CARES Act Questions for the Manufacturing, Distribution and Retail Industry (Updated 08/7/2020)

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Congress recently passed the economic stimulus package referred to as the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), the Paycheck Protection Program and Health Care Enhancement Act (“PPPHCE Act”), and the Paycheck Protection Program Flexibility Act (“PPP Flexibility Act”) (together, the CARES Act1, PPPHCE Act, and PPP Flexibility Act are called the “CARES Act”). The CARES Act is important to certain manufacturers because it offers necessary financial relief during this unprecedented time. Understanding the available loans and grants, tax provisions, and employment considerations available under the CARES Act could have a tremendous impact on manufacturers as they make business-critical decisions about their workforce and the
continuation of their businesses. As further information becomes available about financial relief offered under the CARES Act, we will update this post.

What are the key provisions in the CARES Act that impact the manufacturing sector?

The CARES Act establishes a new temporary lending program for small businesses, extends the Economic Injury Disaster Loan ("EIDL") program and allows for advances, amends the tax code, and includes new items relevant to unemployment insurance.

CARES Act and FFCRA Employment Considerations

The CARES Act made federal funds available to states that enter into agreements with the federal government to increase their weekly unemployment benefits and added additional funds available if states eased some of their unemployment requirements.

1. Are workers who were not typically eligible for unemployment now able to receive benefits?

Yes. The CARES Act created a Pandemic Unemployment Assistance program that expands coverage to individuals who would otherwise not be qualified for benefits, including self-employed workers, independent contractors, and part-time workers. As with other recipients, these individuals must still establish that they are able and available to work but cannot because of a COVID-19 related reason. The benefits will be administered by the states, which means the states will determine eligibility, but these benefits are federally funded and will be eligible through December 31, 2020.

2. Is there an increase in benefits that workers can receive?

Yes. The federal government will provide an additional $600 per week in Federal Pandemic Unemployment Compensation for those who receive unemployment benefits as of the date the state enters into an agreement with the federal government until July 31, 2020.

3. A worker has exhausted their unemployment benefits that a state provides. May they receive more?
Yes. The CARES Act established Pandemic Emergency Unemployment Compensation to provide an additional 13 weeks of unemployment benefits for workers who have exhausted their state benefits, are able and available to work, but cannot work because of a COVID-19 related reason, including but not limited to quarantine, illness, or movement restriction order. These additional 13 weeks become available as of the date the state enters into an agreement with the federal government until December 31, 2020.

4. How does the CARES Act interact with the Families First Coronavirus Response Act (“FFCRA”) for my employees?

The FFCRA requires employers with fewer than 500 employees to provide up to 80 hours of emergency paid sick leave (“EPSL”) and emergency paid Family and Medical Leave Act (“EPFMLA”) in certain circumstances. The CARES Act clarified the amounts that individuals would be paid under these leaves. For example, an individual who takes 80 hours of EPSL because they are seriously ill with COVID-19 symptoms and cannot perform work would be paid their regular daily rate up to a maximum of $511 per day, or $5,110. If another employee needs to stay home to care for young school-aged children and cannot perform work, that employee would be paid up to two-thirds of their regular daily rate to a maximum of $200 per day, or $12,000 (if you combine their EPSL and EPFMLA). The CARES Act also clarified that an individual who was laid off on or after March 1, 2020, worked for an employer at least 30 of the last 60 calendar days before the layoff, and is rehired is eligible for EPFMLA.

5. Does seeking tax credits under the FFCRA for emergency sick leave and extended leave make me ineligible for a Paycheck Protection Program (“PPP”) loan?

No, you may seek tax credits under the FFCRA and still apply for a PPP loan. You just cannot apply the payments you make under the FFCRA to employees for emergency sick leave or extended FMLA leave towards PPP loan forgiveness if you are seeking a tax credit for the same funds. That would be “double-dipping.”

6. Is the calculation of the number of employees for the FFCRA and PPP the same?

No. For purposes of FFCRA, companies count all employees as of the time the FFCRA related leave is being requested, including full-time and part-time employees, employees on leave, temporary employees, and those employees who are jointly employed with another employer or considered part of the “single integrated employer.” Please be careful. The calculation analysis differs under the PPP. See Question 8 under the CARES Act Lending Programs Section.

7. For purposes of counting employees under the FFCRA, are all employees counted or only those employees whose principal place of residence is in the United States?

