Paycheck Protection Program: FAQs for SMACNA Members  
(Updated 5-18-2020; adds new FAQs 30-39, covering loan forgiveness application)

Small Business Loans – CARES Act

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One of the programs instituted by the federal government in response to the outbreak of COVID-19 aimed at helping small businesses recover from the economic impact of the ongoing pandemic is the Paycheck Protection Program (“PPP”). The program provides funding for loans to small businesses. Small businesses with pending or approved applications should be aware of the program’s features and requirements.

The information provided in these FAQs is based upon the information and guidance provided by the Treasury Department as of May 18, 2020. The most recent guidance issued by the Treasury Department includes the loan forgiveness application, which sets forth and clarifies certain issues surrounding the process of loan forgiveness. We will continue to update these FAQs as we receive additional guidance from the Treasury Department.

**Small Business Loans – CARES Act**

**FAQ #1: What is the Paycheck Protection Program?**

The Paycheck Protection Program is a new loan program included in the recently adopted CARES Act that is designed to help small businesses meet their payroll costs.

**FAQ #2: Who is eligible to participate in the Paycheck Protection Program?**

Eligible recipients include small businesses and 501(c)(3) nonprofits that employ less than 500 employees, or less than the normal size standard that the SBA uses for the applicant’s primary industry (determined by NAICS number). For example, for NAICS number 332322—Sheet Metal Work Manufacturing, the normal SBA size standard is also 500 employees, but some industries have different size standards. A business can qualify for a PPP loan so long as they meet either the 500 employees standard, or the standard for their respective industry, regardless of whether it’s an employee-based or revenue-based size standard. Note, however, that nonprofit organizations must meet the employee-based standard and cannot look to revenue size standards.

Employees include all persons employed on a full-time, part-time, or other basis. Sole-proprietors, independent contractors, and certain self-employed individuals are also eligible recipients. Importantly, the CARES Act waives the “credit available elsewhere” test that SBA loans normally have, so eligible businesses are not required to seek credit elsewhere before applying. The CARES Act also eliminates the personal guaranty and collateral typically required to obtain an SBA loan.

Note, however, that some small businesses are ineligible even if they satisfy the foregoing criteria. Businesses are ineligible for a PPP loan if: (i) they engaged in any activity that is illegal under federal, state, or local law; (ii) they are a household employer (individuals who employ
household employees such as nannies or housekeepers); (iii) an owner of 20% or more of the equity of the applicant is incarcerated, on probation, on parole, presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or has been convicted of a felony within the last five years; or (iv) they are a business deemed ineligible by 13 CFR 120.110 (e.g., among others, financial businesses, passive businesses, insurance companies, government-owned entities).

FAQ #3: How much can eligible businesses borrow?

Eligible recipients can receive loans for up to the lesser of (i) 2.5x their average monthly payroll costs over the prior twelve (12) months plus any amounts outstanding under an Economic Injury Disaster Loan, or (ii) $10 million.

FAQ #4: What counts as “payroll costs”?

“Payroll costs” are determined by the twelve (12) months prior to the application, and include the following items: (i) salary, wages, commissions, or similar compensation; (ii) payment of cash tips or equivalent, (iii) payment for vacation, parental, family, medical, or sick leave, (iv) allowance for dismissal or separation, (v) payment required for the provision of group health care benefits, including insurance premiums, (vi) payment of any retirement benefit, and (vii) payment of State and local taxes assessed on the compensation of employees. The Treasury Department has not released guidance expanding the definition of “Payroll costs” to include non-listed fringe benefits.

FAQ #5: What does “payroll costs” exclude?

“Payroll costs,” as defined in the CARES Act, specifically cannot include salary, wages, commission or similar compensation of an individual employee in excess of $100,000 annualized (but the first $100,000 of such employee’s salary would count as payroll costs). The $100,000 limitation applies only to salaries, i.e. an individual employee’s compensation for purposes of calculating payroll costs can exceed $100,000 when non-cash benefits are included, provided that no salary in excess of $100,000 is included in such calculation. Payroll costs also cannot include (i) compensation paid to employees whose principal place of residence is outside of the United States, (ii) federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employer’s share of FICA and income taxes required to be withheld from employees, and (iii) qualified sick and family leave wages for which a credit is allowed under the Families First Coronavirus Response Act.

