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**Huddle: PPP Edition Top Submitted FAQs April 8, 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 14, 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: Best practice recommendation—Use the note as is, mark through the invalid items/requirements or use the bank’s own note?**

**A1:** The bank is free to develop their own promissory note or to use the SBA’s Promissory Note Sample found here: <https://content.sba.gov/sites/default/files/2020-04/040720note.pdf>. It is the 2002 Form 147 Note that was not designed specifically for PPP loans within the Program’s parameters. It is mentioned that the bank is free to use their own forms and there’s been no mention of this form providing any bank’s a safe harbor. But the issue with the note is that several parts are in direct violation of the PPP, and the instructions to the note state that the note cannot be altered.  There is a savings clause but it doesn’t change the fact that the note was released with blatant PPP violations.  Financial institutions can choose to use their own notes or conservatively, should be awaiting guidance from the SBA on how to proceed with the SBA Promissory Note Sample. If the only option is the use the SBA’s Sample Note, a best practice recommendation is to strike through any non-compliant provisions with the borrower, having them initial those changes. It is important to make sure the borrower is educated as to why these are being removed and that the true Program’s parameters are clearly documented on the Note in the applicable sections.

**Q2: Do you think the PPP will be amended to extend or change the 8-week period for retail businesses or restaurants that aren’t able to rehire their full staff in 8 weeks due to restrictions by the government? For examples, restaurants can’t rehire people until dine-in is allowed again and that may not be for 8-weeks. Not sure how this will work for those businesses.**

**A2:** The FAQ released 4/8 by SBA addresses the 8-week period here to address situations like this:

20. Question: The amount of forgiveness of a PPP loan depends on the borrower’s payroll costs over an eight-week period; when does that eight-week period begin? Answer: The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.

Resource: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequenty-Asked-Questions.pdf?utm_campaign=NEWSBYTES-20200408&utm_medium=email&utm_source=Eloqua>

**Q3: Can our insiders go to another bank and get a PPP?**

**A3:** It is acceptable and highly recommended that bank insider’s go to another institution where there is a reciprocal agreement to extend PPP loans to each other’s insiders per Regulation O.

**Q4: If we can lend to insiders, does the SBA guarantee allow it to be removed Regulation O limits on aggregate indebtedness?**

**A4:** No—all of Regulations O’s requirements are applicable to PPP loans. The CARES Act nor the implementing regulations directly prohibit bank insiders from participating in the Paycheck Protection Program--however, one of the requirements of the PPP is compliance with the SBA's 13 CFR 120.110 and Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2:

*How do I determine if I am ineligible?
Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA’s Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations authorized under the Act are eligible. (SOP 50 10 can be found at* [*https://www.sba.gov/document/sop50-10-5-lender-development-company-loan-programs*](https://www.sba.gov/document/sop50-10-5-lender-development-company-loan-programs)*)*
Resource: <https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf>

In these citations, you'll note that there is a fairly broad restriction on this:

*III. INELIGIBLE TYPES OF BUSINESSES A. The Lender must determine whether the Applicant is one of the types of businesses listed as ineligible in SBA regulations (13 CFR § 120.110). Certain business types appearing on this list may be eligible under limited circumstances, as discussed below.*

*14. Equity Interest by Lender or Associates in Applicant Concern (13 CFR § 120.110(o))*
*a) A Lender or any of its Associates, may not obtain an equity interest, either directly or indirectly, in the Applicant.*
*b) The only exception is when the Associate of the Applicant is a Small Business Investment Company (SBIC), in which case the requirements of 13 CFR § 120.104 apply. See also 13 CFR § 120.140 for a list of ethical requirements that apply to Lenders.*
Resource: <https://www.sba.gov/sites/default/files/2017-10/SOP%2050%2010%205%28J%29_FINAL_.pdf>

*"§120.110   What businesses are ineligible for SBA business loans?*

*The following types of businesses are ineligible:*
*...*
*(o) Businesses in which the Lender or CDC, or any of its Associates owns an equity interest;"*
Resource: <https://www.ecfr.gov/cgi-bin/text-idx?SID=40c56d244eaa72026eaf7b8c125bb7ec&mc=true&node=pt13.1.120&rgn=div5#se13.1.120_1110>

