain entities that are owned by foreign nationals or foreign entities;
- any entity for which an owner of 20 percent or more of the equity is incarcerated; on probation; on parole; presently subject to an indictment, criminal information arraignment, or other means by which formal charges are made; or has been convicted of a felony in the last five years;
- any entity that obtained a direct or guaranteed loan from the SBA or any other federal agency and subsequently defaulted or become delinquent on the loan within the last seven years;
- any entity that is owned or controlled by an individual or entity that obtained a direct or guaranteed loan from the SBA or any other federal agency and subsequently defaulted or become delinquent on the loan within the last seven years; and
- financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors.

For a full list of ineligible entities, see [13 CFR 120.110](#) and [SOP 50 10](#), Subpart B, Chapter 2, but note that nonprofit organizations authorized by the CARES Act are still eligible.³

Am I eligible for the PPP if I am a sole proprietor, an independent contractor, or self-employed?

Yes.

What are the eligibility requirements for non-profit organizations to apply for PPP loans?

Nonprofit organizations that are tax-exempt under sections 501(c)(3) and 501(a) of the Internal Revenue Code (IRC) are eligible for SBA loans under the Payroll Protection Program to the same extent as small businesses, provided they otherwise satisfy the requirements of the PPP. This means that a wide variety of “charitable” nonprofit organizations will be eligible for this funding, including, for example, certain educational institutions, research institutes, foundations, social service organizations, houses of worship, and hospitals. Veterans organizations that are tax-exempt under section 501(c)(19) will be similarly eligible. Nonprofit organizations that are not tax-exempt under sections 501(c)(3) or 501(c)(19) of the IRC are not eligible; those include trade associations, advocacy organizations, unions, and social clubs.

The SBA has made a determination that nonprofit hospitals exempt from taxation under section 115 of the Internal Revenue Code will meet the CARES Act’s definition of “nonprofit organization” and thus be eligible for PPP loans if the hospital reasonably determines, in a written record, that it is an organization described in section 501(c)(3) of the Internal Revenue Code and is therefore within a category of organization that is exempt from taxation under section 501(a).

What businesses already qualify as “small business concerns”?

In general, the SBA defines “small” based on norms applicable to the industry in which a business primarily operates, together with one of two metrics: (1) the average number of employees over the past 12 months or (2) the average annual

² For example, marijuana businesses may not be eligible for a PPP loan, even in states where the business is legal under state law, because marijuana is still illegal at the federal level. See [SOP 50 10](#) at pages 107–108 for more information on marijuana-related businesses that are ineligible for SBA loans.

³ In an Interim Final Rule published on April 28, 2020, the SBA clarified that hedge funds and private equity firms are ineligible to receive a PPP loan because they are primarily engaged in investment or speculation. 85 Fed. Reg. 23451.

receipts over the past three years. A business that qualifies under the size standards applicable to its primary industry is eligible to apply for the PPP. The [SBA offers a size standards Size Standards Tool](#) that can help determine whether a business qualifies as small.

What are the SBA's size standards?

Whether a business is “small” is not determined solely by the size of its workforce or its revenue. Rather, the SBA recognizes that those metrics are relative and vary by industry. Accordingly, the SBA publishes a list, by industry, that describes the number of employees and the volume of receipts that qualify a business as “small” within the meaning of the SBA's programs. For example, using the current list, a commercial bakery (i.e., a business with a NAICS code of 311812) with 1,000 employees is still considered “small,” but a new car dealer (i.e., a business with the NAICS code 441110) is considered “small” only if it employs 200 or fewer. The SBA's current size standards are available on the [SBA's website](#).

What is the operative date for the SBA to determine the size status of a business applying to participate in the PPP?

Under the SBA's rules and regulations, the general rule is that size status is determined as of the date the SBA accepts the application for processing. However, language in the CARES Act suggests that, for the PPP, the operative date is when the loan is disbursed.⁴ Absent contrary SBA guidance, we anticipate that this is the rule for PPP loans.

How does a concern calculate the number of employees?

For eligibility purposes, **a concern can calculate the number of employees**—including full-time, part-time, temporary, leased,⁵ and affiliate employees—**using one of the following methodologies:**

- the average number of employees per pay period for the 12 completed months before the **date of the concern's loan application**;
- **the average number of employees per pay period for the 2019 calendar year**;
- if a concern has not been in business for 12 full months, the average number of employees for each of the pay periods during which the concern has been operating;
- for concerns that were not in business from February 15, 2019 and June 30, 2019, the average number employees for the pay periods January 1, 2020 through February 29, 2020; or
- for a seasonal business, the average number of employees for the period between February 15, 2019 or March 15, 2019 and June 30, 2019.

When calculating the number of employees, a concern should consider the following:

- **Part-time, temporary, and volunteer employees.** Part-time and temporary employees are counted the same as full-time employees, but volunteers (i.e., individuals who do not receive monetary or in-kind compensation) are not counted at all.
- **Independent contractors.** Per guidance issued by the SBA in June 2016, independent contractors are subcontractors and do not count in the calculation of employees.⁶ **Likewise, for the purposes of a borrower's PPP loan calculation,**

⁴ See CARES Act 16 (“[A]ny business concern that employs not more than 500 employees . . . at the time of disbursement shall be eligible to receive a covered loan.”).

⁵ Leased employees include employees retained through a professional employer organization.

⁶ 81 Fed. Reg. 34243 (May 31, 2016).

payments to independent contractors do not count as “payroll costs” because independent contractors have the ability to apply for a PPP loan on their own.

Applicants should carefully check the certifications in the loan application form which may also require that a concern certify the number of employees as of the date of the application.

How does the SBA calculate annual receipts to determine eligibility under the size standards?

For the SBA, “receipts” refers to “all revenue in whatever form received or accrued from whatever source.” That calculation includes revenue from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns or allowances. In general, receipts are “total” or “gross” income plus the cost of goods sold. The SBA’s rules on calculating annual receipts are available at [13 CFR 121.104](#).

How does the SBA determine a concern’s primary industry?

A business may have operations that touch on a variety of industries. In those cases, in order to determine a business’s primary industry, the SBA will consider certain of the business’s metrics over the most recently completed fiscal year, including:

- the attribution of receipts to various parts of the operation;
- the distribution of employees among the business’s operations; and
- the costs of doing business among the different industries in which the business operated.

