

## SBA Issues Frequently Asked Questions on Paycheck Protection Program

Late on April 6, and during the day on April 8, 2020, the Small Business Administration (SBA), in consultation with the Department of Treasury, issued Frequently Asked Questions (FAQs) on the Paycheck Protection Program (PPP) under the Coronavirus Aid, Relief and Economic Security Act (CARES Act). The FAQs are intended to provide additional guidance to borrowers and lenders on the implementation of the PPP. The SBA indicates that the FAQs will be updated on a regular basis.

The PPP program went into effect for eligible small businesses on April 3. Independent contractors and self-employed individuals are eligible to apply for a PPP loan starting April 10, 2020. A limited number of national and local banks began accepting applications immediately, while other lenders made their applications available over the weekend and began accepting applications on Monday, April 6, 2020. Numerous lenders are reportedly advising that they will only process PPP loan applications for existing clients, so clients looking to submit a PPP loan application are advised to try and work with their existing lenders first. The FAQs come after many small businesses, lenders, and trade groups have been advocating that the SBA provide additional clarity on both eligibility and process-related issues following rollout of the PPP.

Borrowers and lenders are not required to take action based on the updated guidance in the FAQs. Although the FAQ document does not independently carry the force and effect of law, the U.S. government will not challenge lender PPP actions that conform to the FAQs, the PPP Interim Final Rule previously issued, and any other rulemaking in effect at the time. However, borrowers whose previously submitted PPP applications have not yet been processed are permitted to revise their applications based on the FAQ guidance.

The FAQ responds to 20 questions. We will summarize those responses by topic, rather than the order in which they were presented.

### PPP Eligibility

A business is an eligible borrower under the PPP if the business qualifies as a “small business concern” as defined in the Small Business Act by either (i) satisfying the applicable employee-based or revenue-based size standard for their industry, or (ii) satisfying the SBA’s “alternative size standard,” which requires a business to show that as of March 27, 2020, its maximum tangible net worth is not more than \$15 million and its average net income after federal income taxes (carry-over losses excluded) for the two years preceding its PPP application is not more than \$5 million.

Entities that do not qualify as “small business concerns” can still be an eligible borrower under the PPP if they are a business, a tax exempt, nonprofit or veterans organization, or a Tribal small business that has 500 or fewer employees, excluding employees with a principal place of residence outside the United States. This may be important to borrowers with foreign employees or foreign affiliates, since it appears to exclude non-U.S. employees from the size calculation, as opposed to the SBA’s normal policy of counting worldwide employees of the applicant and its affiliates.

For the purposes of applying an employee-based size standard, borrowers may calculate the number of employees by using the traditional SBA standard: average number of employees per pay period in the previous 12 months, or the average number of employees for each period that the business has been operational (if it has not been operational for 12 months). However, a borrower may also calculate the number of employees using the same periods the borrower used to calculate its payroll costs (see Payroll Costs; Loan Forgiveness below).



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**Related Practice Areas**

- Corporate

Under the Act and prior SBA guidance, to be an eligible borrower an entity is required to show it was in operation as of February 15, 2020, and had employees or independent contractors at that time. The FAQs state, however, that a lender may also consider whether a seasonal borrower was in operation for an eight-week period between February 15, 2019, and June 30, 2019.

On the SBA's PPP Application Form, borrowers are required to certify their status as an eligible borrower under the rules in effect at the time the application is submitted. This includes the affiliation rules set forth in the SBA's Interim Final Rule on Affiliation. Lenders are not required to make an independent determination regarding the applicability of the affiliation rules and are permitted to rely on a borrower's certification of its application of the rules. Cozen O'Connor's Alert on the Interim Final Rule on Affiliation under the PPP can be found [here](#).

There are no new exceptions to the general SBA's affiliation rules. The FAQs, for example, do not provide any relief from the SBA's affiliation rules to allow more VC- and PE-backed companies to be eligible for PPP loans. The FAQs clarify the affiliation rule based on ownership, stating that minority shareholders who irrevocably waive or relinquish existing rights to prevent a quorum or block board or shareholder action will not be considered an affiliate of a business under the affiliation rules (assuming no other relationship triggers the affiliation rules). Neither the FAQ nor the previous affiliation rules alter the SBA's general guidance that a majority shareholder is an affiliate.