*Associate. (1) An Associate of a Lender or CDC is:*
*(i) An officer, director, key employee, or holder of 20 percent or more of the value of the Lender's or CDC's stock or debt instruments, or an Agent (as defined in §103.1 of this chapter) involved in the loan process; or*
*(ii) Any entity in which one or more individuals referred to in paragraphs (1)(i) of this definition or a Close Relative of any such individual owns or controls at least 20 percent.*
Resource: <https://www.ecfr.gov/cgi-bin/text-idx?SID=40c56d244eaa72026eaf7b8c125bb7ec&mc=true&node=pt13.1.120&rgn=div5#se13.1.120_1110>

That is not to say, assuming the insider is not ineligible, that they cannot apply for PPP loan at another institution.

 **Q5: So, one definition for calculating eligibility and one for calculating maximum loan amount, correct?**

**A5:** SBA’s April 8 FAQ states that for determining payroll costs for purposes of the maximum loan amount, allowable uses of a PPP loan and for the amount of a loan that may be forgiven, it shall be on a gross basis:

16. Question: How should a borrower account for federal taxes when determining its payroll costs for purposes of the maximum loan amount, allowable uses of a PPP loan, and the amount of a loan that may be forgiven?

Answer: Under the Act, payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee’s and employer’s share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer’s share of payroll tax. For example, an employee who earned $4,000 per month in gross wages, from which $500 in federal taxes was withheld, would count as $4,000 in payroll costs. The employee would receive $3,500, and $500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the $4,000 in wages are excluded from payroll costs under the statute.2

2 The definition of “payroll costs” in the CARES Act, 15 U.S.C. 636(a)(36)(A)(viii), excludes “taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period,” defined as February 15, 2020, to June 30, 2020. As described above, the SBA interprets this statutory exclusion to mean that payroll costs are calculated on a gross basis, without subtracting federal taxes that are imposed on the employee or withheld from employee wages. Unlike employer-side payroll taxes, such employee-side taxes are ordinarily expressed as a reduction in employee take-home pay; their exclusion from the definition of payroll costs means payroll costs should not be reduced based on taxes imposed on the employee or withheld from employee wages. This interpretation is consistent with the text of the statute and advances the legislative purpose of ensuring workers remain paid and employed. Further, because the reference period for determining a borrower’s maximum loan amount will largely or entirely precede the period from February 15, 2020, to June 30, 2020, and the period during which borrowers will be subject to the restrictions on allowable uses of the loans may extend beyond that period, for purposes of the determination of allowable uses of loans and the amount of loan forgiveness, this statutory exclusion will apply with respect to such taxes imposed or withheld at any time, not only during such period.

Resource: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequenty-Asked-Questions.pdf?utm_campaign=NEWSBYTES-20200408&utm_medium=email&utm_source=Eloqua>

 **Q6: Could you please specifically indicate which sections in the SBA Note violate the PPP?  We are trying to finalize our PPP note, and would be helpful to know which areas are in violation so we confirm we are addressing the issues.**

**A6:** While Compliance Alliance cannot provide guidance on the specifics of a note itself, it is important to remember that the PPP’s parameters must be included accurately on the note, as well as Program prohibitions and restrictions. Those are as follows:

Loan Terms:

* Maximum loan amount of $10 million- or 2.5-times borrower’s average monthly payroll costs, whichever is less (capping salary for employee making more than $100,000);
* First come, first served loans offered until June 30, 2020 or until Program runs out of funds or is not extended;
* All loans will have a 1% interest rate
* All loans will have a 2-year term
* All loans are 100% guaranteed by the SBA
* Loan payments may be deferred for up to 6 months
* Loan is for payroll costs, mortgage interest calculations, rent obligations, utilities and any other interest payment on debt obligations before February 15, 2020.
* SBA requires 75% of the loan to be used for payroll costs (as defined in the Interim Final Rule), while the remaining 25% can be used for other expenses.
	+ Funds used for purposes other than those outlined above must be repaid by the borrower.

