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**The CARES Act: Paycheck Protection Program Webinar FAQ and Answers**

\*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: Do you know with the CARES Act is there any issue that you would see for any loans that are dated Friday April 3rd, but the financial institution hadn’t received an SBA approval until Saturday, April 4th?**

**A:** There unfortunately is no certainty with this aspect of the Program, which is one of the biggest concerns of its swift implementation.  There is a lack of guidance, a lack of loan documentation resources (i.e.-standardized note), and well as basic calculation concerns.  This accounts for the reasoning of why many organizations have chosen not to participate in this Program, or, at a minimum, have capped the bank’s credit risk and lending capital to a specific threshold (i.e.- maxed at $10 million) or limited their approved applicant based to current customers, or borrowers with smaller employee thresholds (i.e.- 50 employees max rather than 500). Some forms providers (LaserPro) have already developed a standardized note for their customers.  Other are having legal counsel draw them up, or have modified the SBA’s Sample Promissory note, but the fact remains, there is little to no guarantee within the parameters of the Program that what is specifically being required by the SBA is being met by banks’ implementing of the Interim Final Rule at face value.

What this boils down is the bank’s assumption risks and what they are willing to wager. While there is no indication that the bank cannot fund prior to SBA approval and not receive the guaranty, or that the guaranty form has to be done on the same day as the note date, there are risks of this being a violation or risks that the SBA does not approve the loan that you have already funded. SBA is within their power to come back stating that the required information was not obtained or the loan was otherwise done in violation of any other requirements in the rule. Whether or not the bank chooses to wait or fund, the risks associated with it should be brought to your board of directors or some other governing committee for a determination of risk.

**Q2: Does anyone know what SBA is doing about requiring more information on their portal than what they asked on the loan application? Errors are present due to information not on the application that is requested by the online portal.**

**A2:** Unfortunately, C/A cannot assist with technical issues with the SBA portal. We would just advise that any deviations from the required loan parameters and the application could jeopardize loan reimbursement from the SBA. We recommend contacting SBA to determine next steps. But other banks are facing this problem and the key issue is you do not want to be certifying that you have entered accurate information when you did not (whereby certification of lender's submissions is a reimbursement requirement).

**Q3: We are an existing lender with the SBA but since it has been some time since we have done any loans, we are no longer an Authorized Lender. We are unable to log into CAFS. Any guidance****?**

Unfortunately, C/A cannot assist with technical issues with the SBA portal. We recommend contacting SBA to determine next steps. Lenders who need assistance accessing SBA's E-Tran system may call our Lender Customer Service Line at 1-833-572-0502.

**Q5: There is a question on the SBA application site about credit card payments. The questions on the SBA application website is: Business - Total payments less than total amount of credit card purchases. Can we get guidance on that?**

**A5:** Unfortunately, C/A cannot assist with technical issues with the SBA portal. We would just advise that any deviations from the required loan parameters and the application could jeopardize loan reimbursement from the SBA. We recommend contacting SBA to determine next steps. But other banks are facing this problem and the key issue is you do not want to be certifying that you have entered accurate information when you did not (whereby certification of lender's submissions is a reimbursement requirement).

**Q6: Where do I find form 3506?**

**A6:** The CARES Act Lender Agreement known as Form 3506 can be found here: <https://www.sba.gov/sites/default/files/2020-04/PPP--Agreement%20for%20New%20Lenders%20Banks%20Credit%20Unions%20FCS_w%20seal.pdf>

**Q7: How do lenders get paid their fees?**

**Q7:** In regards to processing fee payment from SBA to lenders, the Interim Final Rules states that the SBA will pay lenders their approved percentage within five days after funding based on the funded amount, but unfortunately again, the Interim Final Rule is not clear whether the bank has to notify SBA upon funding, whether submission of documents to SBA puts them on notice, or if SBA will reach out to determine what funded. There is just zero guidance as to how lenders need to get paid. Waiting for SBA guidance or attempting to contact SBA is the only option currently.