The FFCRA does not require the employee’s permanent residence to be in the United States for purposes of counting.
8. If an employer pays qualified sick and family leave wages under the provisions of FFCRA, how does the employer report those amounts for tax purposes?

Consistent with the requirements of IRS Notice 2020-54, employers will be required to report qualified sick and family leave wages paid to employees pursuant to the terms of FFCRA either on Form W-2, Box 14, or in a statement provided the Form W-2. Notice 2020-54 goes on to provide optional language an employer may use in the Form W-2 instructions for employees.

CARES Act Tax Considerations

1. What are three “big” tax provisions for manufacturers in the CARES Act?

   - Net operating loss (“NOL”) carrybacks.
   - Increase in allowable interest deduction.
   - Deferral of payroll tax/employee retention tax credits.

2. How does the NOL carryback provision work?

   Under the CARES Act, companies with losses from 2018, 2019, and 2020 may be able to carry those losses back five years and offset up to 100% of taxable income. That could generate tax refunds that businesses could put to use upon receipt.

3. Why should manufacturers care about the increase in the interest deduction?

   Under the CARES Act, the maximum amount of business interest deductions is increased from 30% of earnings before interest, taxes, depreciation, and amortization ("EBITDA") to 50% of EBITDA. This means businesses can reduce their taxable income for 2020 and 2021 by deducting more interest expense. Although this takes longer for businesses to realize the savings, it is a net win. Businesses should note, however, that this provision sunsets starting in 2022.

4. Payroll tax deferral and employee retention credits are lumped together. Looking at them one at a time, what more do we need to understand about deferral of payroll taxes?

   Under the CARES Act, businesses are permitted to defer payment of the employer’s share of Social Security taxes through the end of 2020. Businesses deferring payroll taxes under this provision are permitted to pay half of the deferred amount by the end of 2021 and the remaining half by the end of 2022. All the while, no penalties or interest will accrue. So in some ways, you can view this as a short-term interest-free loan from the government.
5. What can you tell me about the employee retention tax credit?

The CARES Act creates a new, temporarily refundable payroll tax credit for “eligible employers” affected by COVID-19. An eligible employer is an entity (1) whose operation is fully or partially suspended in response to governmental orders limiting commerce, travel, or group meetings or (2) that has experienced a significant decline in gross receipts, defined as a decline of 50% or more in quarterly receipts when compared to the prior year quarter. If an employer meets that definition, the credit is 50% on the first $10,000 of certain wages incurred or paid from March 13, 2020, through December 31, 2020. The credit is not available to those employers getting PPP loans.

CARES Act Lending Programs

Small Business Lending

1. What programs are available?

The Paycheck Protection Program (“PPP”) was established and the Economic Injury Disaster Loan (“EIDL”) program was extended to certain businesses, and advances were allowed. For the PPP, apply at a Small Business Administration (“SBA”) lender, and for the EIDL program, apply on the SBA site.

2. How does the PPP application process work?

The PPP loans are first come, first served. For PPP, lenders began taking applications on April 3, 2020, for small businesses and sole proprietorships, and on April 10, 2020, for independent contractors and self-employed persons. Applications were suspended as of April 16, 2020, due to lack of funds. The funds were replenished as of April 24, 2020, by $310 billion, of which $250 billion is for PPP and an additional $60 billion is set aside for PPP to be issued by certain depository institutions. See Question 3A. The PPP loan program expired as of June 30, 2020, but was extended on July 4, 2020 to August 8, 2020 and there was approximately $130 billion available as of that date. As of April 24, 2020, an additional $50 billion was allocated to EIDLs and an additional $10 billion was allocated for EIDL grants. As of June 30, 2020, applications are still being accepted for EIDLs; check the EIDL website for the current status.

3. Are PPP funds available as of end of day on July 6, 2020?

Yes. The PPP loan program expired as of end of day on June 30, 2020, but was extended to August 8, 2020 on July 4, 2020. The PPP originally had $349 billion available, which was exhausted as of April 16, 2020. On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act (“PPPHCE Act”) went into effect with an additional funding of $310 billion. As of June 30, 2020, the program expired, but there were approximately $130 billion unused. As of July 6, 2020, approximately $130 billion was available under the program.
3A. What are the set-aside provisions for rural, minority, and women-owned small businesses?