The SBA may also consider other factors, including the distribution of patents, contract awards, and assets.⁷

What businesses have a NAICS code beginning with 72?

According to the [2017 NAICS manual](#), Sector 72 covers “Accommodation and Food Services.” Businesses in this sector provide consumers with lodging and/or prepare meals, snacks, and beverages for a consumer’s immediate consumption.⁸

- Accommodation businesses include, among others, hotels; motels; bed-and-breakfasts; RV parks and recreational camps; rooming and boarding houses; dormitories; and workers’ camps.
- A lodging establishment is considered part of Sector 72 even if it generates more revenue by providing a complementary service, such as providing meals.
- Food services businesses include, among others, food service contractors; caterers; bars; restaurants and other eating places; cafeterias; carryout doughnut, bagel, or pretzel shops with on-premises baking; coffee shops with on-premises brewing; and ice cream parlors.

Sector 72 does *not* include civic and social organizations; amusement and recreation parks; theaters; and other recreation or entertainment facilities providing food and beverage services.

How do the SBA rules for affiliates work for the purpose of determining whether a business is eligible for a Payment Protection Program loan?

In determining whether a business is “small,” the SBA looks at the concern together with its affiliates. SBA’s affiliation analysis is intended to determine whether those that might appear small are, in fact, tied to other entities to an extent that the SBA would no longer consider them to be in that category.

⁷ The SBA’s rules for determining a concern’s primary industry are in [13 CFR 121.107](#).

⁸ NAICS Manual 557.

As a general matter, concerns are deemed affiliates when one controls or has the power to control the other, regardless of whether an entity actually exercises that power. Entities that are commonly controlled by another entity, often called sister companies, are also treated as affiliates of each other and of the controlling entity. In determining whether an affiliation exists, the SBA looks at the totality of the circumstances, considering factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships. Control may also be affirmative or negative, such as through contractual blocking rights or veto rights. Control may also exist indirectly through third parties.

The Treasury Department has published an [overview of the affiliation rules](#) that are applicable to PPP loans.

Below are the scenarios under which the SBA may find entities to be affiliates:

- **Stock ownership** - A concern is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50 percent of that concern's voting equity. A minority shareholder is in control if that individual or entity has the ability under the concern's charter, bylaws, or shareholder's agreement to prevent a quorum or otherwise block action by the concern's board of directors or shareholders.
- **Stock options, convertible securities, and agreements to merge** - These instruments and contracts are given present effect on the power to control a concern, except where they are still in negotiation, incapable of fulfillment, speculative, or unenforceable.
- **Common management** - Affiliation may arise where one or more officers, directors, managing members, or partners control the management of more than one concern through the board of directors, management, or a management agreement.
- **Identity of interest** - An identity of interest may exist where close relatives have identical or substantially identical business or economic interests.

If a franchise brand is listed on the [SBA Franchise Directory](#), each of its franchisees that individually meets the applicable size standard is eligible for a PPP loan. However, a franchise brand that has been denied listing on the Directory because of affiliation between franchisor and franchisee may nonetheless request listing for the limited purpose of receiving PPP loans. The SBA will not apply affiliation rules to a franchise brand that has requested listing on the Directory to enable its franchisees to participate in the PPP.

Ascertaining whether entities are affiliates is a nuanced and fact-intensive exercise, and these examples highlight the complexity of the necessary analysis. **The SBA typically gathers the relevant information for its size determination on [SBA Form 355](#), although the PPP Borrower Application Form, [SBA Form 2483](#), requests that applicants list and describe such common ownership and common management relationships in a separate "Addendum A."** In preparation, prospective applicants should examine the relationships (including other employment) and holdings of their stockholders, directors, and officers; contractual relationships; employee count per pay period for the past year; and revenue sources to determine whether and the extent to which the affiliation rules may apply. Relevant documentary materials for such information include, but are not limited to, recorded documents, operating documents, financial statements, and tax returns for both the concern and relevant individuals.

When is the last day to apply for a PPP Loan?

June 30, 2020.

How does the CARES Act change the application of affiliation rules?

The CARES Act carves out three categories of concerns that do *not* need to consider any of the affiliate rules when counting their employees:

- (1) businesses with no more than 500 employees and a NAICS code beginning with 72 (i.e., accommodation and food services businesses);
- (2) franchises listed on the SBA Franchise Directory **or that have requested listing on the Directory to participate in the PPP**; and
- (3) businesses that receive financial assistance from an SBIC (15 U.S.C. § 681).

For those concerns, the calculation of the number of employees and annual receipts will include only the average number of employees and annual receipts.⁹

The Second Interim Final Rule released by the SBA pursuant to the CARES Act also exempts from the affiliation rules the relationships of faith-based organizations to other organizations, where such relationships are based on a religious teaching or belief or otherwise constitutes part of the exercise of religion.

For concerns not affected by the changes the CARES Act made to the affiliation rules, the SBA's normal affiliation rules will apply.

For many concerns, the key to calculating the number of employees will be whether they have any "affiliates" within the SBA's understanding of the term.

How do former and newly-acquired affiliates play into the employee and annual receipts calculations?

- **Former affiliates.** The employees of a former affiliate *do not* need to be counted—for the entire measurement period—if the affiliation ceased before the date on which the SBA will determine concern's size. For example, if a concern's size status is determined on April 10, 2020, and the concern and an affiliate terminated their relationship on January 1, 2020, the concern would not need to include the affiliate's employees in the calculation for the entire measurement period, i.e., April 1, 2019, through March 31, 2020.
- **Newly acquired affiliates.** The employees of a newly-acquired affiliate *do* need to be counted—for the entire period of measurement—if the affiliation began before the date on which the concern is applying. For example, if a concern's size status is determined on April 1, 2020, and the concern and an affiliate began a relationship on February 29, 2020, the concern would need to include the affiliate's employees in the concern's calculation for the entire measurement period, i.e., April 1, 2019, through March 31, 2020.

Are there limits on a single corporate group receiving PPP loans?"

Businesses that are part of a single corporate group shall not receive more than \$20 million of PPP loans in the aggregate. For purposes of this limit, businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent. This limitation is effective with respect to any loan that not has not been fully disbursed as of April 30, 2020.