**Q8: On qualified payroll expenses, bonuses are not listed.  I would assume that bonuses should not be included.  That unless they are commissions.  Am I correct?**

**Q8:** That is correct per a strict reading of the Interim Final Rule. The only permissible considerations for payroll costs are as follows:

* Compensation to Employees with principal residence is the United States
	+ Salary, wages, commissions, or similar compensation,
	+ Cash tips or the equivalent based on:
		- Employer records of past tips or,
		- In the absence of such records, a reasonable, good-faith employer estimate of such tips.
* Payment for vacation, parental, family, medical, or sick leave;
* Allowance for separation or dismissal;
* Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement;
* Payment of state and local taxes assessed on compensation of employees.

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

**Q9: For the $100,000 cap is that salary only or does that include any benefits?**

**Q9:**  The SBA April 8, 2020 FAQ #7 addresses this question: The exclusion from compensation in excess of $100,000 annually applies only to cash compensation, not to non-cash benefits, including:

* Employer contributions to defined-benefit or defined-contribution retirement plans;
* Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and
* Payment of state and local taxes assessed on compensation of employees.

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>

**Q10: For the loan amount, do we submit calculations from the 1099 income or information calculated from the net profit on Schedule C for the loan amount on independent contractors and sole proprietors?**

**A10:** The SBA’s April 7, 2020 FAQ #16 addresses this issue:

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

2The 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>

Additionally, the SBA has stated:

*You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual, you were in operation on February 15, 2020. You must also submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099- MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.*
[*https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf*](https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf)

**Q11: 1099s - we can count those as payroll cost for an entity.  We were under the impression that those receiving the 1099 would have to apply as an independent contractor.**

**A11:** Borrowers may also be sole proprietors, independent contractors, or self-employed. Borrowers must have been in operation on February 15, 2020 and employed either salaried employees subject to payroll taxes or paid independent contractors. Independent contractors have to apply separately and must be submitting documentation to establish eligibility such as:

* Payroll processor records;
* Payroll tax filings;
* Form 1099-MISC or
* Income and expenses from a sole proprietorship.

For purposes of determining whether you are a small business, you needed to have met the following requirements:

1. 500 or fewer employees
2. Whose principal place of residence is in the United States
3. Operating on February 15, 2020 and had:
	1. Employees for whom you paid salaries or payroll taxes; OR
	2. Paid independent contractors as reported on Form 1099-MISC.

That is ***only*** applicable just to determine if the business meets the eligibility criteria for a small business to receive a PPP loan.

When it comes time for the small business to calculate its maximum loan amount, the final rule takes away independent contractors –the intent of the rule is to have them apply by themselves.

So, in short—it is a contradiction but they iron it out with what it applies to:

1. Independent contractors count when a business is determining whether it’s a small business

But they do not count when:

1. The small business is determining their maximum loan amount calculations. The intent of the Rule is for IC’s to apply separately.

The April 7, 2020 SBA FAQ also addresses the requirement of independent contractors to apply separately:

15. Question: Should payments that an eligible borrower made to an independent contractor or sole proprietor be included in calculations of the eligible borrower’s payroll costs?

Answer: No. Any amounts that an eligible borrower has paid to an independent contractor or sole proprietor should be excluded from the eligible business’s payroll costs. However, an independent contractor or sole proprietor will itself be eligible for a loan under the PPP, if it satisfies the applicable requirements.

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>

**Q12: Sole Proprietorship question:  If proprietor does not pay himself wages, but rather just takes draws when he needs them, leaving profits in the business, how is their income calculated specifically?**

**A12:** Individuals who are sole proprietorships, independent contractors or self-employed must submit the following documentation to determine their eligibility:

* Payroll processor records,
* Payroll tax filings
* Form 1099-MISC, or
* Income and expenses from a sole proprietorship.

In determining payroll costs for the maximum loan amount under the Program, it consists for independent contractors or sole proprietors of wages, commissions, income or net earnings from self-employment or similar compensation.

At this time, that is the only guidance provided. The bank should consult with a tax professional and/or the SBA to determine if draws on a line of credit as compensation would be appropriate for PPP eligibility and payroll costs calculations.

Additionally, April 7, 2020 SBA FAQ #16 provides some additional guidance on calculations:

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

2The 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.

