FAQs: The CARES Act – Paycheck Protection Program

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The Coronavirus Aid, Relief, and Economic Security (CARES) Act was passed by Congress and signed by the president on March 27, 2020. It provides a massive $2 trillion in much-needed emergency relief to businesses of all sizes impacted by the COVID-19 pandemic.

On April 1, 2020, Ulmer & Berne LLP hosted a webinar regarding the CARES Act's economic stimulus provisions and loan programs available to help businesses. Following are among the 500+ questions posted by listeners in that webinar. As of April 14, 2020, we have also issued a new CARES Act update client alert, a copy of which can be viewed **here**.

1. Even if I am not sure my business qualifies for a PPP loan, or even if my business has not suffered from the COVID-19 pandemic, should I apply just to hold my place in line?

A. No. When you sign the PPP application, you are certifying that everything in the application, and in all its supporting documents, is true and accurate in all material respects. Knowingly making false statements is punishable under law, including criminal penalties of $5,000 to $1 million, and jail time of two to 30 years' imprisonment, depending upon the offense.

2. Is the lender required to double check or make an independent determination of my business' employee count, or a determination of whether any business' affiliates have properly been included in that count?

A. No. It is the responsibility of the borrower to determine if any of its affiliates should be included, and the proper employee headcount, as reflected on the application. The business and its owners may be subject to criminal fines and jail time if the business knowingly made false statements on the application or in any of its supporting documents. *See Question 1 above.*

3. Can you apply for PPP loans at multiple banks if you do business with more than one bank?

A. No. Each business is entitled to one PPP loan and must certify in its application that it has not submitted an application elsewhere.

4. For a business, <u>what is included</u> in average monthly payroll costs used for calculating the amount of the PPP loan?

A. According to the Treasury Dept. Information Fact Sheet and Treasury Dept. FAQ, business payroll costs include compensation paid to employees, measured on a gross basis, including:

- Salary, wages, bonuses, commissions, or tips (capped at $100,000 cash compensation on an annualized basis for each employee);
- Employee benefits, including cost for vacation, parental, family, medical, or sick leave;
- Allowances for separation or dismissal;
- Employer's share of payments required for provision of group health benefits, including insurance premiums;
- Payment of any retirement benefits, including defined-benefit and defined contribution retirement plans; and
- State and local taxes assessed on compensation.

5. For sole proprietors, self-employed or independent contractors, <u>what is included</u> in average monthly payroll costs used for calculating the amount of the PPP Loan?

A. According to the Treasury Dept. Information Fact Sheet, for a sole proprietor or independent contractor, payroll costs include:

- Wages, commissions, income, or net earnings from self-employment, with an aggregate $100,000 cap on these amounts, as measured on an annualized basis for each such person or employee.

6. For a business, <u>what is excluded</u> from average monthly payroll costs used for calculating the amount of the PPP Loan?

A. The following items are excluded:

- Any sick leave wages and family leave wages for which the payroll tax credit is allowed under the Families First Coronavirus Response Act;
- The excess cash compensation portion paid to any employee over $100,000, on an annualized basis;
- Federal taxes imposed upon or withheld from employee compensation;
- The employer's share of any federal taxes (FICA);
- Any compensation paid to a sole proprietor, independent contractor, self-employed individual, or anybody paid on a 1099 – sole proprietors,

independent contractors, and self-employed individuals are eligible to apply themselves for a loan under the PPP; and

- Any payments to consultants, vendors, or other businesses issued a 1099.

7. How do you calculate average payroll costs for employees making more than $100,000?

A. Prorate the cash portion of payroll costs for employees receiving more than $100,000 per year ($100,000/12 = $8,333.33 per month).

8. 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?

A. No. Any amounts that an eligible borrower has paid to an independent contractor or sole proprietor should be excluded from the eligible business' 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.

9. Does my business have to qualify as a small business concern (as defined in section 3 of the Small Business Act, 15 U.S.C. 632) in order to participate in the PPP?

A. No. In addition to small business concerns, a business is eligible for a PPP loan if the business has 500 or fewer employees whose principal place of residence is in the United States, or the business meets the SBA employee-based size standards for the industry in which it operates (if applicable). Similarly, PPP loans are also available for qualifying tax-exempt nonprofit organizations described in section 501(c)(3) of the Internal Revenue Code (IRC), tax-exempt veterans organizations described in section 501(c)(19) of the IRC, and Tribal business concerns described in section 31(b)(2)(C) of the Small Business Act that have 500 or fewer employees whose principal place of residence is in the United States, or meet the SBA employee-based size standards for the industry in which they operate.