FAQ #6: Does “payroll costs” include fringe union benefits?
Whether or not a business has to pay fringe benefits to its employees is determined by its Collective Bargaining Agreement and past practice. But it is unclear whether fringe benefits may be included in the calculation of payroll costs for purposes of determining the amount of a PPP loan or loan forgiveness. The guidance from the SBA specifically lists certain categories, i.e. (i) salary and wages, (ii) payments for vacation, parental, family, medical, or sick leave, (iii) allowance for separation or dismissal, (iv) payment for group health care coverage, including insurance premiums, and retirement, and (v) payment of state and local taxes assessed on compensation of employees. Other fringe benefits that may be included in a CBA are not included in that list.

So, even if your CBA requires that that fringe benefits be paid out to employees, it is possible that the SBA will interpret the statute as not permitting them to be included in payroll costs when determining whether a loan recipient is eligible for forgiveness.

A business’s obligation to pay fringes may be impacted by whether the business is paying the employee to work or simply paying the employee to take advantage of loan forgiveness. In areas with a CBA requiring payment of fringes on “hours worked” rather than “hours paid,” hours paid by a business to an employee who is not rendering any service for the benefit of the business would not be considered “hours worked” and would not require payment of fringes.

The CARES Act specified that regulations regarding loan forgiveness must be issued by April 26, 2020. Hopefully, this issue is among those dealt with in that guidance.

**FAQ #7: How does an applicant calculate the amount they can borrow?**

Per the SBA’s Interim Final Rule, you can calculate the maximum amount you can borrow by using the following guide:

1. Total payroll costs from the last twelve months for employees who live in the United States.
2. Subtract any salary or wages paid to an employee in excess of an annual salary of $100,000. For example, if an employee makes $130,000 a year in salary (excluding non-cash benefits), then for these purposes, only include $100,000 for that employee.
3. Calculate average monthly payroll costs by dividing the amount from Step 2 above by 12.
4. Take that number and multiply it by 2.5.
5. Finally, add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL COVID-19 loan (because it does not have to be repaid).

For example:
1. Assume total payroll costs from the last twelve (12) months of $1,200,000 (including $100,000 of non-cash benefits like vacation, health care, and retirement benefits).

2. If four (4) employees make $150,000, then we subtract the amount above $100,000 for each of them ($1,200,000 - $200,000 = $1,000,000) (Recall that only an employee’s salary and wages are relevant to the $100,000 cut off; non-cash benefits can exceed $100,000 when combined with salary less than $100,000.)

3. Divide $1,000,000 by 12 = $83,333.33

4. Multiply $83,333.33 by 2.5 = $208,333.33

5. Add in the amount of an outstanding EIDL (but not any emergency advance), if any, and that is the total amount of money you could borrow under the PPP.

FAQ #8: What effect, if any, does qualified sick and family leave under the Families First Coronavirus Response Act have on Paycheck Protection Program loans?

Qualified sick and family leave wages for which a tax credit is allowed under the Families First Coronavirus Response Act cannot be counted as payroll costs for determining loan amounts under a Paycheck Protection Program loan.

FAQ #9: What can recipients spend loan proceeds on?

During the period from February 15, 2020 through June 20, 2020, loan recipients may spend loan proceeds on (i) payroll costs, (ii) costs associated with continuation of group healthcare benefits and insurance premiums, (iii) interest payments on mortgage debt incurred prior to February 15, 2020 (not including principal or prepayments), (iv) rent payments, (v) utility payments, and (vi) interest on any other debt obligations incurred prior to February 15, 2020. Amounts not spent within the eight (8) weeks following origination of the loan will convert into a term loan (see FAQ #17). The statute itself does not indicate whether there are limitations on what the loan proceeds can be spent on after June 30, 2020, but note that the loan application requires that borrowers certify that the funds will be used on business-related costs consistent with the PPP.