**Q13: Application guidance for the average payroll on the applications says:**

**“For purposes of calculating “Average Monthly Payroll,” most Applicants will use the average monthly payroll for 2019, excluding costs over $100,000 on an annualized basis for each employee.  For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019, excluding costs over $100,000 on an annualized basis for each employee.  For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over $100,000 on an annualized basis for each employee.”**

**Question - How is NEW BUSINESS defined for purposes of this calculation?**

**A13**: New business, while not specifically defined in the Interim Final Rule, would appear to be any otherwise eligible small business that does not have applicable tax records from 2019 (i.e.- the business came into existence in 2020 prior to February 15, 2020). There is no official guidance that specifically states this, however.

**Q14: Are you sure that we completely exclude all employees that make more than $100,000 or just the amount above $100,000?**

**A14:** Salary for employees making more than $100,000 is capped at the level for the calculation of loan size. You do not exclude them entirely merely because their salary was over $100,000. What is only excluded is the compensation to an individual employee in excess of the annual salary of $100,000. Resource: <https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf>

**Q15: Does the Lender have to certify the business gross annual revenues prior to allowing an application to the SBA if the business is one that qualifies as a small business through revenues and not through number of employees? Should the banks be requesting the most recent tax returns from borrowers?**

**A15:** A business may still be eligible for a PPP loan if it has more than 500 employees if it is:

* A business operating in certain industries;
* Meets the applicable SBA employee-based size standards or that industry; and
* Is a small business concern as defined in section 3 of the Small Business Act ([15 USC 632](https://www.sba.gov/sites/default/files/Small%20Business%20Act_0.pdf#page=8)) and
* Subject to SBA’s affiliation rules under [13 CFR 121.301(f)](https://www.sba.gov/sites/default/files/2018-09/2018-07-13%20AFFILIATION%20GUIDE_Updated%20%281%29.pdf#page=3) unless they are specifically waived under the CARES Act.

Categories of businesses that may have more than 500 employees are franchise and food services, but no more than 500 employees can be at each location.

SBA’s affiliation standards are waived for small businesses in the hotel and food service industries ([NAICS code 72](https://www.census.gov/eos/www/naics/)), franchises in the SBA’s Franchise [Directory](https://www.census.gov/eos/www/naics/) or if they are receiving financial assistance from small business investment companies licensed by the SBA.

As such, the bank should conservatively, in order to protect its interest in the 100% guaranty of the loan, be attempting to verify (although not required in the Interim Final Rule) eligibility of their applicants prior to funding loans. You are required to be collecting for the Program’s terms all payroll documentation. There is currently no guidance from the SBA on what tax documentation the borrowers should be providing banks. It would appear both W-3’s and the 940 series may be acceptable.

**Q16: Do the lenders need to get an application from the borrower’s agent to be able to pay the agents?**

**A16:** The Interim Final Rule is not clear about whether the application has to come *from* the agent in order for the agent to be paid their fee in assisting. It merely states agent fees are to be paid by the lender out of the fees the lender receives from the SBA. The agent is defined only as someone who assists the borrower—they are not required to be filling out the application to qualify, that is only one of the potential uses of an agent:

* An attorney;
* An accountant;
* A consultant;
* Someone who prepares an applicant’s application for financial assistance and is employed and compensated by the applicant;
* Someone who assists a lender with originating, disbursing, servicing, liquidating, or litigating SBA loans;
* A loan broker; or
* Any other individual or entity representing an applicant by conducting business with the SBA.

Resource: <https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf>

**Q17: Does a company with less than 500 employees also have to meet the SBA size requirements? Just clarifying if it is an AND or an OR.**

**Q17:** Small business concerns are not required to have 500 or fewer employees to be an eligible borrower. They can have more than 500 and still be eligible as long as they satisfy the existing stator and regulatory definition of a small business under section 3 of the Small Business Act, 15 U.S.C. 632. A business can qualify if it meets the SBA employee-based or revenue-based size standard corresponding to its primary industry. Go to [www.sba.gov/size](http://www.sba.gov/size) for the industry size standards.

Additionally, a business can qualify for the Paycheck Protection Program as a small business concern if it met both tests in SBA’s “alternative size standard” as of March 27, 2020: (1) maximum tangible net worth of the business is not more than $15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million. A business that qualifies as a small business concern under section 3 of the Small Business Act, 15 U.S.C. 632, may truthfully attest to its eligibility for PPP loans on the Borrower Application Form, unless otherwise ineligible.

