

What Is the CARES Act Paycheck Protection Program and Are You Eligible?

April 1, 2020 Update

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) which contains the Paycheck Protection Program. The Paycheck Protection Program provides for up to \$349 billion in loans to eligible small businesses under Section 7(a) of the Small Business Act. While this program has been passed into statute, the situation will remain fluid until the Small Business Administration (SBA) issues implementing regulations, publishes guidance, and formulates and initiates an application process. Below we answer questions regarding the scope of the Paycheck Protection Program. Furthermore, companies can take steps now to determine whether they are likely to qualify for the program and begin to collect the necessary documentation that can help in that threshold determination and may be required as part of the application.

On March 31, 2020 the United States Department of the Treasury issued additional guidance on the Payroll Protection Program, including Loan Terms and Conditions, dates on which applications will be accepted and other information on the loans. As a result of this additional guidance, we are updating our earlier release on the Payroll Protection Program and eligibility.

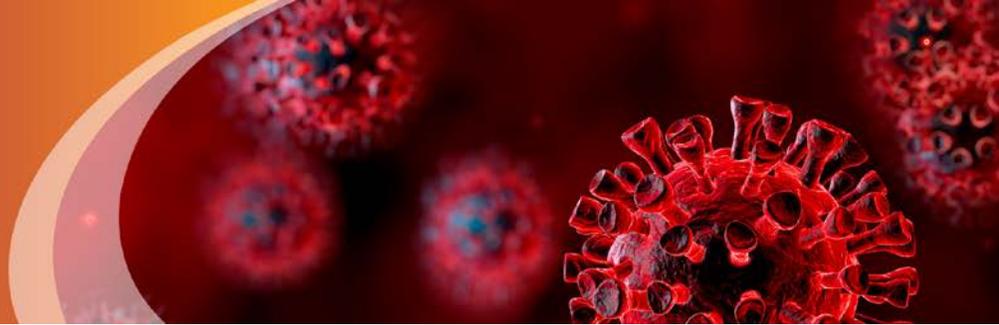
How much can be borrowed under the Paycheck Protection Program?

Eligible borrowers can borrow up to \$10,000,000 (PPP Loans) determined as follows:

- 225%¹ of the average total monthly payments by the company for payroll costs during the 12 month period ending the day before the loan is made (unless the company is a seasonal employer, in which case it can use a 12 week period beginning February 15, 2019, or at the election of the company, March 1, 2019, and ending June 30, 2019), plus
- the amount of any SBA Economic Injury Disaster Loan (EIDL) obtained after January 31, 2020 through the day before the loan is made which is refinanced into the PPP Loan.²

¹ There is a discrepancy between the information published by Treasury and the application form which still indicates a maximum loan amount of 250% of average total monthly payroll.

² This language is from the text of the Cares Act. The information provided by Treasury is silent as to the ability to roll EIDL Loans into PPP Loans. Until this is further clarified, borrowers should assume that rolling EIDL Loans into PPP Loans will not be an option.



No personal guarantees are required for PPP Loans and all are 100% guaranteed by the United States Government.

Is an applicant eligible?

Types of applicants that may apply for Paycheck Protection Program loans:

- Small business concerns, business concerns, nonprofit organizations,³ veterans organization,⁴ and Tribal business concerns that were in operation as of February 15, 2020.
- Individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals.⁵

At the end of this alert, please find an eligibility questionnaire for use in determining eligibility.

What certifications are required to demonstrate eligibility?

The CARES Act requires that eligible applicants must be able to make a few good faith certifications expressly laid out in the statute. Currently, the PPP application has implemented this certification requirement in the following ways.

First, the individual signing on behalf of the applicant must represent, among other things, that “[a]ll SBA loan proceeds will be used only for business related purposes as specified in the loan application” and “[t]o the extent feasible, I will purchase only American-made equipment and products.”

Second, the applicant and each 20% or greater owner of the applicant must each make a number of certifications, including but not limited to:

- Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.
- The funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;

³ “Nonprofit organization” means an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 (the “Code”) and that is exempt from taxation under section 501(a) of the Code.