Note that 75% of the loan proceeds must be spent on payroll costs. Recall also that the definition of “payroll costs” in the CARES Act does not include employee salaries above $100,000.

Also note that only some of the above are eligible for loan forgiveness. See FAQ #11.

FAQ #10: Do recipients need to start paying back the loans right away?
No. The program allows for deferral of all payments for at least six (6) months.

FAQ #11: Are PPP loans eligible for forgiveness?

Yes. Recipients of Paycheck Protection Program loans may apply to have their loans forgiven. While there may be other things a loan recipient is permitted to spend loan proceeds on, the statute and regulations only list certain things as being eligible for loan forgiveness. Recipients are eligible for forgiveness in the amount equal to what the recipient spends on (i) payroll costs, (ii) mortgage interest, (iii) rent, and/or (iv) utilities (all of which must have been incurred or begun service prior to February 15, 2020) in the eight (8) week period after origination of the loan. Only 25% of the amount spent over the eight (8) week period can have been for non-payroll costs.

After the eight (8) week period, borrowers will be able to apply to their lenders for forgiveness. Lenders will have sixty (60) days in which to make a determination.

For example, if a PPP loan originates on April 20, 2020, then the eight (8) week period will run from April 20, 2020 until June 15, 2020. Let’s assume the borrower received $100,000. During that eight (8) weeks, if the borrower spends $80,000 on payroll costs, $10,000 on rent, and $10,000 on utilities, then 100% of the loan is eligible for forgiveness because the borrower (i) only spend the funds on approved costs eligible for forgiveness, (ii) spent 75% or more of the funds on payroll costs, and (iii) spent 100% of the funds within the eight (8) week period.

FAQ #12: Is the amount of the loan that is forgiven reduced by any factors?

Yes. There are two factors that can reduce the portion of the loan that is forgiven: (i) reduction of employees, and (ii) reduction in salaries.

FAQ #13: How is the loan forgiveness reduced if a recipient has laid off employees?

The amount of the loan that is forgiven is reduced by multiplying (i) the average number of full-time equivalent employees by (ii) the quotient obtained by dividing the average number of full-time equivalent employees per month during the covered period by either, at the election of the borrower, (a) the average number of full-time equivalent employees per month employed during February 15, 2019 through June 30, 2019 or (b) the average number of full-time equivalent employees per month during January 1, 2020 through February 29, 2020. Recipients will be required to submit documentation when applying for loan forgiveness to demonstrate the amount of loan forgiveness for which they are eligible, e.g. payroll tax filings reported to the IRS, state
income, payroll, and unemployment insurance filings, canceled checks for mortgage interest payments, etc.

For example, let’s assume the following:

- A loan recipient called ABC, LLC received a loan for $100,000 and spent 100% of it on approved, forgivable costs.
- During the eight (8) weeks following origination, ABC has an average of ten (10) full-time equivalent employees per month.
- During January 1, 2020 through February 29, 2020, ABC had an average of twelve (12) full-time equivalent employees per month.
- Using the formula above, ABC divides 10 by 12 = .83 and multiplies that number by the amount spent on forgivable costs ($100,000) = $83,000.

So in that example, ABC would be eligible for forgiveness of $83,000 of the loan.

FAQ #14: How is the loan forgiveness reduced if a recipient has reduced salaries?

The portion of the loan that is forgiven is also reduced by the amount of any reduction in total salary or wages of any employee in excess of 25% of the total salary or wage of such employee (excluding employee salaries in excess of $100,000 annually). As noted above, recipients will be required to submit documentation when applying for loan forgiveness to demonstrate the amount of loan forgiveness for which they are eligible, e.g. payroll tax filings reported to the IRS, state income, payroll, and unemployment insurance filings, canceled checks for mortgage interest payments, etc.