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>

**Q18: Is the payroll expense used to compute the loan amount for 2019 or twelve months from when they apply?**

**A18:** The loan amount is determined based on monthly payroll amounts. The maximum loan amount will be the lesser of:

* The product obtained by multiplying:
	+ The average total monthly payments

**Q19: If a business can’t wait for the funds, but wants to keep their business open and funds April from a line of credit, are they allowed to repay that line from proceeds as long as they can validate the usage?**

**A19:** The stipulation on this is that the borrower must be spending at a minimum 75% of the loan forgiveness amount to payroll costs. Not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs. Otherwise, that amount in excess of 25% is not forgiven.

**Q20: Will you please give more clarification on whether or not the following example would qualify for the PPP program:**

**Example: On Schedule C, a Real Estate Agent has gross receipts/1099 of $90,000 but Net Profit $67,000.  Which amount to you use to calculate monthly income?**

**A20:** 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 or employer’s share of the Federal Insurance Contributions Act (FICA) and income 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. Due to the CARES Act’s definition of payroll costs (15 USC 636(a)(36)(A)(viii), SBA defines payroll costs as calculated on a gross basis.

**Q21: A single member LLC that has a schedule C on their tax returns but does not have any employees on payroll other than themselves.  If they were forced to close can they qualify for the PPP program based on net earnings of the previous year?**

**A21:** SBA defines payroll costs as calculated on a gross basis. A single member LLC would follow the requirements of a self-employed applicant.

**Q22: Does Compliance Alliance plan to provide a sample risk assessment for this product?**

**A22:** At this time, the risks of this Program are too unknown for a beneficial risk assessment to be developed. Should the Program’s parameters become clearer, or as time passes, C/A might consider a separate risk assessment product. Currently, C/A does have a PPP Loan Audit/Checklist.

**Q23: Are SBA loans reported differently on the Call Report?**

**A23:** There has not yet been any guidance up to this point that would indicate treating these differently from any other similarly situated loan, or any guidance about special call report reporting requirements for PPP loans. These would be reported under Commercial and Industrial Loans as they are unsecured and also guaranteed by the SBA.
Resource: pg. RC-C-13 <https://www.fdic.gov/regulations/resources/call/crinst-051/2018-06/051-618rc-c1-063018.pdf>

**Q24: Has there been any indication of whether regulatory examiners will be instructed to give participating banks some leniency when it comes to PPP and associated lending regulations since there were so many gray areas in this rollout?**

**A24:** This is a slowly unfolding aspect to the Program but no, there have not been specific mentions of leniency other than the following:

The Federal Reserve, FIDC and OCC issued two interim final rules to provide temporary relief to community banking organizations—they plan to implement Section 4012 of the CARES Act, which requires agencies to temporarily lower the community bank leverage ratio to 8%. The two rules will modify the community bank leverage ratio framework so that beginning in the second quarter of 2020 and until the end of the year, banks that have a leverage ratio of 8% or greater and meet certain other criteria may elect to use the community bank leverage ratio framework; and community banking organizations will have until January 1, 2022 before the community bank leverage ratio requirement is re-established at greater than 9%. It’s no secret a fundamental aspect of banking is managing capital and capital requirements.