PPP Loan Terms

What are the loan terms for the PPP?

The SBA fixed the interest rate for PPP loans at 1% in the First Interim Final Rule. Under the CARES Act and the regulations promulgated thereunder, payments of principal, interest, and fees by the borrower were initially deferred for at 6 months from the date of disbursement. The Flexibility Act extended the deferral period until the date on which the loan forgiveness amount is remitted to the lender by the SBA, subject to a maximum of 10 months following the last day of the

⁹ In addition to the affiliation rules described above, apart from the PPP, the CARES Act also permanently rescinds the affiliation standards for the SBA's Express Loan Programs, which were issued February 10, 2020 at 85 Fed. Reg. 7622.

covered period for loan forgiveness. However, interest continues to accrue over this period. Both borrower and lender fees ordinarily payable to the SBA are waived for PPP loans. **While the CARES Act allows the SBA to set the loan maturity for up to 10 years, for loans made before June 5, 2020, loan maturity is set at 2 years; however, borrowers and lenders may mutually agree to extend the maturity of such loans to 5 years. Following passage of the Flexibility Act, loans made on or after June 5, 2020 have a maturity of 5 years.**

The maximum loan amount that may be borrowed will be the lesser of:

- The sum of (i) 2.5 multiplied by the average total monthly payments for payroll costs incurred during the 1-year period before the date on which the loan is made and (ii) the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and the date on which PPP loans are made available to be refinanced under the PPP loan (if applicable);
- For a seasonal employer, the sum of (i) 2.5 multiplied by the average total monthly payments for payroll for February 15, 2019 (or March 1, 2019, at the election of the recipient) through June 30, 2019 **or any consecutive 12-week period between May 1, 2019 and September 15, 2019** and (ii) the outstanding amount of an EIDL made between January 31, 2020 and the date on which PPP loans are made available to be refinanced under the PPP loan (if applicable);
- If requested by an eligible recipient that was not in business from February 15 through June 30, 2019, then the sum of (i) 2.5 multiplied by the average total monthly payments by the applicant for payroll costs incurred January 1 to February 29, 2020 and (ii) the outstanding amount of an EIDL that was made between January 31, 2020 and the date on which PPP loans are made available to be refinanced under the PPP loan (if applicable); or
- \$10 million.

What are payroll costs?

Payroll costs include:

- compensation to employees (**whose principal place of residence is in the U.S.**) that is a salary, wage, commission or similar compensation; cash tips; vacation, parental, family, medical, or sick leave; allowance for dismissal or separation; group health care benefits; retirement benefits; and state or local taxes on the compensation of employees; and
- **for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation in an amount not more than \$100,000 in 1 year.**

However, payroll does *not* include compensation of an employee in excess of \$100,000/year, federal income taxes, compensation for employees who principally reside outside the U.S., and qualified sick and family leave wages for which a borrower receives a credit under §§ 7001 and 7003 of the Families First Coronavirus Response Act.

How are federal taxes treated for the purpose of determining payroll costs under the Payment Protection Program?

According to the FAQs, federal taxes that are withheld from employees, including the employer's and employee's share of FICA, are included in payroll costs. The FAQ goes on to provide that the employer's share of payroll taxes, however, must be excluded from the calculation of payroll costs.

What does “compensation of an individual employee in excess of an annual salary of \$100,000” mean when determining the amount of “payroll costs” under the Payment Protection Program?

According to the FAQs issued by the Treasury Department on April 6, 2020, this limitation applies to cash compensation only. Retirement plan contributions, healthcare premiums, state and local taxes, and other non-cash items may be included in addition to the \$100,000 cash compensation limitation in calculating payroll costs.

Can I apply for more than one PPP loan?

No, an eligible borrower may not receive more than one PPP loan. Therefore, an applicant should consider applying for the maximum amount.

What forms does an applicant need to submit to apply for a PPP loan?

The applicant must submit SBA Form 2483 (PPP Application Form) and payroll documentation, including payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship.

How can a borrower use the loan?

In addition to the allowable uses for 7(a) loans, PPP loans can be used for:

- payroll costs;
- mortgage interest payments;
- rent;
- utilities; and
- interest on debt obligations incurred before February 15, 2020.

At least 60% of the Paycheck Protection loan proceeds must be used for payroll costs for a borrower to receive full loan forgiveness.

What certifications must a borrower make in order to obtain a loan under the PPP?

Entities that meet those conditions must also be prepared to certify, in good faith, that:

- (1) the concern was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes (or it paid independent contractors);
- (2) the loan request is necessary to support the concern’s ongoing operations due to the uncertain economic conditions;
- (3) the funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments (**with no more than 40% of loan proceeds being used for non-payroll costs**) and the applicant understands that **knowingly using funds for unauthorized purposes will result in legal liability, such as charges for fraud;**
- (4) the applicant understands that loan forgiveness will be provided for documented payroll costs, covered mortgage interest payments; covered rent payments, and covered utilities (provided that no more than 40% of loan proceeds were used for non-payroll costs);
- (5) the concern does not have an application pending for another SBA loan for the same purpose, and between February 15, 2020 and December 31, 2020, the concern has not already received an SBA loan for the same purpose;
- (6) the information provided in the application and the information in all supporting documents and forms is true and accurate in all material respects; and
- (7) the applicant acknowledges that the lender will confirm the eligible loan amount using tax documents and that those documents are identical to those submitted to the IRS, and the applicant also understands that the

lender can share this tax information with the SBA's authorized representatives for the purpose of compliance with SBA loan program requirements.

In addition, under the PPP Borrower Application form published by the SBA, applicants must certify that, to the extent feasible, they will purchase only American-made equipment and products.

The First Interim Final Rule allows lenders to rely on the accuracy of certifications and other information provided by borrowers in their applications for PPP loans. Lenders will have no obligation to verify independently the accuracy of those certifications and other information. Borrowers must acknowledge that knowingly making a false statement to obtain a guaranteed loan from the SBA is punishable under the law, including under 18 U.S.C. §§ 1001 and 3571 by imprisonment of not more than 5 years and/or a fine of up to \$250,000; under 15 U.S.C. § 645 by imprisonment of not more than 2 years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 U.S.C. § 1014 by imprisonment of not more than 30 years and/or a fine of not more than \$1 million.