For example, if ABC, LLC had two (2) employees making $100,000 annually, and reduced their salaries to $50,000 annually, then the amount of forgiveness that ABC could receive would be reduced by $50,000 (the first 25% reduction was allowable, so only the combined reductions from $75,000 to $50,000 are penalized).

FAQ #15: What if a recipient has already laid off employees or reduced salaries? Are those recipients still eligible for loan forgiveness?

Yes. The amount of loan forgiveness is determined without regard to a reduction in the number of full-time equivalent employees of a recipient or to the reduction of one or more employees’ total salary and wages that occurred between February 15, 2020 and April 26, 2020, if the recipient eliminates the reduction in full-time equivalent employees and/or eliminates the reduction in total salary not later than June 30, 2020.
For example, if ABC, LLC laid off three (3) of its twenty (20) employees between February 15, 2020 and April 26, 2020, the law provides that the amount of loan forgiveness will be determined without regard to that reduction, so long as ABC “eliminates the reduction” in full-time equivalent employees before June 30, 2020. Likewise, if ABC had reduced two (2) employees’ salaries from $100,000 to $50,000, but then eliminated such reductions prior to June 30, 2020, then the amount of loan forgiveness ABC was eligible for would be determined without regard to that salary decrease.

How this will work in practice is a little unclear still, given that we are all still waiting on further loan forgiveness guidance from the SBA.

FAQ #16: Are forgiven loans considered taxable income?

Not by the IRS. Loan amounts forgiven under this program will not be considered taxable income by the federal government. Individual states may treat them differently.

FAQ #17: If any amount of the loan is not forgiven, what are the loan terms?

If any amount of the loan is not forgiven, lenders may charge a maximum of one percent (1%), and the loan matures two (2) years from the date that the borrower applies for loan forgiveness.

FAQ #18: Is there any more information or guidance coming out about this program?

Yes. The SBA stated in its Interim Final Rule that it will issue additional guidance on loan forgiveness, and that it may provide further guidance as needed. This guidance will be important to watch, as it will affect each recipient’s ability to apply for and receive loan forgiveness under the program.

FAQ #19: What if a business did not apply for a Paycheck Protection Loan before the SBA indicated that applications could no longer be accepted?

Businesses should still be speaking with their existing lender, or any approved SBA lender, about whether that lender is accepting applications for Paycheck Protection loans. The program is first-come first-served, so it is preferable to have an application already submitted or ready to be submitted as soon as possible. To that end, businesses should gather their payroll information from the prior twelve (12) months and begin calculating their average monthly payroll costs, since that will determine the size of the loan they may eligible to receive.

FAQ #20: What was covered in the latest guidance issued on April 28, 2020?
The Treasury Department issued its new Interim Final Rule on Disbursements, which covers how recipients of the loans may receive the funds.

**FAQ #21: How can PPP loans be disbursed?**

The Rule clarifies that PPP recipients must take their loans as a one-time lump sum payment within ten (10) calendar days of the loan being approved.

**FAQ #22: What if my business received a PPP loan, but our bank only made a partial disbursement?**

For any loans that were approved but not yet fully disbursed, they must be fully disbursed by May 8, 2020. Moreover, the eight (8) week period relevant for loan forgiveness purposes will be deemed to have begun on the date of the first disbursement.

**FAQ #23: What if the delay in disbursement is because my business has not been able to get everything to our lender?**

This is very important, and all recipients of these loans must get the required documentation to their lenders as soon as possible. The latest guidance says that loans for which funds have not been disbursed because a borrower has not submitted required loan documentation within twenty (20) days of loan approval shall be canceled by the lender, subject only to the above-referenced transition period ending on May 8, 2020. That is, even if twenty (20) days has elapsed since your business received its loan approval, there will be a transition period until May 8, 2020 in which recipients can provide their lenders with the required documents. This deadline does not apply to businesses that are still within the twenty (20) day window. Note, however, that despite the Rule not requiring that loans be canceled until twenty (20) days after approval, it also requires that monies should be disbursed within ten (10) days of approval. Businesses with approved loans should endeavor to provide their lenders with all required documentation as soon as possible.