Additionally, on April 3, FinCEN issues a notice providing additional information to financial institutions in response to COVID-19. This notice updates FinCEN’s March 16, 2020 [Notice](https://www.fincen.gov/news/news-releases/financial-crimes-enforcement-network-fincen-encourages-financial-institutions.). Compliance with BSA obligations remains paramount for financial institutions to protect natural security in combating money laundering and related crimes, including terrorism and its financing. FinCEN expects financial institutions to continue following a risk-based approach, and to diligently adhere to their BSA obligations. FinCEN understands the challenges that financial institutions are facing when it comes to taking actions to protect employees, their families and others in response to the COVID-19 pandemic, which has created challenges in meeting certain BSA obligations, including the timing of the requirements pertaining to certain BSA report filings. FinCEN of course offered guidance on beneficial ownership (See Q13 above). FinCEN will continue to outreach to regulatory partners and financial institutions to ensure risk-based compliance with the BSA, and it will also be issuing new information as appropriate. For non-PPP loans, FinCEN reminds financial institutions of FinCEN’s September 7, 2008 ruling ([FIN-2018-R004](https://www.fincen.gov/sites/default/files/administrative_ruling/2018-09-18/Permanent%20Exceptive%20Relief%20Extension%20of%20Compliance%20Date%20CDs_final%20508%202.pdf)) offering certain exceptive relief to beneficial ownership requirements. To the extent that a renewal, modification, restructuring or extension for existing legal entity customers falls outside the scope of that ruling, FinCEN recognizes that a risk-based approach taken by financial institutions may result in reasonable delays in compliance. FinCEN will continue to assess reasonable risk-based approached to BSA obligations and will issue further information, as appropriate, particularly as it relates to the CARES Act.

**Q25: Are PPP Loans CRA reportable in any way?**

**A25**: In most cases, yes. According to existing examination guidance as well as the March 19, 2020 [Joint Statement on CRA Consideration for Activities in Response to the COVID-19](https://www.fdic.gov/news/news/financial/2020/fil20019a.pdf), when consistent with safe and sound banking practices and applicable law, loans that benefit small businesses and small farms impacted by COVID-19 serve the long-term interest of those communities and the financial system. Generally, loans to for-profit businesses in amounts of $1 million or less are considered small business loans in CRA evaluations and will be considered as such under the lending test. Additionally, PPP loans to small businesses could receive consideration as innovative or flexible lending practices. Generally, loans to businesses greater than $1 million to small businesses that create or retain jobs would qualify as community development loans under economic development if the loans create or retain jobs or under revitalization/stabilization if they benefit primarily low- and moderate-income areas or distressed middle-income areas. Resource: <https://www.fdic.gov/coronavirus/smallbusiness/faq-sb.pdf>

**Q26: When the loan is forgiven, will that be considered taxable income to the borrower?  Just wondering about any tax consequences to getting these loans forgiven.**

**A26:** Under normal circumstance, the amount of debt that is forgiven is included in taxpayer’s taxable income. However, the portion of the PPP loan that is forgiven is not included in taxable income (so forgiveness of indebtedness income is waived). As always, with tax concerns, the bank should be addressing counsel of a tax professional or attorney.

**Q27: I am not clear on what portion of the loan is considered unforgivable. How is that determined? Does the SBA guarantee these loans 100% or just the part they are forgiven?**

**A27:** The loan forgiveness amount can be up to the full principal amount of the loan and any accrued interest. A borrower *will not* be responsible for any loan payment if:

* The borrower uses *all* of the loan proceeds for forgivable purposes; and
* Employee and compensation levels are maintained.

Actual amounts of loan forgiveness are dependent, in part, on payments made over the 8-week period following the date of the loan, which include:

* Total amount of payroll costs;
* Payments of interest on mortgage obligations incurred before February 15, 2020;
* Rent payments on leases dated before February 15, 2020; and
* Utility payments under service agreements dated before February 15, 2020.

But, at least 75% of the loan forgiveness amount must be attributed to payroll costs. No more than 25% can be given to non-payroll costs.

Any remaining balance after the loan forgiveness period will maintain a 100% government guarantee while the borrower makes payments.

**Q28: Regarding lender decisions on loan forgiveness within 60 days of receipt. If the bank doesn't accept the forgiveness request, would we be required to provide adverse action and comply with those timing requirements?**

**A28:** Conservatively, yes, the bank should be providing an adverse action if the bank does not accept a loan forgiveness request from the PPP borrower. The discrepancy comes, however, from Regulation B stipulating 30-days to provide a decision, while the PPP extends it to 60. As this is under the SBA, the bank should comply with SBA requirements of 60 days.