What does the certification, "the loan request is necessary to support the concern's ongoing operations due to the uncertain economic conditions," mean?

Per the SBA's FAQ document, while the CARES Act suspends the ordinary requirement that borrowers be unable to obtain credit elsewhere, borrowers must still certify in good faith that their PPP loan request is necessary to support their ongoing operations due to current economic uncertainty. Borrowers must consider their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. In the FAQs, the SBA notes that a public company with substantial market value and access to capital markets likely will not be able to make the required certification in good faith.

If the SBA determines a borrower lacked an adequate basis for the required certification, the SBA will seek repayment of the outstanding loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from the SBA, the SBA will not pursue administrative enforcement or referrals to other agencies.

For administrative ease, the SBA issued guidance providing that any borrower which, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith. The SBA has stated it will review all loans in excess of \$2 million, in addition to other loans as appropriate.

Is an employer that repays its PPP loan by the safe harbor deadline eligible for the Employee Retention Credit?

Yes, in such a situation, the employer will be treated as though it did not receive a covered loan under the PPP for purposes of the Employee Retention Credit. Therefore, the employer will be eligible if the employer is otherwise eligible for the credit.

For how long is a loan payment deferred?

If a borrower submits to its lender a loan forgiveness application within 10 months after the end of the borrower's loan forgiveness covered period, the borrower will not have to make any payments of principal or interest on the loan before the date on which SBA remits the loan forgiveness amount on the loan to the lender (or notified the lender that no loan forgiveness is allowed).

If a borrower does not submit a loan forgiveness application to its lender within 10 months after the end of the borrower's loan forgiveness covered period, the borrower must begin making payments at the 10-month mark.

Are personal guarantees or collateral required, including for fund-backed portfolio companies?

The CARES Act waives the borrower requirement for any personal guarantees or collateral for any loans made pursuant to the PPP.

Loan Forgiveness

Can a loan granted under the PPP be forgiven?

In general, yes. The principal amount of a loan may be forgiven in an amount equal to payroll costs, interest on mortgage obligations incurred before February 15, 2020, rent payments for leases in force before February 15, 2020, and utility payments for service which began before February 15, 2020 during either the 8-week or **24-week** period following the origination of the loan (the "covered period"). **Originally, the CARES Act defined the "covered period" for loan forgiveness to be eight weeks commencing on the disbursement date. The Flexibility Act extended the covered period to 24 weeks. A borrower that received a PPP loan prior to June 5, 2020 may elect to use the 8-week or the 24-week covered period. All other borrowers must use the 24-week covered period.** However, as described in more detail below, the loan forgiveness amount cannot exceed the loan principal and may be reduced in the event the business has laid off employees or decreased their compensation during the covered period. **In addition, the SBA requires not more than 40% of the loan forgiveness amount can be attributable to non-payroll costs for a borrower to receive full forgiveness.**

When does the covered period begin?

Generally, the period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. Alternatively, a borrower may elect to calculate eligible payroll costs using the period that begins on the first day of their first pay period following their PPP loan disbursement date (the "Alternative Payroll Covered Period").

When must costs be incurred and/or paid to be eligible for loan forgiveness?

In general, payroll costs paid or incurred during the Covered Period (or the Alternative Payroll Covered Period) are eligible for forgiveness. Payroll costs are considered paid on the day paychecks are distributed. Payroll costs are incurred on the day the employee's pay is earned. Payroll costs incurred but not paid during the borrower's last pay period of the Covered Period (or Alternative Payroll Covered Period) are eligible for forgiveness if paid on or before the next regular payroll date.

Nonpayroll costs must be either (1) paid during the Covered Period or (2) incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period.

How do reductions in staffing affect the amount eligible for forgiveness?

The amount forgiven is reduced by multiplying the loan forgiveness amount (calculated as described above) by a quotient:

- the numerator of which is the average number of full-time employee equivalents (FTEs) per month employed during the covered period, and
- the denominator of which is the average number of FTEs per month employed from February 15, 2019 through June 30, 2019 or January 1, 2020 through February 29, 2020, or in the case of a seasonal employer, either of the two preceding methods or a consecutive 12-week period between May 1, 2019 and September 15, 2019, with the employer electing which period to use.

If you reduce the number of FTEs between February 15, 2020 and April 26, 2020 as compared to the number of FTEs on February 15, 2020, you may rehire the same number of FTEs not later than **the earlier of December 31, 2020 or the date the loan forgiveness application is submitted**, and thereby avoid application of the reduction to the amount of your loan forgiveness by reason of a reduction in the number of your employees during the Covered Period.

The SBA has granted de minimis exemptions from the reduction of loan forgiveness. Specifically, a borrower does not have to include any FTE reductions for the following scenarios: (1) if the borrower made a good-faith, written offer to rehire a previously laid-off employee, which was rejected by the employee; (2) if an employee during the covered period or the Alternative Payroll Covered Period (a) was fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours; and (3) if the borrower was unable to operate between February 15, 2020 and the end of the covered period at the same level of business activity as before February 15, 2020 due to compliance with worker or customer safety requirements related to COVID-19 established or issued between March 1, 2020 and December 31, 2020.

The average number of FTEs for purposes of the loan forgiveness reduction and rehiring is determined by calculating the average number of FTEs during each payroll period falling within a month.

How should a borrower calculate its number of FTE employees?

FTE employee means an employee who works 40 hours or more, on average, each week. To calculate the number of FTE employees, borrowers must document their average number of FTE employees during the Covered Period (or Alternative Payroll Covered Period) and their selected historical reference period. An employee who works 40 hours or more per week, on average, is treated as 1.0 FTE employee. The full-time equivalency of an employee who is paid for less than 40 hours per week, on average, can be calculated either (1) by dividing the hours worked per week, on average, by 40 and rounding to the nearest decimal or (2) as 0.5 of an FTE employee. Whichever method a borrower selects, it must apply the method consistently to all part-time employees for the Covered Period (or Alternative Payroll Covered Period) and the reference period.

How do reductions in compensation affect the amount eligible for forgiveness?

The amount forgiven is reduced by the amount of any reduction during the covered period in an employee's total salary or wages in excess of 25% of the total salary or wages paid to the employee during the most recent full quarter in which the employee was employed before the covered period. This only applies to employees earning no more than \$100,000, on an annualized basis, during any pay period in 2019.

