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## Related People

Lewis M. Horowitz  
horowitzl@lanepowell.com

Eric J. Kodesch  
kodesche@lanepowell.com

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# SBA Provides Much Needed Guidance for PPP Loans

## COVID-19 Resource

As the Small Business Association (SBA) and U.S. Treasury scramble to get the Paycheck Protection Program (PPP) going from zero to full-implementation, the two agencies have issued additional guidance, in the form of [Frequently Asked Questions \(FAQs\)](#), which have been subsequently edited to be current as of April 8 (and might be updated again after the publication of this article). This guidance comes just three days after the Treasury Department promulgated the PPP Interim Final Rule ([IFR](#)).

Although the guidance was issued two days after most lenders started making loans and after some \$50 billion of loans were in process, the FAQs are beneficial and address some significant ambiguities and challenges in interpreting the CARES Act. The FAQs are short and in plain English, both of which are much appreciated (especially by those of us who have struggled to understand a complex and often illogical statutory scheme). Furthermore, the FAQs adopt some straightforward interpretations that bring much order out of chaos and ease compliance.

## Here are the key takeaways from the FAQs:

1. Applicants can use aggregate payroll costs for either 2019 or the previous 12 months prior to their loan application to determine the amount of their loan. This comports with prior SBA statements and lender preferences. Lenders seem to strongly prefer using 2019 data because the computation can be readily supported with 2019 Forms 941. Some businesses do not yet have ready their Form 941 for the first quarter of 2020. (FAQ 14)

2. Clarifies that *only cash compensation* paid in excess of \$100K per year needs to be carved out from the definition of payroll costs. This clarifies an ambiguity about nontaxable benefits paid by an employer (e.g., healthcare or employer retirement contributions) and simplifies all computations. It also fixes a potential glitch for calculating the forgivable portion of the PPP loan. (FAQ 7)
3. Payroll costs (both for determining the amount of the PPP loan and forgiveness of the PPP loan) are determined *without reduction for the employer share of FICA or federal income taxes withheld from employee paychecks*. Many people attempting to interpret the statute reached a different conclusion. The SBA's view is a welcome change upon which borrowers "may rely." (FAQ 16)
4. Confirms that lenders only need to verify that the payroll costs computed by the borrower look appropriate, taking into account the quality of the supporting documents supplied by the borrower. Given that over \$50 billion has been distributed in the first three days of the program, before many large banks even began accepting applications, it is possible that some lenders may be more diligent than others in this review process. Nevertheless, this is a reminder to those whose applications have not yet been processed to provide thorough information to support their loan computation. (FAQ 1)
5. Borrowers who filed a loan application based on the April 2 Interim Final Rules do not need to amend their applications if the application followed the laws, rules and guidance available at the time of the application. However, borrowers whose previously submitted loan applications have not yet been processed may revise their applications based on clarifications reflected in the FAQs. For those who have submitted their PPP loan applications and would benefit from the FAQs, we encourage you to check on the status and, if possible, revise the application. (FAQ 17)
6. Confirms that the definition of payroll costs includes sick leave and normal FMLA (presumably including unused sick leave paid out upon termination), other than sick leave wages for which a credit is allowed under sections 7001 and 7003 of the FFCRA. (FAQ 8)

7. Confirms that borrowers can restructure to eliminate affiliation, at least to the extent the affiliation arises from rights granted to minority shareholders. (FAQ 6)
8. Confirms that borrowers, not lenders, need to determine their eligibility under the SBA's affiliation rules in 13 CFR 121.301(f). This was the only logical interpretation of the statute, but many banks were concerned that they might have an obligation to confirm a legal conclusion that often takes considerable effort. (FAQ 4)
9. Confirms that lenders do not need to know their customers under the "know your customer" or "KYC" rules if they already know them. Again, a logical rule, but some lenders were seeking supporting information (e.g., articles of incorporation) from customers they have known for decades. (FAQ 18)
10. Strongly suggests that borrowers cannot fire their way into the 500 employee limit.
11. Loans can be documented electronically on either the SBA or lender's form promissory note. This is convenient for the lenders but a little strange given the government guarantee, but the "any form" position validates the message that the SBA wants the money out in the community regardless of terms.
12. Lenders are expected to make *the first* disbursement *no later than 10 days after loan approval*. The 10-day timeframe is welcome news, though we know that many lenders are acting even more quickly. But the meaning of "first disbursement" raises –for the first time–the possibility that not all approved funds will be available immediately.