Additionally, the FAQs confirm previous guidance from the SBA that certain entities will be ineligible for PPP loans if an owner of 20 percent or more has a defined criminal background, including having been convicted, pleaded guilty, pleaded nolo contendere, been placed on pretrial diversion, or been placed on parole or probation, for any felony within the last five years. However, such convictions are not a bar if they are more than five years old.

## **Payroll Costs; Loan Forgiveness**

There was previously a great deal of uncertainty regarding what time period borrower's should use to calculate their payroll and maximum loan amount. For the first time, the SBA states in the FAQs that a borrower may use average monthly payroll either from the previous 12 months or from calendar year 2019. In addition, seasonal businesses, may use average monthly payroll from the period between February 15, 2019, or March 1, 2019, and June 30, 2019. Borrowers not in operation as of February 15, 2020, may use average monthly payroll from January 1, 2020, through February 29, 2020.

SBA confirmed that the \$100,000 salary cap applies only to salary and similar compensation and not to non-cash benefits, such as employer payments for defined-benefit or defined-contribution retirement plans, group health care benefits and related insurance premiums, and state and local taxes on employee compensation.

The SBA provides an explanation of its interpretation of the definition of "payroll costs" under the CARES Act. The SBA states that when determining maximum loan amounts, allowable uses of a PPP loan, and amounts of forgiveness, payroll costs are calculated on a gross basis, without subtracting federal taxes imposed on an employee and required to be withheld by the employer (e.g., income taxes and the employee's portion of FICA). For example, an employee who earned \$4,000 per month in gross wages, from which \$500 in federal taxes was withheld, would count as \$4,000 in payroll costs. However, the employer's portion of federal payroll taxes is excluded from the payroll costs.

The FAQs reiterate that any amounts paid by a borrower to independent contractors or sole proprietors are excluded from the payroll cost calculation, since these individuals or entities may obtain their own PPP loan.

The FAQs confirm previous SBA guidance that proceeds from a PPP loan can be used to cover payroll costs such as employee vacation, parental, family, medical, and sick leave, but qualified sick leave wages/qualified family leave wages for which credit was already provided under the Families First Coronavirus Response Act are expressly excluded.

The eight-week period used to calculate loan forgiveness begins on the date the lender makes the first disbursement of the loan. That disbursement must be no later than 10 calendar days following the date of loan approval.

## PPP Applications & Processing

The FAQs state that pursuant to the PPP application form, borrowers must certify accurate calculations of payroll costs. Lenders, in turn, are expected to perform reasonable, good faith due diligence on the calculations and supporting documentation provided by borrowers. The level of review performed by lenders should be informed by the quality of the borrower's documentation. However, lenders are not required to replicate the borrower's calculations.

Borrowers that process payroll and report payroll taxes through a professional employer organization (PEO) or other payroll provider can submit to lenders payroll documentation received from such payroll provider. This payroll documentation should indicate the amount of wages and payroll taxes reported to the IRS for the borrower's employees. Acceptable PPP loan payroll documentation from a PEO or payroll provider includes relevant information from a Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, and Employer's Quarterly Federal Tax Return. If such information and documentation is not available, borrowers should obtain a statement from their payroll provider documenting the amount of wages and payroll taxes. The FAQs also confirm that employees of a borrower that utilizes a PEO or other payroll provider will not be considered employees of the borrower's payroll provider or PEO.

The FAQs reiterate that the signature of an authorized representative of an applying business on a PPP application form is a representation to the lender and the U.S. government that the signatory is authorized to sign on behalf of the business and to make the certifications contained in the PPP application form. Lenders may rely on these representations.

With respect to the processing of PPP applications, the FAQs confirm that lenders are permitted to use their own online portals and electronic PPP application forms, so long as such forms request the same information and use the same language as the PPP application form issued by the SBA. Lenders are still required to transmit application and loan data using the SBA's interface.

The FAQs also state that if a PPP loan is being made to an existing customer of a lender and the information required by a PPP application has been previously provided by the customer, then the lender does not need to re-verify such information. With respect to federally insured deposit institutions and federally insured credit unions eligible to participate in the PPP, the collection and verification of beneficial ownership information of existing customers applying for new PPP loans are not required (but may be otherwise requested).

Lenders are not required to use the SBA's form of promissory note, but instead may use their own forms.

Lenders must disburse loan proceeds to borrowers no later than 10 calendar days from the date of loan approval.

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