

NH Tracker: Senator Hassan Listening Session; Updated PPP FAQs – 5.4.20

Save-the-Date Listening Session with Senator Hassan

The Association is pleased to offer a credit union listening session with Senator Maggie Hassan, May 13 at 4:00 pm. The purpose of the discussion is two-fold: to receive an update on the latest congressional activity and to inform the Senator of your efforts to serve your members and communities during the crisis, highlighting ongoing challenges and opportunities for assistance.

The Senator's schedule is very fluid. The date for this discussion is flexible and may be changed. However, May 13 has been confirmed to date. Registration information and further details will be sent shortly. In the interim, please mark your calendars to attend.

Small Business Administration ("SBA") guidance on PPP loans

Updated SBA PPP FAQs on Forgiveness, Seasonal Employers, and Nonprofit Hospitals

Question: Will a borrower's PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA's implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?

Answer: No. As an exercise of the Administrator's and the Secretary's authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act's limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

Question: Can a seasonal employer that elects to use a 12-week period between May 1, 2019 and September 15, 2019 to calculate its maximum PPP loan amount under the interim final rule issued by Treasury on April 27, 2020, make all the required certifications on the Borrower Application Form? 15 Questions 38 – 39 published April 29, 2020. As of May 3, 2020

Answer: Yes. The Borrower Application Form requires applicants to certify that "The 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." On April 27, 2020, Treasury issued an interim final rule allowing seasonal borrowers to use an alternative base period for purposes of calculating the loan amount for which they are eligible under the PPP. An applicant that is otherwise in compliance with applicable SBA requirements, and that complies with Treasury's interim final rule on seasonal workers, will be deemed eligible for a PPP loan under SBA rules. Instead of following the instructions on page 3 of the Borrower Application Form for the time period for calculating average monthly payroll for seasonal businesses, an applicant may elect to use the time period in Treasury's interim final rule on seasonal workers.

Question: Do nonprofit hospitals exempt from taxation under section 115 of the Internal Revenue Code qualify as “nonprofit organizations” under section 1102 of the CARES Act?

Answer: Section 1102 of the CARES Act defines the term “nonprofit organization” as “an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and that is exempt from taxation under section 501(a) of such Code.” The Administrator, in consultation with the Secretary of the Treasury, understands that nonprofit hospitals exempt from taxation under section 115 of the Internal Revenue Code are unique in that many such hospitals may meet the description set forth in section 501(c)(3) of the Internal Revenue Code to qualify for tax exemption under section 501(a), but have not sought to be recognized by the IRS as such because they are otherwise fully tax-exempt under a different provision of the Internal Revenue Code. Accordingly, the Administrator will treat a nonprofit hospital exempt from taxation under section 115 of the Internal Revenue Code as meeting the definition of “nonprofit organization” under section 1102 of the CARES Act if the hospital reasonably determines, in a written record maintained by the hospital, that it is an organization described in section 501(c)(3) of the Internal Revenue Code and is therefore within a category of organization that is exempt from taxation under section 501(a).¹⁶

The hospital’s certification of eligibility on the Borrower Application Form cannot be made without this determination. This approach helps accomplish the statutory purpose of ensuring that a broad range of borrowers, including entities that are helping to lead the medical response to the ongoing pandemic, can benefit from the loans provided under the PPP. This guidance is solely for purposes of qualification as a “nonprofit organization” under section 1102 of the CARES Act and related purposes of the CARES Act, and does not have any consequences for federal tax law purposes. Nonprofit hospitals should also review all other applicable eligibility criteria, including the Interim Final Rules on Promissory Notes, Authorizations, Affiliation, and Eligibility (April 28, 2020) regarding an important limitation on ownership by state or local governments. 85 FR 23450, 23451.17