**Q29: Is the Advance on the EIDL (up to $10K), 100% forgivable regardless of how funds are used?**

**A29:** If and EIDL was made between January 31, 2020 and April 3, 2020, the borrower can still receive a PPP loan, and the borrower is free to refinance it into a PPP loan. Not using the EIDL for payroll costs does not prohibit the borrower would being eligible for a PPP loan. However, *if* the EIDL *was* used for payroll costs, the new PPP loan *must* be used to refinance the EIDL. So, proceeds from any advance up to $10,000 on the EIDL are deducted from the loan forgiveness amount on the PPP loan. When determining the 75% of use of proceeds for payroll costs on the PPP forgiveness determination, the amount of any EIDL refinanced is going to be included. The borrower, however, will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness.

**Q30: Follow up on the Refinancing of EIDL loan into PPP loan:  Say a business takes out $10,000 EIDL loan and a PPP loan.  Business does not refinance. Would the $10,000 EIDL still be deducted from the PPP forgiveness?  What is the citation for this?**

**A30:** Proceeds from any advance up to $10,000 on an EIDL will be deducted from the loan forgiveness amount on the PPP loan. It’s important to note the requirements above as well in Q31 regarding EIDLs and PPPs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included.

“vii. refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. If you received an SBA EIDL loan from January 31, 2020 16 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to $10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

However, at least 75 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness.”

Resource: pg. 16 Interim Final Rule <https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf>

**Q31: The EIDL refinance seems unclear in the examples. Can you confirm: If the 2.5 number is 200,000.00 and the EIDL loan was 50,000.00 and used for payroll, the PPP loan will be $250,000.00. If they took the initial $10,000.00 advance, we would lower the loan to $240,000.00 and would only submit $40,000.00 for the EIDL refinance payoff?**

**A31:** For purposes of determining maximum loan amount, the Interim Final Rule provides as follows:

Step 1: Aggregate payroll costs from the last twelve months for employees whose principal place of residence is the United States.

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

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

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

Step 5: Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, minus the amount of any “advance” under the EIDL COVID-19 (because it does not have to be repaid).

Now when it comes to the EIDL loan itself, the $10,000 advance is a grant and does not have to be repaid by the borrower. For purposes of the bank holding the EIDL loan, the $10,000 advance is deducted from the EIDL loan amount as a grant from the SBA, and the bank would seek forgiveness of $10,000 from the SBA, and the remaining amount of the loan from the borrower.

**Q32: Are FI's that are not banks eligible for the Program?**

**A32:** The authority to make PPP loans applies to:

1. Any federally insured depository institution or any federally insured credit union;
2. Any Farm Credit System institution (other than the Federal Agricultural Mortgage Corporation) as defined in 12 U.S.C.2002(a) 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; and
3. 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, and e. Has originated, maintained, and 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
	5. 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 is in good standing with the appropriate Federal banking agency.

**Q33: Are Banks/Community Banks eligible to participate in the program and receive the relief funds?  We have been told that Banks are ineligible but have seen nothing from regulatory bodies addressing the issue.**

**A33:** Unfortunately, no.Existing [SBA SOP 50 10 5 (K)](https://www.sba.gov/sites/default/files/2019-02/SOP%2050%2010%205%28K%29%20FINAL%202.15.19%20SECURED%20copy%20paste.pdf), as well as in [CFR §120.110](https://www.ecfr.gov/cgi-bin/text-idx?SID=7b60c4633af8c56df092210fd68f55e3&mc=true&node=pt13.1.120&rgn=div5#se13.1.120_1110), preclude banks from participating. The CFR states that “Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances) are ineligible for SBA business loans. Unless a typically exempt organization was specifically allowed to participate in the PPP program under the CARES Act, like a 501(c)(3), then these usually ineligible businesses are unable to apply for PPP loans.

The FAQ #22 also has some additional guidance:

22. Question: I am a non-bank lender that meets all applicable criteria of the PPP Interim Final Rule. Will I be automatically enrolled as a PPP lender? What criteria will SBA and the Treasury Department use to assess whether to approve my application to participate as a PPP lender?

Answer: We encourage lenders that are not currently 7(a) lenders to apply in order to increase the scope of PPP lending options and the speed with which PPP loans can be disbursed to help small businesses across America. We recognize that financial technology solutions can promote efficiency and financial inclusion in implementing the PPP. Applicants should submit SBA Form 3507 and the relevant attachments to NFRLApplicationForPPP@sba.gov. Submission of the SBA Form 3507 does not result in automatic enrollment in the PPP. SBA and the Treasury Department will evaluate each application from a non-bank or non-insured depository institution lender and determine whether the applicant has the necessary qualifications to process, close, disburse, and service PPP loans made with SBA’s guarantee. SBA may request additional information from the applicant before making a determination.