**FAQ #24: What if part of my PPP loan includes funds to refinance an existing EIDL?**

Lenders are required to send any amount of loan proceeds designated for the refinance of an EIDL directly to the SBA.

**FAQ #25: I saw a news report that the SBA is now going to audit PPP loan recipients, is that true?**

Partly. A new FAQ issued by the Treasury Department poses the question of whether “businesses owned by large companies with adequate sources of liquidity to support the business’ ongoing operations qualify for a PPP loan?” In response to this, the Treasury
Department reiterates that borrowers must be able to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” That’s the same language from the Act, and the same certification borrowers have already made when applying for their loans.

The response goes on say that borrowers must take 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.” The response makes specific reference to public companies “with substantial market value and access to capital markets” and states that such companies are unlikely to qualify.

In a subsequent interview, Secretary Mnuchin stated that the SBA would perform an audit of any company receiving more than $2 million from the PPP. The SBA has indicated that additional guidance will be issued regarding this process, but there is not timeline for when it may be issued, leaving the possibility that it will be issued after the May 14, 2020 grace period has passed (see FAQ #27).

The answer to whether a specific borrower is able to make the above certification in good faith depends entirely on that borrower’s circumstances.

FAQ #26: The example given by Treasury references publicly-traded companies. Is this something I need to consider if my company is privately held?

Yes. Subsequent guidance issued in the Treasury’s ongoing FAQs indicates that private companies must look to the same requirements issued by Treasury for publicly-traded companies (see above FAQ #25).

FAQ #27: What if my business received a PPP loan, but did not experience the anticipated loss in revenue, and now I think my business should return the funds?

The FAQ states that any borrowers that return funds in full by May 14, 2020 will be deemed by the SBA to have made the certification in good faith, and therefore no further inquiry would be made.

FAQ #28: Will a borrower’s PPP loan forgiveness amount be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?

No. The SBA and Treasury intend to issue additional guidance regarding how this will be implemented, but for now have stated that there will be no reduction in loan forgiveness for borrowers that make a good faith, written offer to rehire laid off employees, and that have documented the employee’s rejection of that offer.
FAQ #29: Is there any additional information on how the SBA will review the certifications made by loan applicants?

Yes, on May 13, 2020 Treasury issued a new FAQ that gives a little more information on the review of the certification by borrowers. The guidance states that borrowers that, combined with their affiliates, received less than $2 million, will be deemed to have made the certification in good faith. That means that any recipient, when considered in combination with their affiliates, that did not receive more than a $2 million PPP loan is automatically deemed to have acted in good faith when submitting the application. This is consistent with Treasury’s prior guidance that their review would focus on PPP loan recipients of more than $2 million.

Treasury also clarified that borrowers that received more than $2 million may still have made the certification in good faith depending on their individual circumstances. However, if the SBA determines in the course of its review that a borrower lacked an adequate basis to make the certification regarding the necessity of the loan request, then the SBA will seek repayment of the loan and will notify the borrower’s lender that the borrower is not eligible for loan forgiveness.

Importantly, the guidance also states that if the improper loan is paid back after the borrower receives notice from the SBA, then the SBA will not pursue additional administrative enforcement or referrals to other agencies.

FAQ #30: Is there any guidance about the loan forgiveness process yet?

Yes, the Treasury Department posted a loan forgiveness application that includes some instructions for borrowers. You can find the form here.

FAQ #31: Does the loan forgiveness application explain how to calculate how much of a PPP loan is eligible to be forgiven?

Yes, on pages one (1) and two (2) of the form, there is a line by line explanation of the amounts to enter in order to calculate the amount of the loan that is eligible for forgiveness.

FAQ #32: Is the Covered Period for purposes of loan forgiveness still the eight (8) weeks following disbursement of the loan? What is the Alternative Payroll Covered Period?

