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**Huddle: PPP Edition Top Submitted FAQs April 15, 2020**

\*All the information contained in this FAQ 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 22, 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.

**Q1: Do PPP loans count towards a borrower’s in-bank Legal Lending Limit (i.e.—bank would need to participate the loan out or send the loan elsewhere?)**

**A1:**  At this time, it remains unclear. The OCC has the allowance to make this a national exemption but it has not done so currently. Some state departments of banking have made this exception for state-chartered institutions (i.e.- Massachusetts) but no guidance has been issued on a national level. Conservatively the bank should be considering or at least aware and tracking of individual legal lending limits if outside the scope of state guidance until the OCC exercises its allowance.

**Q2: PPP: The owner of a company does not include himself in his payroll but takes disbursements as the company as excess funds. Can he apply for a loan?**

**A2:** Unfortunately, this remains uncertain. It hinges on whether or not the owner draws are considered wages or not. It ultimately would depend on whether the part of the draw paid is subject to self-employment taxes. Depending on business structure, affiliation rules may also become applicable as well.

**Q3: If a partnership agreement indicates that the partners of a law firm operate as an independent contractor and have their own employees paid from the law firm’s accounts, and partners applied on their own, would they be eligible? If not, what if they have already been approved for PPP and are pending funding?**

**A3:** Potentially, yes, this might be permissible under the SBA FAQ guidance but it remains unclear. Partners in a service partnership may be entitled to contain a loan to cover their own payroll costs—eligible self-employed individuals who regularly carry on any trade or business within the meaning of section 1402 of the IRC and are subject to self-employment meet the current CARES requirements. If the partners in the law firm are subject to self-employment tax, they’d be eligible self-employed individuals—but it would appear that only the equity partners would benefit, not the W-2 wage earners.

**Q4: Is a self-employed individual without employees required to initial the first Certification on the Borrower Application: 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(s) 1099-MISC.**

**A4:** There has been no guidance that any section of the attestation/certification can be left blank. Conservatively, the borrower should be attesting to all points allotted.

**Q5: If the stimulus check comes in and the account is closed due to charge-off, do we have the right to offset? What about is the account is open, but currently negative status? Can we collect our negative amount from the stimulus check?**

**A5:** There is unfortunately not enough guidance to determine whether this is permissible or not. Banks need to consider reputational risks and the spirit and intent of the CARES Act which is to assist in this time of crisis. In regard to garnishment, Attorney Generals and Senators are petitioning for stimulus checks to be free from garnishment except for child support, like social security checks. The CARES Act already prohibits the checks from being garnished past due student loan payments.

Although it is not considered official guidance from the Treasury, on a recent call with the Treasury and the ABA (April 17, 2020), the Treasury also indicated this.

For reference:

“(e) Suspending Involuntary Collection.—During the period in which the Secretary suspends payments on a loan under subsection (a), the Secretary shall suspend all involuntary collection related to the loan, including—

(1) a wage garnishment authorized under section 488A of the Higher Education Act of 1965 ([20 U.S.C. 1095a](http://uscode.house.gov/quicksearch/get.plx?title=20&section=1095a)) or section 3720D of title 31, United States Code;

(2) a reduction of tax refund by amount of debt authorized under section 3720A of title 31, United States Code, or [section 6402(d)](http://uscode.house.gov/quicksearch/get.plx?title=26&section=6402) of the Internal Revenue Code of 1986;

(3) a reduction of any other Federal benefit payment by administrative offset authorized under section 3716 of title 31, United States Code (including a benefit payment due to an individual under the Social Security Act or any other provision described in subsection (c)(3)(A)(i) of such section); and

(4) any other involuntary collection activity by the Secretary.”

<https://www.congress.gov/bill/116th-congress/house-bill/748/text?q=%7B%22search%22%3A%5B%22Coronavirus+Aid%2C+Relief%2C+and+Economic+Security+Act%22%5D%7D&r=2&s=3#H68DBEB55B32A4B16B9DB8FA6AF5C5F23>

And

“(d) Exception From Reduction Or Offset.—Any credit or refund allowed or made to any individual by reason of [section 6428](http://uscode.house.gov/quicksearch/get.plx?title=26&section=6428) of the Internal Revenue Code of 1986 (as added by this section) or by reason of subsection (c) of this section shall not be—

(1) subject to reduction or offset pursuant to section 3716 or 3720A of title 31, United States Code,

(2) subject to reduction or offset pursuant to subsection (d), (e), or (f) of [section 6402](http://uscode.house.gov/quicksearch/get.plx?title=26&section=6402) of the Internal Revenue Code of 1986, or

(3) reduced or offset by other assessed Federal taxes that would otherwise be subject to levy or collection.”

<https://www.congress.gov/bill/116th-congress/house-bill/748/text#H7721427F994C4134B0507478275D8886>

**Q6: How is the stimulus different than a regular direct deposit tax refund?**

**A6:** Although it is not considered official guidance from the Treasury, on a recent call with the Treasury and the ABA (April 17, 2020), the Treasury indicated that these are not currently protected funds. If the AGs are successful in their request, then they would be protected from garnishment though, correct.