The purpose of the set-aside provisions is to help rural small businesses, minority small businesses, and women-owned small businesses get access to the PPP funds. The set-aside provisions reserve certain amounts for PPP, specifically:

- $30 billion for loans made by insured depository institutions and credit unions that have assets between $10 billion and $50 billion; and
- $30 billion for loans made by community development financial institutions, minority depository institutions, Small Business Investment Alliance ("SBIA") development companies, and intermediaries ("Community Financial Institutions") and small insured depository institutions and credit unions with assets of less than $10 billion.

4. Who is eligible for the Paycheck Protection Program?

The CARES Act creates a new loan program run through lenders and the Small Business Administration called the Paycheck Protection Program ("PPP"), which is designed to provide a direct incentive for small businesses to keep their workers on the payroll.

First, the following entities may be eligible (see Question 7 for ineligible businesses):

- Small business concerns that meet the SBA size standards. A business can qualify if it meets the SBA employee-based or revenue-based size standard corresponding to its primary industry. Many manufacturers fall within SBA size standards that allow for greater than 500 employees. See NAICS Codes – 13 CFR 121.201.
- Small business concerns that meet both tests in the SBA's "alternative size standard" as of March 27, 2020: (1) the 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.
- Any business that meets the SBA employee-based size standard for the industry in which it operates (if applicable).
- Any 501(c)(3) nonprofits, 501(c)(19) veterans organizations, or 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 that meet the SBA employee-based size standards for the industry in which they operate.
- Any business with a NAICS Code that begins with 72 (Accommodation and Food Services) that has more than one physical location and employs fewer than 500 people per location.
- Sole proprietorships, independent contractors, and self-employed individuals.
The affiliation rules apply for most businesses. See Questions 5 and 6.

Second, the eligible business must:

- Have had operations on February 15, 2020; and
- Either had employees for whom the business paid salaries and payroll taxes or paid independent contractors.

As part of the application, the business will need to supply documentation and certifications relating to these items. See Questions 13 and 14.

4A. **On May 18, 2020, the SBA issued an Interim Final Rule stating that to calculate the number of employees of an entity for purposes of determining eligibility for the PPP, an entity must include all employees of its domestic and foreign affiliates, except in those limited circumstances in which the affiliation rules expressly do not apply to the entity. If the borrower used the eligibility criteria that it has 500 or fewer employees whose principal place of residence is in the United States to obtain a loan, what are the consequences to the borrower?**

In the Interim Final Rule, the SBA stated:

... [A]s an exercise of enforcement discretion due to reasonable borrower confusion based on SBA guidance (which was later resolved through a clarifying FAQ on May 5, 2020), SBA will not find any borrower that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the borrower’s exclusion of non-U.S employees from the borrower’s calculation of its employee headcount if the borrower (together with its affiliates) had no more than 500 employees whose principal place of residence is in the United States. Such borrowers shall not be deemed to have made an inaccurate certification of eligibility solely on that basis. Under no circumstances may PPP funds be used to support non-U.S. workers or operations.

See Interim Final Rule on Treatment of Entities with Foreign Affiliates

5. **Who determines eligibility and applies the affiliation rules?**

The borrower is responsible for this analysis and must certify that it is eligible to receive a PPP loan, including that it has applied the applicable affiliation rules. Lenders are not required to make an independent determination and may rely on the borrower certification. Knowing misrepresentations or false statements, in the borrower certification or otherwise, can result in civil and criminal penalties.

6. **What are the affiliation rules?**

In most cases, a borrower will be considered together with its affiliates for purposes of determining eligibility for the PPP. Under SBA rules, entities may be considered affiliates based on factors including stock ownership, overlapping management, and identity of interest. The Borrower Application Form, SBA Form 2483, released on June 12, 2020, requires applicants to list other businesses with which they have
common management. Applicants should use the information supplied as they assess whether they have affiliates that should be included in their number of employees reported on SBA Form 2483.

The affiliation rules are waived for PPP for businesses in the Accommodation and Hotel Code 72, certain franchises, and certain business concerns that receive financial assistance from a company licensed under section 301 of the Small Business Investment Act.

The affiliation rule also exempts otherwise qualified faith-based organizations from the SBA’s affiliate rules where the application of the affiliation rules would substantially burden those organizations’ religious exercise.

6A: Do businesses owned by large companies or private companies, in each case, with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?