10. What is the exact time period to calculate average monthly payroll?

A. According to the Treasury Dept. FAQ, a borrower 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), through 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.

11. What is the exact time period to calculate the number of employees for eligibility?

A. According to the Treasury Dept. FAQ, a borrower may use their average employment over the same time period (*as used in Question 10 above to determine average monthly payroll*) to determine their number of employees for purposes of applying the 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 loan application date.

12. We have a holding company with three operating subsidiary businesses. Do the operating businesses apply separately, or does the holding company apply for all of them?

A. First, we must assume the three businesses, combined, have fewer than 500 employees (or such larger number as may be permitted for that industry by the SBA NAICS Code size chart). Next, only businesses with employees and payroll costs can apply to generate a PPP loan amount. Thus, a holding company without employees cannot apply. If each separate operating business has its own employees and payroll costs, each operating business would apply separately for its own PPP loan. On each respective application, each business would attach a list of all other businesses under common ownership or management in response to application question 3.

13. Are businesses that are majority or wholly owned by a parent entity but are separately managed considered to be affiliates for purposes of determining the number of employees for eligibility under PPP? What if each business has less than 500 employees?

A. Under the affiliation rules promulgated in 13 CFR 121.301(f)(1), the parent and subsidiary businesses would be considered affiliates if the parent entity owns more than 50% of a subsidiary's voting equity or is otherwise able to block others from approving or taking company action, and thus the employees of all of the companies would be aggregated for eligibility purposes. The existence of such control by ownership is sufficient for aggregation, regardless of whether this control is actually exercised.

This affiliate principal will also apply to many investment companies and private equity firms that own multiple businesses. If the investment company owns, controls, or has common management or common officers across multiple businesses, the affiliation rules may likely cause the employees of all those businesses to be aggregated for the employee count threshold.

Note that there are some exceptions to the affiliation rules, including businesses whose NAICS Code begins with 72 (Hospitality Accommodation, Food Service and Drinking Places), certain franchises, and businesses receiving financial assistance from a SBIC, who instead have special rules where each physical location must not exceed 500 employees. Treasury Guidance issued April 14, 2020 makes it clear that each separate restaurant, hotel, or other applicable business in this special category will file their own separate PPP applications.

14. If a business' current loan or mortgage prohibits any additional borrowing without the existing lender's consent, does anything in the CARES Act prohibit that lender from enforcing such a provision as it relates to a PPP loan?

A. No. Each business should carefully review its existing loan documents to determine if consent to obtain a PPP loan must be first obtained from their existing lender, in order to avoid an automatic default when a PPP loan is made.

15. What utilities are permitted to be paid with PPP loan funds?

A. Covered utilities are electricity, gas, water, transportation, telephone, or internet access, for which service began before February 15, 2020.

16. How do you validate that you have used the PPP funds for payroll costs/rent/etc.?

A. Each lender will request slightly different documentation, but you will likely need to provide documentation verifying the number of full-time employees on payroll and rates, payroll tax filings reported to the IRS, state income, payroll and employment insurance filings, cancelled checks, payment receipts, transcripts of accounts or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments. Your lender can request additional documentation. As an applicant, you will certify that: (i) all documentation provided is true and correct; and (ii) the amount for which forgiveness is requested was used to retain employees or to make covered mortgage, rent, and utility payments.

17. Must a business segregate the PPP loan proceeds into a separate bank account?

A. While that may be preferable to help establish the paper trail to document that loan funds are used for the forgivable purposes, that may not be possible while bank branches are closed and new bank accounts cannot be opened. Instead, in your business accounting software, set up a separate account to help you clearly establish each and every expenditure from the PPP loan funds, and track those expenses back to one of the permissible PPP forgivable uses.

18. When does a business apply for loan forgiveness?

A. The SBA and Treasury Dept. have not clarified when the application must be made. We presume it will be after June 30, 2020. The application for loan forgiveness will be made to the same lender that made the PPP loan.

19. When will the loan forgiveness be determined?

A. The business must provide documentation and evidence of the use of loan proceeds. Once the loan forgiveness application and all requested documents are submitted to the lender, the lender will have 60 days to determine what portion of the loan is forgivable.

20. Will my business be taxed on any forgiven portions of a PPP loan?

A. No. A special provision of the CARES Act specifically protects businesses from taxation on the forgiven portion of any PPP loan.