If you employ tipped employees, you may receive forgiveness for additional wages paid to your tipped employees.

If you reduced the salary or wages of your employees between February 15, 2020 and April 26, 2020 as compared to their salaries or wages on February 15, 2020, you may restore their compensation before **the earlier of December 31, 2020 or the date the loan forgiveness application is submitted**, and thereby avoid application of the reduction to the amount of your loan forgiveness by reason of a reduction in salary or wages during the covered period.

How should borrowers account for the FTE reduction relative to the salary and wages reduction in loan forgiveness?

To avoid being doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is not attributable to the FTE reduction.

What is the general process to obtain loan forgiveness?

- (1) A borrower must complete and submit the Loan Forgiveness Application (SBA Form 3508 or the lender equivalent) to its lender. The application requires a borrower to provide certain documentation, which is detailed below.
- (2) The lender will issue a decision on your loan forgiveness within 60 days of receiving the complete application.
- (3) If the lender determines the borrower is entitled to loan forgiveness, the lender must request payment from the SBA at the time the lender issues its decision to the SBA. The SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to the SBA. If the SBA determines the borrower was ineligible for the PPP loan, the loan will not be eligible for loan forgiveness.

If only a portion of the loan is forgiven, or if the forgiveness request is denied, any remaining balance on the loan must be repaid by the borrower before the maturity of the loan.

When do I find out if my loan is forgiven?

The lender will issue a decision on your loan forgiveness within 60 days of receiving the complete application.

What documents must borrowers submit for PPP loan forgiveness?

When applying for loan forgiveness, the borrower will need to provide documentation verifying nearly every aspect of the Loan Forgiveness Application, such as:

- **bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees;**
- **tax forms, including payroll tax filings and state quarterly business and individual employee wage reporting and unemployment insurance tax filings;**
- **payroll receipts or other statements documenting the amount of employer contributions to employee health insurance and retirement plans (if the borrower included these payments in the forgiveness amount);**
- **documentation showing the average number of FTE employees per month during the applicable periods; and**
- **documentation evidencing the existence of nonpayroll costs prior to February 15, 2020 and payments of such costs during the Covered Period.**

A borrower will need to maintain all records relating to its PPP loan for at least 6 years after the loan is forgiven or repaid in full and allow the SBA to access such records. A borrower must maintain, but does not need to submit, documentation supporting the application of the FTE-based reduction and salary/hourly wage-based reduction safe harbors, as well as the PPP Schedule A Worksheet of the loan forgiveness application, which includes information needed to calculate the FTE-based reduction and the salary/hourly wage-based reduction, or its equivalent.

A borrower will need to certify on the Loan Forgiveness Application that the documentation is true and correct and that the amount of forgiveness requested was used for retaining employees and paying mortgage interest, rent, and utilities during the covered period.

Is the loan forgiveness treated as gross income for federal tax purposes?

No, the amount of the loan forgiveness is not included in gross income for federal tax purposes. **In addition, the Internal Revenue Service (“IRS”) declared that no deduction is allowed under the Internal Revenue Code for an expense**

that is otherwise deductible if the payment of the expense results in PPP loan forgiveness and the income associated with the forgiveness is excluded from gross income.

Will the SBA have recourse against my business for nonpayment?

If a borrower fails to repay a PPP loan and the lender receives payment from the SBA under the guarantee, the SBA will have a claim by subrogation against the business. Nevertheless, the SBA will not have recourse against a shareholder, member, or partner of a loan recipient for nonpayment except to the extent the loan was not used for the authorized purposes.

What if my loan has a remaining balance after application of forgiveness?

The SBA will continue to guarantee the remaining balance. Under the CARES Act, PPP loans will have a maximum maturity of up to 10 years from the date on which the borrower applies for loan forgiveness under Section 1106 of the CARES Act. **As noted above, for loans made before June 5, 2020, loan maturity is set at 2 years; however, borrowers and lenders may mutually agree to extend the maturity of such loans to 5 years. Following passage of the Flexibility Act, loans made on or after June 5, 2020 have a maturity of 5 years.**

Are there other considerations under the CARES Act that will impact the decision to request a loan and/or loan forgiveness?

An employer who receives a PPP loan is ineligible for the employee retention credit in Section 2301 of the CARES Act.

Applying for a PPP Loan

What is the process to apply for a loan through the PPP?

A small business should apply for a loan directly from any approved 7(a) lender. **A borrower must complete the PPP Application Form (SBA Form 2483) with the required payroll documentation, such as payroll processor records, payroll tax filings, or, for a sole proprietorship or independent contractor, Form 1099-MISC.**

How do I find an already approved 7(a) lender?

Lenders authorized to issue SBA 7(a) loans will be authorized to issue loans under the program. We recommend reaching out first to existing lenders to determine whether any are already approved 7(a) participants. A borrower can also contact its [local SBA office](#) to find a list of approved 7(a) lenders in their area. In addition, SBA maintains a [list](#) of the 100 most active SBA lenders in the country.

How does a loan get approved?

An approved 7(a) lender participating in the PPP will be authorized to make and approve these loans.

The lender may consider only whether the business (1) was in operation on February 15, 2020 and (2) had employees and paid them salaries and payroll taxes, or paid independent contractors as reported on a Form 1099-MISC. A borrower does not need to:

- demonstrate that it cannot obtain credit elsewhere;
- put up collateral; or
- make a personal guarantee.

Is the PPP “first come, first served?”

Yes.

Can an existing loan be refinanced as a PPP loan?

PPP loans may be used to refinance existing indebtedness to the same extent and subject to the same limitations as 7(a) loans. PPP loans may also be used to pay interest on debt obligations incurred before February 15, 2020. They may also be used to refinance an economic injury disaster loan (EIDL) made between January 31, 2020 and April 3, 2020.

EIDL and Emergency EIDL Grants

Economic Injury Disaster Loan (EIDL)

What is an EIDL?

Economic injury disaster loans (EIDL), like 7(a) loans, are a preexisting SBA program. An EIDL is a low-interest federal loan issued by the SBA to alleviate economic injury to small businesses or private nonprofit organizations experiencing injury.