⁴ “Veterans organization” means an organization that is described in section 501(c)(19) of the Internal Revenue Code that is exempt from taxation under section 501(a) of such Code.

⁵ “Eligible self-employed individual” has the meaning given the term in section 7002(b) of the Families First Coronavirus Response Act (Public Law 116–127).

- During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under this program.
- I further certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.
- I acknowledge that the lender will calculate the eligible loan amount using tax documents I have submitted. I affirm that these tax documents are identical to those I submitted to the IRS. I also understand, acknowledge and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

What steps to take to now to help with determining eligibility?

In light of the guidance provided by Treasury and the form of Loan Application made available by the SBA, all companies can take the following steps in furtherance of the application process:

1. Documenting current efforts taken to support ongoing operations;
2. Assembling documentation that verifies the number of full-time employees on payroll and the dollar amount of payroll costs, covered mortgage interest payments, covered rent payments and covered utilities;
3. Determining how many employees the applicant has as well as how many employees any potential affiliate has; and
4. If the affiliation rules apply to the applicant, collecting the documents necessary to help counsel determine if the applicant has affiliates. This can include, but may not be limited, to:
 - Capitalization Table,
 - By-Laws,
 - Articles of Incorporation or Certificate of Incorporation,
 - Any Operating Agreement, Voting, or Shareholder Agreement, and
 - Identification of any family relationships or common business/investment interests between individual shareholders as well as between board members.

What are “payroll costs”?

Payroll costs for U.S. employees generally mean:

- salary, wage, commission, or similar compensation; payment of cash tip or equivalent;
- payment for vacation, parental, family, medical, or sick leave;
- allowance for dismissal or separation;
- payment required for the provisions of group health care benefits, including insurance premiums;
- payment of any retirement benefit; or
- payment of State or local tax assessed on the compensation of employees,

but are capped at \$100,000 in annual salary and exclude taxes and imposed or withheld pursuant to the Federal Insurance Contributions Act or as income tax collected at the source.

Payroll costs also include payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in 1 year, so long as for someone in the U.S.

As noted above, sole proprietors, independent contractors, gig economy workers, and self-employed individuals are all eligible.

What can a PPP Loan be used for?

Permitted uses for PPP Loans include:

- payroll costs;
- costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- employee salaries, commissions, or similar compensations; payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation);
- rent (including rent under a lease agreement);
- utilities;
- interest on any other debt obligations that were incurred before the covered period; and

- uses otherwise for loans made under Section 7(a) of the Small Business Act, which includes equipment and fixtures; working capital, inventory, seasonal line of credit or refinancing debt, including an EIDL loan.

Does a PPP Loan have to be repaid?

PPP Loans are subject to forgiveness for certain “covered expenses” incurred during the 8 week period following the date of the PPP Loan. Covered expenses are:

- payroll costs;
- interest on covered mortgage obligations incurred before February 15, 2020;
- rent obligations under leases in force before February 15, 2020; and
- utilities for which service began before February 15, 2020.

The amount of principal that is forgiven is not included in gross income for tax purposes.

PPP Loan forgiveness is subject to formulaic reduction by multiplying the maximum forgiveness amount by the quotient obtained by dividing:

- The average number of full time employees employed during the 8 week period commencing on the date of the loan by
- Either (as selected by the borrower):
 - The average number of full time employees per month employed during the period February 15, 2019 through June 30, 2019; or
 - The average number of full time employees per month employed during the period January 1, 2020 through February 28, 2020 (unless a seasonal employer, in which case it is the average monthly full time employees between February 15, 2019 and June 30, 2019).

PPP Loan forgiveness is also subject to further dollar for dollar reduction by

- any reduction in the number of full time employees during the period February 15, 2020 through April 26, 2020; and
- the amount of any reduction in total salary or wages of any employee earning less than \$100,000 in annual salary during the 8 week period following the making of the PPP Loan that exceeds 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed prior to the 8 week measurement period.