Resource: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

**Q34: How does venture capital or private equity owners play into this?**

**A34:** Unfortunately, the SBA”s guidance on the PPP leaves venture capital and equity owners in gray areas. The PPP’s definition of small business is defined as having 500 employees or fewer, and the rule judges small business on the number of people employed by both it and “affiliated’ companies. The purpose was apparently to prevent subsidiaries and branch offices of major corporations from taking advantage of the program designed for small businesses. But startup companies are left wondering if they qualify as affiliates of venture capital or private equity firms that invested in them. Defining a startup as affiliated with their investors would generally push most over that 500-employee limit. Under this strict interpretation, however, most would be disqualified from the small business relief under the PPP. Private equity and venture capital investors are generally going to fall under the first rule of affiliation ([13 CFR 121.301](https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5;node=13%3A1.0.1.1.17#se13.1.121_1103)) regarding stock ownership—and if that investment firm owns at least 50% of the voting shares of a business, then the investing firm controls the business for the purpose of affiliation. But small business start-ups are going to need to perform the affiliation test and be working with their investors to determine that 500-threshold.

**Q35: If a bank employee's spouse is a sole proprietor can the bank process the application for the spouse under the rules?**

**A35:** Conservatively, the bank should not be approving and funding loans to bank employees, out of concerns from both the PPP and Regulation O. Refer to Q44 below for additional guidance.

**Q36: What is the process for someone with multiple businesses?  Do they apply for each business or do they do one application for all businesses at once?**

**A36:** Owners of multiple businesses would apply for each business separately and are still subject to the PPP’s qualification guidelines on small business and affiliation.

**Q37: Are banks permitted to turn away applicants working with agents?**

**A37:** With this practice you would be risking Regulation B and Fair Lending violations as this could be held as discouraging applicants. There really is not a justifiable business reason that would mitigate that risk. The PPP specifically allows for applicants to work with agents in gathering materials, as a resource, and even allows for them to complete the applications on their behalf. You would also face reputational risk for turning away applicants with agents as the Rule itself, due to complexities and parameters, may require the average business owner to seek guidance to receive aid.

**Q38: What if you have an active SAR on the borrower and they are under investigation?  What do you tell them?**

**A38:** You would not want to give the appearance of discouraging an application and risk violation of Regulation B and Fair Lending, so the bank should at a minimum take the application and issue an adverse action notice (not disclosing of course that the applicant has SARs filed and is under investigation).

**Q39: Are US companies that have one or more non-US Citizens (with no SSNs) eligible for the program?**

**A39:** Having non-US citizen employees is not necessarily grounds for ineligibility with the Program. The issue is whether the business meets the definition of a small business with 500 or fewer employees whose principal place of residence is in the United States. Each set of facts is different to determine whether or not those non-US citizens’ principal places of residence is in the United States. While H1-B Visa workers and legal immigrant workers are not expressly excluded from the Paycheck Protection Program in and of themselves, one of the conditions for "payroll costs" is that "any compensation of an employee whose principal place of residence is outside" of the US has to be excluded, unfortunately.

“(viii) the term ‘payroll costs’—
…
“(II) shall not include—
…
“(cc) any compensation of an employee whose principal place of residence is outside of the United States;

Resource: <https://www.congress.gov/bill/116th-congress/house-bill/748/text#HE4E7B1F84B384B0D92459C0BEB5AA857>

**Q40: Do we need to pull a credit report on these applicants for the PPP loans? I assume that we cannot deny the loan as long as we have all the required documentation, is that correct?**

**A40:** No credit report is required and there is the potential that to require one and underwrite the loan differently than the parameters laid out in the Program’s Rule would cause the SBA to find the loan file in violation of the Program’s parameters and deny the 100% guaranty.