Footnote

This determination need not account for the ancillary conditions set forth in section 501(r) of the Internal Revenue Code and elsewhere associated with securing the tax exemption under that section. Section 501(r) states that a hospital organization shall not be treated as described in section 501(c)(3) unless it meets certain community health and other requirements. However, section 1102 of the CARES Act defines the term “nonprofit organization” solely by reference to section 501(c)(3), and section 501(r) does not amend section 501(c)(3). Therefore, for purposes of the PPP, the requirements of section 501(r) do not apply to the determination of whether an organization is “described in section 501(c)(3)

Lenders selling participation interests in PPP loans

The SBA's prior written consent is not required in the following instances:

- Any participation interests in PPP loans must be sold only to lenders that have signed the following documents:
 - SBA Form 750
 - SBA Form 3506
 - SBA Form 3507
- The originating lender must continue to hold the note, loan documents, and retain all servicing rights.
- The originating lender will be the party responsible to SBA with respect to:
 - all servicing actions, including requests for advance purchases and loan forgiveness.
- The originating lender will be the party eligible for the guarantee purchase of a PPP loan.

If planning to "participate out" a PPP loan, then the originating lender must notify SBA's Office of Credit Risk Management prior to the sale of the PPP loan, via email to: PPPLoanParticipations@sba.gov. As noted above, there is no need to wait for SBA's approval, just notice to the SBA is required, as well as the other requirements mentioned above. SBA's notice may be found [here](#).

PPP Disbursements

Question: Can a borrower take multiple draws from a PPP loan and thereby delay the start of the eight-week covered period?

Answer: No. The lender must make a one-time, full disbursement of the PPP loan within ten calendar days of loan approval; for the purposes of this rule, a loan is considered approved when the loan is assigned a loan number by SBA. If the tenth calendar day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next business day.

For loans that received an SBA loan number prior to the posting of the interim final rule but have not yet been fully disbursed, the following transition rules apply:

- The ten calendar-day period described above begins on April 28, 2020.
- The eight-week covered period began on the date of first disbursement.

Notwithstanding this limitation, lenders are not responsible for delays in disbursement attributable to a borrower's failure to timely provide required loan documentation, including a signed promissory note. Loans for which funds have not been disbursed because a borrower has not submitted required loan documentation within 20 calendar days of loan approval shall be cancelled by the lender, subject to the transition rules above. When disbursing loans, lenders must send any amount of loan proceeds designated for the refinance of an EIDL loan directly to SBA and not to the borrower.

The Administrator, in consultation with the Secretary, determined that requiring a single loan disbursement will best serve the interests of both borrowers and lenders and promote the purposes of the CARES Act. A single loan disbursement will eliminate the risk of delays in processing loan disbursement installments, advance the goal of payroll continuity for employees, and provide borrowers with faster access to the full loan amount so that they can immediately cover payroll costs.

Change in Ownership

Question 38: Section 1102 of the CARES Act provides that PPP loans are available only to applicants that were "in operation on February 15, 2020." Is a business that was in operation on February 15, 2020 but had a change in ownership after February 15, 2020 eligible for a PPP loan?

Answer: Yes. As long as the business was in operation on February 15, 2020, if it meets the other eligibility criteria, the business is eligible to apply for a PPP loan regardless of the change in ownership. In addition, where there is a change in ownership effectuated through a purchase of substantially all assets of a business that was in operation on February 15, the business acquiring the assets will be eligible to apply for a PPP loan even if the change in ownership results in the assignment of a new tax ID number and even if the acquiring business was not in operation until after February 15, 2020. If the acquiring business has maintained the operations of the pre-sale business, the acquiring business may rely on the historic payroll costs and headcount of the pre-sale business for the purposes of its PPP application, except where the pre-sale business had applied for and received a PPP loan.

The Administrator, in consultation with the Secretary, has determined that the requirement that a business “was in operation on February 15, 2020” should be applied based on the economic realities of the business’s operations.

SBA Review of Loan Files

Question 39: Will SBA review individual PPP loan files?

Answer: 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 #1.15

[Paycheck Protection Program FAQs](#) – Updated as of April 29, 2020