**Q7: We understand PPP loans gives the bank CRA credit, but does the bank report at funding or at the repayment period?**

**A7:** CRA requires that community development loans be reported when originated or purchased during the prior calendar year. There has been no indication that PPP loans are to be treated any differently, if the loan itself is considered CRA-reportable.

**Q8: Does the USAA court decision change banking ACH guidance?**

**A8:** Without additional information regarding this question, it’s important to remember what USAA fined for: the CFPB alleged that USAA failed to properly resolve errors, failed to honor members’ requests to stop preauthorized payments through EFTs, and that it reopened accounts without members’ authorization and without notifying them. The consent order noted that USAA had bene addressing these issues, including changing some policies and procedures in 2015 and 2016 but restitution is a requirement of the consent order.

With that being said, it reinforces the need to comply with regulatory requirements of EFT transactions (Regulation E in particular), account agreements as well as proper authorization and notification regarding closed accounts. It is important to note that banks are not to be reopening closed accounts for stimulus checks unless authorized by your account agreements as permissible, or upon the expressed written consent of your customer (prior or current). This has been echoed in conversations with the Treasury and ABA in the April 17, 2020 call.

**Q9: Would a statutory employee be eligible for PPP as self-employed or would the company that provided their W-2 need to file?**

**A9:**  The answer is possibly. Per the IRS definition:

If workers are independent contractors under the common law rules, such workers may nevertheless be treated as employees by statute (statutory employees) for certain employment tax purposes if they fall within one of the following four categories and meet the three conditions described under Social Security and Medicare Taxes, below:

* A driver who distributes beverages (other than milk) or meat, vegetable, fruit or bakery products; or who picks up and delivers laundry or dry cleaning, if the driver is your agent or is paid on commission;
* A full-time life insurance sales agent whose principal business activity is selling life insurance or annuity contract, or both, primarily for one life insurance company;
* An individual who works at home on materials or goods that you supply and that must be returned to your or to a person you name, if you also furnish specifications for the work to be done;
* A full-time traveling or city salesperson who works on your behalf and turns in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer’s business operation. The work performed for you must be the salesperson’s principal business activity.

Refer to the **Salesperson** section located in [Publication 15-A, Employer's Supplemental Tax Guide](https://www.irs.gov/forms-pubs/about-publication-15-a) for additional information.

**Social Security and Medicare Taxes**

Withhold Social Security and Medicare taxes from the wages of statutory employees if all three of the following conditions apply.

* The service contract states or implies that substantially all the services are to be performed personally by them.
* They do not have a substantial investment in the equipment and property used to perform the services (other than an investment in transportation facilities).
* The services are performed on a continuing basis for the same payer.

Resource: <https://www.irs.gov/businesses/small-businesses-self-employed/statutory-employees>

**Q10: Can we get clarification for C/A FAQ Question #9 on the applicability for use of K-1’s for LLCs for justification of PPP loan amounts and how it will be reviewed for forgiveness?**

**A10:** The Interim Final Rule [Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans](https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf) clarified that individuals treated as partners may not submit a separate PPP loan application as an “eligible self-employed individual.” K-1 service partners’ income must be reported as a payroll cost, up to $100,000 annualized, on a PPP loan application filed by and on behalf of the partnership. At this time, additional Treasury or SBA guidance on forgiveness calculations to address these updates has not been addressed.

**Q11: How important is it ensuring the application/approval name(s) match the legal entity exactly—down to the punctuation of LLC versus L.L.C.?**

**A11:** The bank should be following your internal policies when it comes to verifying and matching of documentation received and the borrower’s information. There are potentials risks with lacking this verification. Specificity is up to bank risk tolerance thresholds (i.e.- in regard to LLC versus L.L.C. requirements).

**Q12: Is there any information available for institutions experiencing an applicant who has certified, produced all information, but decided against proceeding at the last minute before closing?**

**A12:**  This would just either be a withdrawn (if no final approval has been made) or an approved not accepted application and you would document as such. The bank would not fund the loan and you would close the loan file out upon the borrower’s request, coding appropriately and according to bank internal procedures. It is unclear whether or not the bank needs to do any additional notification requirements in regard to the SBA at this time.

**Q13: As Reg B applies to all SBA PPP loans, are FI’s running into trouble meeting the 30th day deadline due to COVID-19 related staff decreases? Has there been any guidance from the regulators indicated some relief in this requirement?**

**A13:** Yes, everyone is starting to grapple with this at this point. Technically, Reg. B has a pretty hardline 30-day requirement: <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1002/9/> with no specific exceptions or concessions mentioned. A lot of financial institutions are planning to hold off on sending adverse action notices until toward the end of the 30-day period, in case Congress reauthorizes more funding soon - but banks are free to technically just deny now. Compliance Alliance is also generally suggesting including extra information with the bank's notices, like on a cover letter, to explain the unique circumstances and inform applicants to watch for increased funding, additional messaging from the bank, alternative loans the bank may be offering, etc. if the bank decides to send an adverse action notice.