**Q41: Thoughts on Fair Lending risks with limiting applications to existing customers?  Common sense says it’s just good business to take care of existing customers first.**

**A41:**  There are Fair Lending and Regulation B/ECOA risks when it comes to discouraging applicants or limiting the pool of accepted applicants to customers only. Disparate impact is always a chance. The bank can attempt to mitigate this with the argument of a justified business reason that would need to be documented. But it’s important the bank is aware of any reputational backlash this may cause as it does appear to go against the intent of the Rule. There is just no outright prohibition on limiting the scope of acceptable applicants to bank’s customers.

**Q42: Are individuals who fall under Reg O eligible to participate in the PPP?**

**A42:** 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.

**Q43: If an applicant let an employee go temporarily, can they bring them back in order to qualify? Even by providing the employee with back pay for missed wages?**

**A43:** As long as the small business meets PPP loan eligibility requirements, even if they have laid off workers, they would not be excluded necessarily from the PPP if they rehire their employees and restore their wages by June 30, 2020. The rehiring process can be challenging for small businesses from an operational standpoint.

**Q44: Will these loans be subject to a bank's legal lending limit to any one borrower or as that part of the unknown variables?**

**A44:** There's nothing in the Interim Final Rule to suggest the general lending limits applicable to the Bank would be exempt, so the Bank would still need to include these loans in the Bank's calculations.

**Q45: Provide guidance on accessing the E-TRAN SYSTEM.**

**A45:** E-Tran is integrated into SBA software products and enable banks to submit electronically you’re your existing screens. Lenders who need assistance accessing SBA's E-Tran system may call our Lender Customer Service Line at 1-833-572-0502. SBA also has additional guidance here: <https://www.sba.gov/sites/default/files/articles/ETran_Origination_01_2014.pdf>

**Q46: Are owner draws and/or money paid by business to cover owners’/employees’ expenses (i.e.-rent/car/cell phone etc.) eligible to be included as payroll related expenses?**

**A46:** The way that payroll costs are defined appears that those types of expenses do not necessarily constitute payroll expenses, unless it is included in salary, wages, commissions or similar compensation:

1. Compensation to Employees with principal residence is the United States

a. Salary, wages, commissions, or similar compensation,

b. Cash tips or the equivalent based on:

i. Employer records of past tips or,

ii. In the absence of such records, a reasonable, good-faith employer estimate of such tips.

2. Payment for vacation, parental, family, medical, or sick leave;

3. Allowance for separation or dismissal;

4. Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement;

5. Payment of state and local taxes assessed on compensation of employees.

**Q47: Can an owner of a seasonal business when approved for this choose to defer the loan for a month or two until the operating season begins?**

**A47:** The April 8, 2020 FAQ allows for borrowers to apply and be approved for a PPP loan but permits them to defer the receipt of the funds. Borrowers can determine their own start date for the 8-week period of forgiveness. See below:

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>

**Q48: Does this affect in any way EIDL loans applied after April 3rd?**

**A48:** There has been no indication that PPP loans will be impacting EIDL loans made after the April 3rd cut-off period. Those EIDLs will be outside the scope of refinancing under the current Program parameters.

**Q49: Is there any risk to the participating Lender?**

**A49S:** It’s kind of a Catch-22 scenario with the bank stuck in the middle.  The borrower has to certify with attestations that they are a small business that is eligible, that they meet the PPP requirements and can show documentation that’s verified and accurate for payroll costs in order for the loan to meet the PPP standards and receive the 100% guaranty by SBA. The bank is merely processing and, unfortunately, funding these applications at 1% unsecured. The SBA says that they will “hold harmless” any lender that relies on such borrower documents and attestations but that *does not* mean they will apply the guaranty (at face value). That means they will not *prosecute* the bank in funding a loan that assisted a borrower in taking advantage of the PPP’s funds.  There has been no guidance that if the bank incorrectly funded a non-eligible business that the bank is off the hook on the loan and the guaranty applies. The bank is still left holding a 1% unsecured loan with a borrower who now faces potential criminal charges from the government; or in a less dramatic situation, a borrower who unknowingly did not qualify (due to the confusing nature of eligible small businesses, payroll costs calculations etc.) and now is stuck with the loan and the bank an unsecured one at that.  Either scenario, however, it does not change the fact the bank is left with the loan and no guaranty.