What are the ordinary parameters for an EIDL?

An EIDL is a working capital loan of up to \$2 million that can be used to pay fixed debts, payroll, accounts payable, and other bills that could have been paid had the disaster not occurred. EIDLs are not meant for business expansion. Interest rates on EIDLs are 3.75% for small businesses and 2.75% for private nonprofit organizations. The maximum loan term is 30 years.

Generally, to be approved, a business must demonstrate:

- an acceptable credit history;
- an ability to repay the loan;
- location within a state or county that has received an economic injury disaster declaration;
- substantial economic injury as a result of the disaster;
- inability to obtain credit elsewhere;
- collateral for loans of more than \$25,000 (although the SBA often does not decline loans for such lack of collateral);
- a personal guarantee for loans of more than \$200,000; and
- documentation, including an SBA Loan Application, IRS Form 4506T, complete copies of recent federal income tax returns, schedule of liabilities, and personal financial statements for all owners.

What requirements for EIDLs does the CARES Act waive?

For any EIDL application resulting from COVID-19, the following requirements are waived:

- requests for personal guarantees on loans of not more than \$200,000, between January 31, 2020 and December 31, 2020;
- that the applicant have been in business for the 1-year period before the disaster; however, the CARES Act still requires the business have been in operation as of January 31, 2020;
- that the applicant be unable to obtain credit elsewhere;
- that the applicant provide the lender with tax returns; the lender may approve based solely on the applicant's credit score or other appropriate methods; and
- that the business must be located in a state or county that received an economic injury disaster declaration from the SBA.

Who is eligible for an EIDL?

Small businesses and small agricultural cooperatives that meet the applicable size standards for SBA and private nonprofit organizations are eligible for an EIDL. In addition, the CARES Act expands eligibility to include businesses with not more than 500 employees, sole proprietorships, independent contractors, cooperatives with not more than 500 employees, Employee Stock Ownership Plans with not more than 500 employees, and tribal small business concerns with not more than 500 employees.

Which nonprofits are eligible for EIDLs?

EIDLs are available to a much broader set of nonprofits than those eligible under the PPP. For the EIDL program, eligible “private non-profit organizations” include any entity exempt under section 501(c), including the trade associations, advocacy organizations, unions, and social clubs that are excluded from the Payroll Protection Program. The EIDL program also includes certain organizations tax-exempt under 501(d) (apostolic organizations) or 501(e) (cooperative hospital service organizations).

What is the operative date for determining the size status of a business’s eligibility for EIDL?

For concerns applying for disaster loan assistance, the size is determined as of January 31, 2020.¹⁰

How does my business apply for an EIDL?

A small business can apply for an EIDL by applying directly to the SBA [online](#), by mail, in-person, or on the phone. The SBA will disburse the funds within 5 days of receiving the executed loan closing documents.

Can a business receive both a PPP loan and an EIDL? What are the relevant considerations for deciding which type of loan is more appropriate?

Generally, a business can apply for loans under both the PPP and the EIDL program but must use the EIDL for a purpose other than covering payroll costs.

To determine whether to apply for a PPP loan or EIDL, businesses should consider the following:

- *Eligibility:* As described in detail in this Advisory, the eligibility requirements are somewhat different for each program.
- *Maximum Loan Amounts:* PPP loans are capped at \$10 million, with an applicant’s limit determined by a formula tied to payroll costs. **While EIDLs can be up to \$2 million, the SBA is currently capping EIDLs at \$150,000.**
- *Loan Forgiveness:* PPP loans may be eligible for loan forgiveness; EIDLs have no such feature. However, EIDL applicants may receive an emergency grant of up to \$10,000 that does not have to be repaid.
- *Maximum Maturity:* **PPP loans have a maturity of two or five years (depending on when the borrower received the loan), with no obligation to make payments under the loan until at least 10 months after the end of the loan forgiveness covered period.** EIDLs can have maturities up to 30 years. EIDL payments can also be deferred for up to a year; however, interest accrues during deferment periods.
- *Interest Rates:* PPP loan interest rates are set at 1%. The EIDL interest rates for COVID-19 are 3.75% for businesses and 2.75% for nonprofit organizations.

¹⁰ The SBA’s pre-CARES Act rules for when it determines the size of an applicant are in [13 CFR 121.302](#). Note that some of these rules are adjusted by the CARES Act.

Emergency EIDL Grant

What if a business needs money immediately and cannot wait for the SBA to process its EIDL application?

Recognizing that the EIDL approval process can be as long as a month, the CARES Act provides that businesses whose applications are submitted between January 31 and December 31, 2020 can receive an advance of up to \$10,000 within 3 days after the SBA receives the application. These advances are available only for applications related to COVID-19. To be eligible for an emergency EIDL grant, an applicant must be eligible to receive an EIDL and have been in operation since January 31, 2020, when the COVID-19 public health crisis was announced. Businesses can use the advance for any allowable EIDL purpose under current law, including:

- providing paid sick leave to employees unable to work due to COVID-19;
- maintaining payroll;
- meeting increased costs due to interrupted supply chains;
- making rent or mortgage payments; and
- repaying obligations that cannot be met due to revenue losses.

Does a business have to repay the \$10,000 advance?

No, the applicant will not be required to repay the \$10,000 advance, even if the SBA ultimately denies the application for an EIDL.

What if a business receives an EIDL or the \$10,000 advance and then is approved for a PPP loan?

The outstanding amount of an EIDL made after January 31, 2020 and up to the date on which PPP loans are made available may be refinanced into a PPP loan. In addition, any emergency EIDL advance received by a borrower who subsequently receives a PPP loan will be subtracted from the calculation of the loan forgiveness amount referred to above.

FOR LENDERS

Becoming a Lender

Why should I become an SBA 7(a) approved lender?

Among additional benefits, the SBA provides a streamlined process for its certified partners to make loans under the 7(a) program, and the SBA guarantees those loans. For loans issued under the PPP, the SBA guarantees 100% of the loan; **on April 2, 2020, the SBA published the First Interim Final Rule implementing the PPP. Pursuant to the First Interim Final Rule, all SBA 7(a) lenders are automatically approved to make Paycheck Protection Loans on a delegated basis.**¹¹

What are the eligibility requirements to become an approved 7(a) lender?