FAQ 31 issued April 23, 2020, and FAQ 37 issued April 28, 2020 (FAQS), answered these questions as follows:

In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower’s certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 18, 2020 will be deemed by SBA to have made the required certification in good faith.

Since this determination is fact based and situational, please discuss with legal counsel.

7. Are there other limitations on eligibility?

Some activities (like financial businesses, household employers, private clubs, loan packagers, etc.) and some owners (like passive businesses owned by developers and landlords, and a 20% owner that is incarcerated, on probation, on parole, etc.), and some industries (like cannabis) are prohibited. For a list of ineligible businesses, see 13 CFR 120.110 (“What businesses are ineligible for SBA business loans?”) and the SBA’s Standard Operating Procedure (SOP) 50 10 5, Subpart B, Chapter 2, except for nonprofit
organizations authorized under the CARES Act. Also see Schwabe’s article Businesses Ineligible for the Paycheck Protection Program.

8. What time periods should borrowers use to determine their number of employees and payroll costs? For seasonal employers, what time periods determine eligibility?

In general, borrowers can calculate their aggregate payroll costs for their employees who reside in the United States using data either from the previous 12 months or from calendar year 2019. For seasonal employers, the applicant may elect to use either (a) the average monthly payroll for a 12-week period between February 15, 2019, or March 1, 2019, and June 30, 2019; or (b) the average total monthly payment for payroll during any consecutive 12-week period between May 1, 2019, and September 15, 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.

For purposes of applying an employee-based size standard, borrowers may use their average employment over the previous 12 months or from calendar year 2019, or for seasonal employers, a 12-week period between February 15, 2019, or March 1, 2019, and ending June 30, 2019. Alternatively, borrowers may elect to use the SBA’s usual calculation: the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months).

For purposes of determining whether a seasonal employer is eligible and in operation as of February 15, 2020, a lender may consider whether the seasonal employer was in operation:

- on February 15, 2020, or
- for an eight-week period between February 15, 2019, and June 30, 2019, or
- for any eight-week period between May 1, 2019, and September 15, 2019.

9. What is the loan amount and other terms?

The maximum loan amount is two and a half times the “average monthly payroll cost” (with some adjustment for seasonal employers) or $10 million. No collateral or personal guarantees are required. There is a six month deferment on payment. The interest rate is 1%, and there is a two year maturity. Only one loan per business is permitted—this means that a business should consider applying for the maximum amount. E-signature and e-consent can be used.

See the June 26, 2020 guidance: How to Calculate Loan Amounts – by Business Type.

9A. If a seasonal employer received a PPP loan before the alternative criterion for determining the maximum loan amount for partnerships or seasonal employers became available (posted originally on April 27, 2020, and revised on April 28, 2020), can the loan amount be increased based on a revised calculation using the alternative criterion?
Yes. On May 13, 2020, the Interim Final Rule – Loan Increases was issued, providing that a seasonal employer that received a PPP loan before the alternative criterion for such employers was posted on April 28, 2020, would be eligible for a higher maximum loan amount under the alternative criterion. The lender may submit an increase of the PPP loan amount, even if the loan has been fully disbursed, provided that the lender’s first SBA Form 1502 report to the SBA on the PPP loan has not been submitted. After the initial SBA Form 1502 report has been submitted to the SBA, or after the date the initial SBA Form 1502 report was required to be submitted to the SBA, the loan cannot be increased. For the alternative criterion, see Interim Final Rule – Additional Criterion For Seasonal Employers.

9B. If a partnership received a PPP loan that did not include any compensation for its partners, can the loan amount be increased to include partner compensation?

Yes. On May 13, 2020, the Interim Final Rule – Loan Increases was issued, providing that a partnership that received a PPP loan that only included amounts necessary for payroll costs of the partnership’s employees and other eligible operating expenses, but did not include any amount for partner compensation, would be eligible to have the loan increased to include appropriate partner compensation. The lender may submit an increase of the PPP loan amount, even if the loan has been fully disbursed, provided that the lender’s first SBA Form 1502 report to the SBA on the PPP loan has not been submitted. After the initial SBA Form 1502 report has been submitted to the SBA, or after the date the initial SBA Form 1502 report was required to be submitted to the SBA, the loan cannot be increased. The interim final rule posted on April 14, 2020, describes how partnerships, rather than individual partners, are eligible for a PPP loan. Guidance describing how to calculate partnership PPP loan amounts and defining the self-employment income of partners was posted on June 26, 2020 (See How to Calculate Maximum Loan Amounts, Question 4.)

