

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

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.

The Trump Administration has indicated that the small business loan programs of the CARES Act could be up and running as early as April 3, 2020. We will update this guidance once the SBA issues its regulations and gives greater insight into how the Paycheck Protection Program will be implemented in practice.

How much can be borrowed under the Paycheck Protection Program?

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

- 250% 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.

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,¹ veterans organization,² 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.³

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

What certifications are required to demonstrate eligibility?

Eligible applicants must be able to make a good faith certification:

- That the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;
- Acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;
- That the eligible recipient does not have an application pending for a loan under Section 7(a) of the Small Business Act for the same purpose and duplicative of amounts applied for or received under a covered loan; and
- During the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under Section 7(a) of the Small Business Act for the same purpose and duplicative of amounts applied for or received under a covered loan.

¹ “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.

² “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.

³ “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).

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

All companies can take three steps right now while waiting for the SBA to issue further guidance or implementing regulations and initiate the application process, including but not limited to:

1. Documenting current efforts taken to support ongoing operations;
2. Determining how many employees the applicant has as well as how many employees any potential affiliate has; and
3. 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, in whole or in part, 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;
- rent obligations; and
- utilities.

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 reduction by 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. This further reduction can be mitigated to the extent that there has been a workforce or salary reduction if the company increases its workforce or the salary/wages it pays its employees by June 30, 2020.

How do PPP Loans that are not forgiven be repaid?

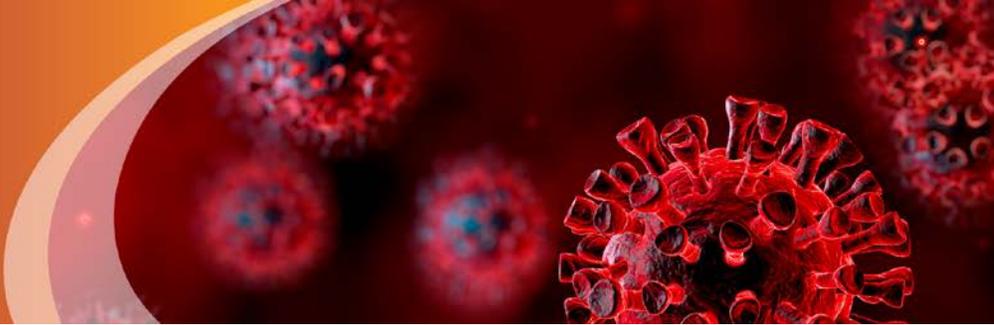
Any balance of a PPP Loan which is not forgiven must be repaid. The terms of repayment shall be determined by the borrower and the lender making the PPP Loan although the maturity of the loan cannot exceed 10 years after forgiveness and the interest rate on the remaining loan balance shall not exceed 4% per annum. Loan payments, including payment of principal, interest, and fees, will be deferred for a period of not less than 6 months, and not more than 1 year.

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

The SBA needs to determine the application process, including documentation that will be required to apply for a PPP Loan, but the CARES Act requires that this be a streamlined process. The CARES Act also expands the number of lenders that can make PPP Loans from that making



other SBA loans. For now, a company should reach out to its current banking relationships to inquire whether that bank will be making PPP Loans.

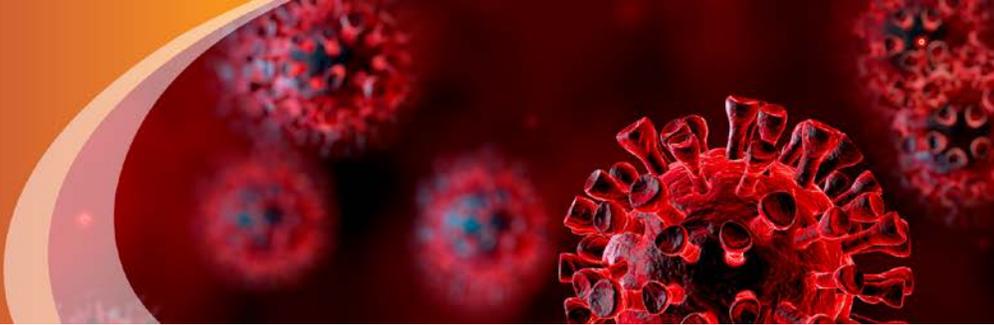
Eligibility Questionnaire

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 and 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 and 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:

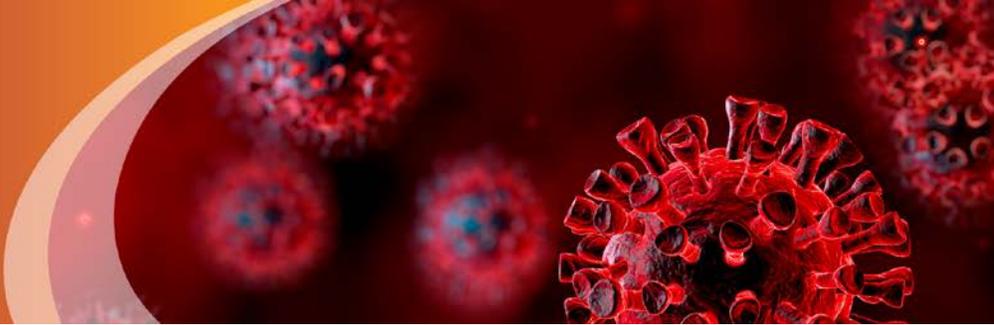
Question 1:	<p>What is the relevant measure of whether the applicant is eligible?</p> <ul style="list-style-type: none"> • Whether the applicant has 500 or fewer employees (total or at each location). • (Note, entities with a NAICS code beginning with 72 that have more than 500 employees but which fall 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?



	(Note that this is a detailed, fact-specific analysis for which companies should consult with counsel, particularly if unfamiliar with the SBA tests.)
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.

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.



<p>Question 3:</p>	<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>
<p>Question 4:</p>	<p>How many employees does the concern – and any affiliates, if applicable – employ?</p> <ul style="list-style-type: none"> • 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.

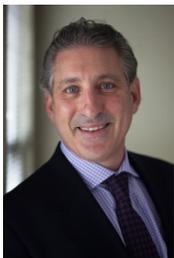
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