SBA 7(a) approved lenders must:

- have a continuing ability to evaluate, process, close, disburse, service, and liquidate small business loans;
- be open to the public to issue loans (and not be a financing subsidiary, engaged primarily in financing the operations of an affiliate);

¹¹ Small Business Administration Interim Final Rule (April 2, 2020), pg. 19.

- have continuing good character and reputation, and otherwise meet and maintain the ethical requirements¹²;
- be supervised and examined by a state or federal regulatory authority, satisfactory to the SBA; and
- maintain satisfactory performance, as determined by the SBA through on-site review/examination assessments, historical performance measures (such as default rate, purchase rate, and loss rate), and loan volume to the extent that it affects performance measures.¹³

For more information, or to begin the application process, the SBA directs interested lenders to contact an SBA lender relations specialist at their local SBA district offices. Local district offices can be found at <https://www.sba.gov/local-assistance/find/>

Can only Small Business Administration 7(a) approved lenders participate in the PPP?

No. While SBA 7(a) lenders are automatically approved to issue Paycheck Protection Loans, the First Interim Final Rule establishes the parameters for non-SBA 7(a) lenders to issue loans under the PPP.

What are the eligibility requirements to lend under the PPP?

SBA 7(a) lenders are automatically approved to lend under the PPP. **However, the SBA has determined the following types of lenders may also lend under the PPP:**

- any federally insured depository institution or any federally insured credit union;
- any Farm Credit System institution (other than the Federal Agricultural Mortgage Corporation), as defined in 12 U.S.C. § 2002(a),¹⁴ that applies the requirements under the Bank Secrecy Act and its implementing regulations (collectively, “BSA”) as a federally regulated financial institution, or functionally equivalent requirements that are not altered by this rule;
- any depository or non-depository financing provider that: (1) originates, maintains, and services business loans or other commercial financial receivables and participation interests; (2) has a formalized compliance program; (3) applies the requirements under the BSA as a federally regulated financial institution, or the BSA requirements of an equivalent federally regulated financial institution; (4) has been operating since at least February 15, 2019; (5) has originated, maintained, or serviced more than \$50 million in business loans or other commercial financial receivables during a consecutive 12 month period in the past 36 months, or is a service provider to any insured depository institution that has a contract to support such institution’s lending activities in accordance with 12 U.S.C. § 1867(c); and (6) is in good standing with the appropriate Federal banking agency; and
- a non-bank lender that: (1) has originated, maintained, or serviced more than \$10 million in business loans or other commercial financial receivables during a 12-month period in the past 36 months, if the non-bank lender is (1) a community development financial institution (other than a federally insured bank or federally insured credit union) or (2) a majority minority-, women-, or veteran/military-owned lender.

Institutions that meet the above mentioned criteria, as promulgated by the First Interim Final Rule, will be automatically qualified under delegated authority by the SBA unless they are currently designated in Troubled

¹² As identified in 13 CFR Part 120.140.

¹³ 13 CFR § 120.410.

¹⁴ Farm Credit Banks, the bank for cooperatives, Agricultural Credit Banks, the Federal Land Bank Associations, the Federal Land Credit Associations, the Production Credit Associations, the agricultural credit associations, the Federal Farm Credit Banks Funding Corporation, the Federal Agricultural Mortgage Corporation, service corporations established pursuant to 12 U.S.C. § 2211, and such other institutions as may be made a part of the Farm Credit System, all of which shall be chartered by and subject to regulation by the Farm Credit Administration.

Condition by their primary federal regulator or are subject to a formal enforcement action by their primary federal regulator that addresses unsafe and unsound lending practices. Further, the CARES Act provides that lenders may participate in the PPP only if participation will not affect the “safety and soundness” of the institution or lender.

What preferences exist for community banks?

The PPP and Health Care Enhancement Act, which became law on April 24, 2020, creates two set-asides. One set-aside is for \$30 billion in loan guarantees for loans made by:

- Insured depository institutions with consolidated assets of not less than \$10 billion and less than \$50 billion, and
- Credit unions with consolidated assets of not less than \$10 billion and less than \$50 billion.

The second set-aside is for \$30 billion in loan guarantees for loans made by:

- Community Financial Institutions, defined as community development financial institutions, minority depository institutions, certified development companies, and microloan intermediaries;
- Insured depository institutions with consolidated assets of less than \$10 billion; and
- State or federal credit unions with consolidated assets of less than \$10 billion.

How do you become a PPP lender?

New lenders that are federally insured depository institutions, federally insured credit unions, or Farm Credit System institutions will need to submit SBA Form 3506 and the relevant attachments to DelegatedAuthority@sba.gov to apply. Non-bank and non-insured depository institution lenders will submit SBA Form 3507 and the relevant attachments to NFRApplicationForPPP@sba.gov.

While the Treasury Department writes new regulations under the CARES Act, do the existing regulations for SBA loans apply?

Yes, except where the CARES Act specifically says otherwise.

Much of Title I of the CARES Act amends portions of the Small Business Act, 15 U.S.C. § 636 et seq. The portions of the Small Business Act, and its accompanying regulations, that are unaffected by these changes will remain in effect.

The CARES Act also direct the SBA to issue certain guidance and new regulations within 15 days of the enactment of the CARES Act to effectuate its provisions. **In the First Interim Final Rule for the PPP, the SBA has now confirmed that the requirements of the PPP will temporarily supersede any conflicting Loan Program Requirements.**¹⁵

Does a lender still need to provide TDR disclosures?

An insured depository institution or an insured credit union that modified a loan because of COVID-19-related difficulties in a troubled debt restructuring on or after March 13, 2020, is not required to comply with the Financial Accounting Standards Board Accounting Standards Codification Subtopic 310-40 (‘Receivables - Troubled Debt Restructurings by Creditors’). This disclosure relief ends when a federal banking agency or the National Credit Union Administration Board determines it is appropriate.

¹⁵ “Loan Program Requirements” are requirements imposed on lenders by statute, SBA regulations, agreements that lenders have executed with the SBA, SBA Standard Operating Procedures (SOPs), official SBA notices and forms applicable to the 7(a) and 504 loan programs, and loan authorizations issued by the SBA. 13 CFR 120.10.

What form does a lender need to submit for a PPP loan?