These further reductions can be mitigated if the company increases its workforce or the salary/wages it pays its employees by June 30, 2020.

Finally, Treasury announced that it is “anticipated” that not more than 25% of the forgiven amount can be used for non-payroll costs, thereby potentially further limiting the amount of the PPP Loan that will be forgiven.

After the 8 week period, requests for forgiveness are submitted to the lender that is servicing the PPP Loan with documentation verifying the number of full-time employees and pay rates as well as the payment of eligible mortgage, lease and utility obligations. Decisions on the forgiveness amount must be made within 60 days.

How do PPP Loans that are not forgiven be repaid?

Any balance of a PPP Loan which is not forgiven must be repaid over a two year period with interest at a fixed rate of 0.5% per annum. No payments will be required for a period of 6 months after the unforgiven portion of the PPP Loan is established. These loans are unsecured and do not require personal guarantees.

Can a borrower have a PPP Loan and an EIDL Loan

A borrower can have both a PPP Loan and an EIDL Loan only if the EIDL loan is for a purpose other than payroll, health care benefits, mortgage interest, rent, utilities and loan interest.

How does a company apply for a PPP Loan

Starting April 3, 2020, small businesses and sole proprietorships can apply for and receive PPP Loans through existing SBA lenders.

Starting April 10, 2020, independent contractors and self-employed individuals can apply for and receive PPP Loans through existing SBA lenders.

Other regulated lenders, including banks and credit unions will be available to make these loans as soon as they are approved and enrolled in the program.

A list of SBA lenders can be found at www.sba.gov.

A copy of the application can be located at <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf> or <https://www.sba.gov/sites/default/files/2020-03/Borrower%20Paycheck%20Protection%20Program%20Application.pdf>.

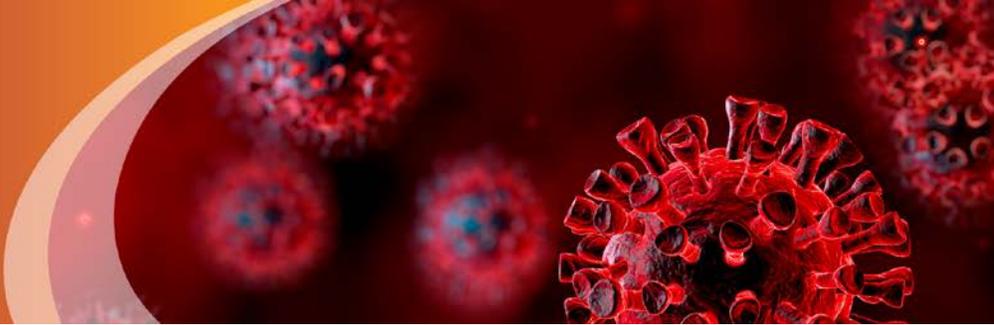
Eligibility Questionnaire

For business concerns that are small under the Small Business Act:

Question 1:	<p>Does the applicant qualify as a small business under its applicable NAICS Code?</p> <ul style="list-style-type: none"> • For services and construction NAICS codes, if, over the most recently completed three (3) fiscal years, the average annual receipts of the applicant <i>and</i> its affiliates falls below the relevant size threshold, the applicant is eligible, • For manufacturing NAICS codes, if, over the most recently completed twelve (12) months, the average annual employee count of the applicant <i>and</i> its affiliates falls below the relevant size threshold, the applicant is eligible,
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Expanded eligibility for hotels, restaurants, and other entities with a NAICS code beginning with 72:

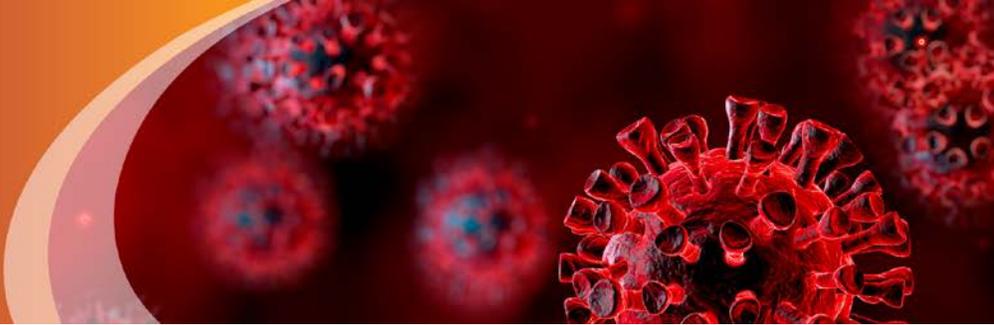
Question 1:	<p>What is the relevant measure of whether the applicant is eligible?</p> <ul style="list-style-type: none"> • Whether the applicant has 500 or fewer employees (total or at each location). • (Note, entities with a NAICS code beginning with 72 that have more than 500 employees but which fall under their applicable size standard for their NAICS code, the analysis in the preceding section applies.)
Question 2:	<p>Do the SBA’s affiliation rules apply to the applicant?</p> <ul style="list-style-type: none"> • The applicant is exempt from SBA’s affiliation rules if it has 500 or fewer employees (total at <u>all locations</u>) → skip to question 4.
Question 3:	<p>If the applicant has more than 500 employees (total at <u>all locations</u>), does the applicant have affiliates under the SBA’s tests?</p> <ul style="list-style-type: none"> • Does the applicant control or have the power to control third parties? • Does another entity or individual have the power to control the applicant as well as to control other third-parties? <p>(Note that this is a detailed, fact-specific analysis for which companies should consult with counsel, particularly if unfamiliar with the SBA tests.)</p>



Question 4:	<p>How many employees does the applicant and its affiliates, if relevant, have at each location?</p> <ul style="list-style-type: none"> • Applicant with more than 1 physical location that employs not more than 500 employees per location shall be eligible to receive a covered loan. • If under 500 at each location, the applicant should be eligible. But, if applicant has more than 500 employees (total at all locations), it is not exempt from affiliation analysis.
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Expanded eligibility in addition to small business concerns for entities with a NAICS code that does not begin with 72:

Question 1:	<p>What is the relevant standard against which size eligibility will be measured for the applicant?</p> <ul style="list-style-type: none"> • Whether the applicant has 500 or fewer employees, or, • If the applicant is subject to a larger employee-based size standard under the NAICS for the industry in which the applicant operates, fewer employees than the applicable size standard.
Question 2:	<p>Do the affiliation rules apply to the applicant?</p> <ul style="list-style-type: none"> • If the concern operates as a franchise that is assigned a franchise identifier code by the SBA <u>or</u> receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 – then the SBA affiliation rules do not apply → skip to Question 4 • If the concern is not a franchise or receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958, answer Question 3.
Question 3:	<p>Does the applicant have affiliates under the SBA’s tests?</p> <ul style="list-style-type: none"> • Does the applicant control or have the power to control third parties? • Does another entity or individual have the power to control the applicant as well as to control other third-parties? <p>(Note that this is a detailed, fact-specific analysis for which companies should consult with counsel, particularly if unfamiliar with the SBA requirements.)</p>

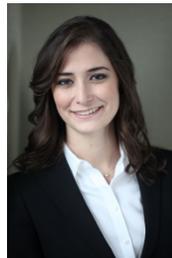


Question 4:	<p>How many employees does the concern – and any affiliates, if applicable – employ?</p> <ul style="list-style-type: none">• With some exceptions, generally the average number of employees is used and calculated based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.• Includes full-time and part-time employees and those obtained from PEOs.• Does not include volunteers who receive no compensation including no in-kind compensation.
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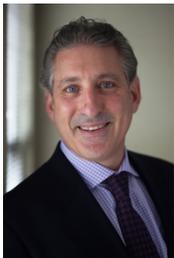
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