Yes, the standard Covered Period for measuring costs that the loan is spent on is still the eight (8) weeks following disbursement of the loan, but the application also addresses a common concern of borrowers by introducing the Alternative Payroll Covered Period. Borrowers with a biweekly (or more frequent) payroll schedule may choose to calculate eligible payroll costs using the eight (8) week period that begins on the first day of their first pay period following the
disbursement date of their PPP loan. For example, if a borrower received its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP loan disbursement is Sunday, April 26, then the first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is Saturday, June 20. Borrowers who choose to use the Alternative Payroll Covered Period must apply it consistently throughout the application wherever there is a reference to “the Covered Period or the Alternative Payroll Covered Period.” However, borrowers must apply only the Covered Period (not the Alternative Payroll Covered Period) wherever there is a reference in the application to just the “Covered Period”.

**FAQ #33: Did the costs eligible for forgiveness change?**

No, the application still lists the following as costs eligible for forgiveness: (i) eligible payroll costs, (ii) mortgage interest payments on any business mortgage obligation on real or personal property incurred before February 15, 2020, (iii) lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020, and (iv) utility payments, including business payments for electricity, gas, water, transportation, telephone, and/or internet access, for which service began before February 15, 2020. As before, eligible payroll costs must comprise seventy-five percent (75%) of the total forgiveness amount.

**FAQ #34: Does the loan forgiveness application require any new certifications?**

Yes, when submitting the application, borrowers will have to certify to several things, including but not limited to: (i) that the amount requested for forgiveness was spent on costs eligible for forgiveness; (ii) that the borrower has accurately verified those costs; (iii) that the information in the application is true and correct, and that the borrower understands the consequences for making false statements when seeking loan forgiveness; and (iv) that the tax documents submitted to the lender when applying for loan forgiveness are consistent with those that the borrower has submitted or will submit to the IRS and/or the applicable state tax agency.

Borrowers who are owner-employees or self-employed will also have to certify that the amount included for compensation to owner-employees or self-employed individuals does not exceed eight (8) weeks’ worth of 2019 compensation.

**FAQ #35: Does the loan forgiveness application explain how to calculate FTEs?**

Yes, for each employee, borrowers should: (i) enter the average number of hours paid per week; (ii) divide by 40; and (iii) round the total to the nearest tenth. The maximum for each employee is capped at 1.0. Borrowers may also choose to use a simplified method and use a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours.
FAQ #36: Does the loan forgiveness application clarify how the forgiveness reduction works if there are salary/wage reductions?

Yes, the actual amount of loan forgiveness the Borrower will receive will be reduced if the salary or hourly wages of certain employees during the Covered Period or the Alternative Payroll Covered Period was more than twenty-five percent (25%) less than during the period from January 1, 2020 to March 31, 2020. Borrowers have to complete the application worksheet to determine what level of reduction they will receive.

FAQ #37: Are there any exceptions for reductions in FTEs that do not count against the loan forgiveness amount?

Yes, the application directs borrowers to indicate the FTE of (i) any positions for which the borrower made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period which was rejected by the employee; and (ii) any employees who during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours. Any FTE reductions in these cases will not reduce the borrower’s loan forgiveness amount.

FAQ #38: In what instances does the loan forgiveness reduction safe harbor apply to reductions in FTEs?

The application reiterates that borrowers are exempt from the FTE reduction penalty if they satisfy both of the following conditions: (i) the borrower reduced its FTE levels in the period beginning February 15, 2020 and ending April 26, 2020; and (ii) the borrower then restored its FTE levels by not later than June 30, 2020 to its FTE levels in the borrower’s pay period that included February 15, 2020.

FAQ #39: Are there any other new requirements or information in the loan forgiveness application?

Yes. Borrowers are strongly encouraged to review the entire application themselves, but one additional obligation the application places on borrowers is to maintain all records relating to their PPP loans, including the loan forgiveness application, related worksheets, and documentation for six (6) years after the date the loan is forgiven or repaid in full. Borrowers must provide such copies to the SBA and/or its Office of the Inspector General upon request.