The lender must submit SBA Form 2484 (PPP Lender's Application for 7(a) Loan Guaranty) electronically.

What are the ongoing reporting requirements for lenders of PPP loans?

The lender has until the later of (1) May 29, 2020 or (2) 10 calendar days after disbursement or cancellation of a PPP loan to electronically submit [SBA Form 1502](#) reporting information to the SBA. Thereafter, lenders must submit PPP loan information to the SBA on a monthly basis. The SBA published a [Procedural Notice](#) informing lenders of the reporting process for PPP loans.

What do lenders have to do in terms of loan underwriting for the PPP?

Each lender shall:

- confirm receipt of borrower certification contained in the PPP Application form issued by the Administration;
- 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;
- 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
- follow applicable BSA requirements.¹⁶¹⁷

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

Are there guarantee fees?

No, the SBA waives all guarantee fees, including the upfront and annual servicing fees.

Compensation from the Federal Government

Will I be compensated for processing loans?

The SBA will pay authorized lenders a processing fee at the following rates for PPP loans:

- 5% for loans up to \$350,000;
- 3% for loans \$350,001 - \$1,999,999; and
- 1% for loans \$2 million and more.

The fee is based on the balance of the loan outstanding at the time of full disbursement of the loan. The SBA will initiate the process of paying the processing fee when the lender successfully reports to the SBA that a PPP loan

¹⁶ However, 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.

¹⁷ Federally insured depository institutions and federally insured credit unions should continue to follow their existing BSA protocols when making PPP loans to either new or existing customers who are eligible borrowers under the PPP. 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. **Entities that are not presently subject to the requirements of the BSA should, prior to engaging in Paycheck Protection lending activities, including making PPP loans to either new or existing customers who are eligible borrowers under the PPP, establish an anti-money laundering compliance program equivalent to that of a comparable federally regulated institution. Depending upon the comparable federally regulated institution, such a program may include a customer identification program, which includes identifying and verifying their PPP borrowers' identities, and, if that PPP borrower is a company, following any applicable beneficial ownership information collection requirements.**

has been fully disbursed using SBA Form 1502. The SBA must pay the processing fee to the lender within 5 days of loan disbursement. **Lenders may not collect any fees from the applicant.**

Note lender processing fees are subject to claw back if the SBA determines a borrower was ineligible for a PPP loan or if a lender has not fulfilled its obligations under the CARES Act and PPP regulations.

Can the loan granted under the PPP be forgiven?

In general, yes. The principal amount of the loan may be forgiven to the extent that it is used during the Covered Period following its origination for payroll costs (**at least 60%**), interest on mortgage obligations incurred before February 15, 2020, rent payments for leases in force before February 15, 2020 and utility payments for service which began before February 15, 2020.

When will the SBA Administrator pay lenders for the forgiven portion of a PPP loan?

In general, the SBA Administrator will pay the amount forgiven, plus interest, not later than 90 days after the date on which the forgiven amount is determined. However, lenders may report in advance to the SBA Administrator the expected amount to be forgiven, and the SBA Administrator will purchase the expected forgiveness amount within 15 days of that report, as if the amount were the principal amount of a loan guaranteed under Section 7(a) of the Small Business Act.

What should a lender review for PPP loan forgiveness?

A lender shall:

- (1) confirm receipt of the borrower certifications in the Loan Forgiveness Application form;**
- (2) confirm receipt of the documentation borrowers must submit to aid in verifying payroll and nonpayroll costs;**
- (3) confirm the borrower's calculations on the Loan Forgiveness Application by reviewing the documentation submitted with the application; and**
- (4) confirm the borrower made the calculation correctly to determine whether at least 60% of the potential forgiveness amount was used for payroll costs.**

While lenders are expected to perform a good-faith review in a reasonable time of the borrower's calculations and supporting documents, the borrower is responsible for providing an accurate calculation of the loan forgiveness amount.

When do I need to issue a decision about loan forgiveness?

Lenders must issue decisions on the loan forgiveness within 60 days of receiving the borrower's complete application.

What must the lender submit to the SBA when approving a loan forgiveness application?

The lender must submit the PPP Loan Forgiveness Calculation Form, Schedule A of the Loan Forgiveness Application, and the optional PPP Borrower Demographic Information Form (if provided by the borrower). The lender must confirm the information accurately reflects the lender's records for the loan. If the lender determines the borrower is eligible for partial or full forgiveness, the lender must request payment from the SBA at the time the lender issues its forgiveness decision to the SBA.

If the lender issues a decision to the SBA that the borrower is not entitled to any loan forgiveness, the lender must provide a reason for its denial, along with the appropriate documents.

Will I be held harmless for my decision to forgive a loan?

In general, yes. The SBA, in the First Interim Final Rule, will allow lenders to rely on certifications of the borrower 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. Lenders must comply with the applicable lender obligations set forth in the First Interim Final Rule, but will be held harmless for borrowers' failure to comply with program criteria.

Does a borrower have recourse if the lender denies the loan forgiveness application?

The SBA reserves the right to review the lender's decision to deny a borrower's loan forgiveness application. Within 30 days of notice from the lender, a borrower may request that the SBA review the lender's decision.

How does a loan sold on the secondary market affect loan forgiveness?

The CARES Act recognizes there is a secondary market for 7(a) loans and provides that the loan purchaser is responsible for dealing with loan forgiveness issues as if it were the originator. **Lenders participating in the PPP may sell all their interest in PPP loans to other participating lenders. A secondary market sale of a PPP loan does not require the SBA's prior consent. A PPP loan sold into the secondary market is 100% guaranteed by the SBA, even if sold at a premium or a discount to par value.**

When a lender sells all its interest in a PPP loan to another participating lender, the SBA will send the processing fee to the originating PPP lender. The lender making the disbursement is responsible for completing and submitting the initial 1502 report. The purchasing lender will be responsible to the SBA for all servicing actions, including monthly 1502 reporting and requests for advance purchases and loan forgiveness, and will be the lender eligible for guarantee payments in respect of a PPP loan.

To help our clients navigate the coronavirus (COVID-19) crisis, Arnold & Porter has established a [Task Force](#) covering a wide range of issues and challenges. Subscribe to our [Coronavirus \(COVID-19\)](#) mailing list to receive our latest client Advisories and register for upcoming webinars.

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