10. For what purposes may a small business manufacturer use its loan?

The loans are primarily intended to be used to pay employee compensation and benefits during the COVID-19 crisis, including salaries, health care costs, paid leave, and state and local taxes. For the purposes of determining the PPP loan amounts and to calculate loan forgiveness, businesses can only include amounts for employees whose principal place of residence is inside the United States. The loans can also be used for rent payments, utility bills, mortgage interest payments, interest on other debt, and to refinance a SBA EIDL. The limitation is to cover costs for the eight-week period after the first disbursement of the loan. The lender is to make the first disbursement no later than 10 calendar days from the date of loan approval. There is also a limitation on forgiveness on a proportionate basis, at least 60% of the loan forgiveness amount must be used for payroll costs and not more than 40% of such amount may be used for non-payroll items.

11. What are “payroll costs”?

“Payroll costs” consist of compensation to employees (whose principal place of residence is in the United States) in the form of salary, wages, commission, or similar compensation; cash tips or the equivalent; 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; and for an independent contractor or sole proprietor, wage, commission, income, or net earnings from self-employment or similar compensation. Independent contractors are not employees for purposes of PPP loan calculations and they have the ability to apply for a PPP loan on their own.

Please note that current guidance from the Treasury provides that a limited liability company (“LLC”) may count up to $100,000 per LLC member to the extent that the member would treat that as self-employment income on the member’s personal tax return. The current guidance also requires the LLC to be the applicant, not the individual who is an LLC member.

Payroll costs do not include the following:

- $100,000 cap on an annualized basis of cash compensation for each employee (does not apply 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).

- Compensation of an employee whose principal place of residence is outside of the United States.

- Federal employment taxes imposed or withheld between February 15 and June 30, 2020, including the employee’s and employer’s shares of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees.

- Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (“FFCRA”).

12. Can the loans be forgiven? If the loan is forgiven, what happens for federal tax purposes? Are the expenses deductible?

Loans under the program are eligible for forgiveness to the extent the funds are used to cover payroll costs, rent payments, utility bills, or mortgage interest payments for the period beginning on the date of the origination of the loan and ending on the earlier of 24 weeks after the date of origination or December 31, 2020. A borrower that received a loan prior to the enactment of the PPP Flexibility Act may elect that the covered period end on the date that is 8 weeks after the date of the origination of such loan. On a proportionate basis, at least 60% of the loan forgiveness amount must be used for payroll costs and not more than 40% of such amount may be used for non-payroll items. Lenders are monitoring this—they want the loans to be fully forgiven.

Loan forgiveness will be reduced to the extent that businesses reduce their full-time employee head count or employee salaries and wages by more than 25%. To encourage employers to rehire any employees who have already been laid off due to the COVID-19 crisis, borrowers that rehire workers previously laid off will be given credit for forgiveness purposes. The forgiveness calculation takes the number of employees and reduced compensation into consideration. There are also various exemptions and safe harbors — see
Schwabe articles Ten Things to Know About the PPP Loan Forgiveness Applications and Why You May Want to Wait to File for PPP Loan Forgiveness and Other Tips.

Loan forgiveness will not lead to cancellation of indebtedness income. That being said, the IRS has concluded in Notice 2020-32 that taxpayers may not deduct as business expenses the amounts that gave rise to the cancellation of the underlying PPP loan. As a result, taxpayers who have a PPP loan forgiven should plan for the tax consequences that may arise due to their inability to claim certain expenditures of the loan proceeds as tax deductible.

12A. Will the SBA review individual PPP loan files following the lender’s submission of the borrower’s loan forgiveness application?

Yes, if the amount of the loan is in excess of $2 million. In FAQ 39 dated April 29, 2020, the Treasury answered this question as follows:

Yes. In FAQ #31, SBA reminded all borrowers of an important certification required to obtain a PPP loan. To further ensure PPP loans are limited to eligible borrowers in need, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of $2 million, in addition to other loans as appropriate, following the lender’s submission of the borrower’s loan forgiveness application. Additional guidance implementing this procedure will be forthcoming. The outcome of SBA’s review of loan files will not affect SBA’s guarantee of any loan for which the lender complied with the lender obligations set forth in paragraphs III.3.b(i)-(iii) of the Paycheck Protection Program Rule (April 2, 2020) and further explained in FAQ #1.