Prohibitions:

* No personal guarantees will be required
* No collateral will be required
* No up-front guarantee fee payable to SBA by borrower;
* No lender’s annual service fee (“on-going guaranty fee”) payable to SBA;
* No subsidy recoupment fee;
* No fee payable to SBA for any guaranty sold into secondary market
* Agent fee must be paid by the lender

Resource: <https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf>

 **Q7: Can an SBA - PPP loan customer park the loan proceeds in a short-term CD?**

**A7:** The key to this question is whether the bank is requiring the borrower to open a CD account to retrieve the funds—the conservative answer to that question is no, as this would be in violation of the “no collateral” requirement. Additionally, there are the considerations of the more than 6-withdrawal restrictions as well as CD terms and conditions that could prohibit the use of all of the funds, or at a minimum, be charging a fee for access, which again, conservatively, appears to violate the Final Rule in regards to fees and collateral requirements.

Additionally, if the borrower is putting the funds in the CD, they are not being used for payroll purposes, which is the intent of the PPP. This either leads to no forgiveness at best, or possible misuse at worse: “If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud.”

 **Q8: If there is an existing account (the business' operating account) and not a specific segregated or control account where the loan proceeds are credited, do you still have to waive the maintenance fees/service charges on that account?**

**A8:** Conservatively, no fees should be charged on PPP loans. It would be an assumption of risk banks would need to consider if applying fees as there is no additional guidance from the SBA. With that being said, how to achieve that for those accounts opened prior to the PPP where funds will be distributed is a bank procedural decision. In this specific scenario, it is the customer’s choice on where to place those funds, so risk should be very low if the bank was not the one also issuing the PPP loan proceeds.

 **Q9: Will PPP loans need to be included in a bank's lending limit authority to one borrower?**

**A9:** Per FDIC guidance:

Will legal lending limits apply to SBA PPP loans?

Generally, the portion of a loan guaranteed by a U.S. government agency is excluded when calculating legal lending limits. Reviewing applicable state laws regarding legal lending limitations would enable financial institutions to confirm the most accurate method for determining legal lending limits.

Resource: <https://www.fdic.gov/coronavirus/smallbusiness/faq-sb.pdf>

 **Q10: These are 24-month notes.  Do the payments start on the 7th month and then run for 24 months from them (30-month note?) or payments start on 7th month and they pay for 18 months (24-month total note)?**

**A10:** PPP loans are required to have a two-year term (so 24-month’s total note). Deferment period does not extend the note’s term.

 **Q11: If a deposit customer gets a PPP loan at another bank and funds are deposited into their existing bank account at our bank, do we still have to waive the fees on that deposit account even though we did not do the PPP loan?**

 **A11:** This is actually not addressed in the Final Rule or the PPP. Conservatively, if your bank was not the one issuing the PPP loan, those requirements may not apply to you.

 **Q12: What is the risk with accepting a digital or electronic signature for beneficial ownership?**

**A12:** For beneficial ownership, there is not a specific prohibition in the Rule from obtaining an electronic signature rather than obtaining a "wet" signature on the form.

 **Q13: Are there any requirements or things to look out for HELOC deferrals?**

**A13:** Any restrictions are going to depend on your state’s statutes and requirements for HELOCs. Always consult bank counsel for additional state specific guidance.

 **Q14: If a customer doesn't have 12 months’ worth of wages, can they qualify with just 9 months?**

**A14:** The April 8, 2020 SBA FAQ #14 addresses this issue:

14. Question: What time period should borrowers use to determine their number of employees and payroll costs to calculate their maximum loan amounts?

Answer: In general, borrowers can calculate their aggregate payroll costs using data either from the previous 12 months or from calendar year 2019. For seasonal businesses, the applicant may use average monthly payroll for the period between February 15, 2019, or March 1, 2019, and June 30, 2019. An applicant that was not in business from February 15, 2019 to June 30, 2019 may use the average monthly payroll costs for the period January 1, 2020 through February 29, 2020. Borrowers may use their average employment over the same time periods to determine their number of employees, for the purposes of applying an employee-based size standard. Alternatively, borrowers may elect to use SBA’s usual calculation: the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months).