Since this determination is fact based and situational, please discuss with legal counsel, see Schwabe article A Guide to the SBA PPP Loan Forgiveness Review Process.

12B. How will the SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?

In FAQ 46 dated May 13, 2020, this question was answered as follows:

When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith. SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit
resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than $2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. The SBA has previously stated that all PPP loans in excess of $2 million, and other PPP loans as appropriate, will be subject to its review for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If the SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, the SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from the SBA, the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning the necessity of the loan request. The SBA’s determination concerning the certification regarding the necessity of the loan request will not affect the SBA’s loan guarantee.

13. What does the application look like?

The Treasury Department has posted a form of application as of June 24, 2020. Please review the application carefully. There is more information in response to Question 14.

14. What documents and certifications are required?

Documents: Per the SBA, the following documents are required:

- Payroll processor records, payroll tax filings, or Form 1099-MISC.
- Banks are also requiring other documents, like organizational and authorization documents. Please contact the lender for required documents.

Certifications: As of June 12, 2020, the certifications stated by the SBA are:

- Applicant has read the statements included in this form, including the Statements Required by Law and Executive Orders, and understands them.
- Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 employees or, if applicable, meets the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant’s industry.
- Applicant will comply, whenever applicable, with the civil rights and other limitations in this form.
• All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.

• To the extent feasible, Applicant will purchase only American-made equipment and products.

• Applicant is not engaged in any activity that is illegal under federal, state or local law.

• Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

• The authorized representative of the Applicant must certify in good faith to all of the following:
  • Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.
  • 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 interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.
  • Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant’s payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the 24-week period following this loan.
  • I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 40% of the forgiven amount may be for non-payroll costs.
  • 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 the Paycheck Protection Program.
  • I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including 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 confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided 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.
15. What records should I keep?

We expect that those that receive PPP loans that are forgiven will be subject to audit by the SBA at some point. Keep all materials to apply for the loan, as well as documents relating to the forgiveness amounts. It is likely the focus of the audit will be on substantiating the forgiveness amounts – see Schwabe article Key Considerations for PPP Documentation.

16. What other guidance is available?

The SBA is required to issue rules within 15 days of the CARES Act's passage to implement the program. The Treasury Department and SBA have issued interim final rules, applicable affiliation rules, the application, frequently asked questions, and other information.

17. What happened with the EIDLs and the Advances?

The changes include:

- Extended to small businesses, nonprofits (including faith based), sole proprietors, and independent contractors
- Up to $2 million working capital loan (as of April 10, 2020, some SBA local offices announced that the loan limit is $15,000)
- Payments deferred for a year
- Loans based on credit scores; no tax returns required; up to $200,000 without a personal guarantee
- No collateral for $25,000 or less; general security interest instead of real estate for larger loans
- Up to $10,000 emergency grant within 3 days that does not have to be repaid (as of April 10, 2020, some SBA local offices announced that this amount was limited to $1,000 per employee, up to $10,000)
- Apply through SBA
- Intersects with the PPP, in that an outstanding EIDL used for payroll costs made between January 31, 2020, and April 3, 2020, less the amount of an advance is added to a PPP loan calculation. If the EIDL loan was not used for payroll costs, it does not affect eligibility for a PPP loan.

Midsized Businesses

18. What loans would be made available to midsized manufacturers and businesses under the CARES Act?

On June 15, 2020, the Federal Reserve launched its Main Street Lending Program by opening up for lender registration. It requested lenders to register using a lender portal and encouraged them to begin making program loans to for-profit firms “immediately.” The central bank also sought feedback on a proposal to expand the program to allow nonprofit organizations to borrow under the program

- The Department of Treasury is required to endeavor to seek the implementation of a Federal Reserve lending program that targets U.S.-eligible businesses (and, to the extent practicable, nonprofit
organizations) with between 500 and 10,000 employees, subject to additional terms and conditions.

- The CARES Act also suggests that the Federal Reserve may establish a Main Street Business Lending Program or facility that supports lending to small and midsized businesses on such terms and conditions that are consistent with its authority under the Federal Reserve Act.

- For both programs, the CARES Act contains restrictions on certain stock buybacks, paying dividends, and executive compensation.

- Midsize loans are not eligible for loan forgiveness and are also subject to specified conflicts of interest rules. For more information, please see Overview of the Main Street Lending Program.

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