

SBA Issues New Guidance via Interim Final Rule on Foreign Affiliates; Releases Loan Forgiveness Application

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On May 15 and May 18, 2020, the Small Business Administration (“**SBA**”) provided additional guidance on the Paycheck Protection Program (“PPP”) through the release of the [PPP Loan Forgiveness Application](#) (the “**Application**,”) as well as the issuance of a new [Interim Final Rule](#) (the “**Foreign Affiliates Rule**”), which supplements the first PPP Interim Final Rule, published on April 2, 2020, and the subsequent interim final rules issued since that date (and linked below). The PPP is a small business loan program established pursuant to Title I of the Coronavirus Aid, Relief, and Economic Security (“**CARES**”) Act signed by President Trump on March 27, 2020, and supplemented by the Paycheck Protection Program and Health Care Enhancement Act (the “**PPP/HCE Act**”), which provided additional funding for the program.

Interim Final Rule on Treatment of Foreign Affiliates

1. On May 18, 2020, the SBA issued an Interim Final Rule clarifying that absent a waiver or exception to affiliation rules, an applicant must count its own employees and those of its domestic and foreign affiliates to determine whether it falls within the SBA’s employee size standard for PPP loan eligibility.
2. The Foreign Affiliates Rule clarified previous FAQ Guidance requiring borrowers to have “500 or fewer employees whose principal place of residence . . . in the United States.” According to the SBA, such guidance applied only “to a PPP applicant’s calculation of payroll for purposes of determining the PPP loan amount and to the calculation of loan forgiveness”, and not for purposes of determining eligibility under the relevant employee-based size standards.
3. As an exercise of enforcement discretion and in light of such confusion, **the SBA will not deem any borrower that applied for a loan prior to May 5, 2020 to be ineligible** based on such borrower’s exclusion of non-U.S. employees from its headcount if the borrower has no more than 500 employees whose principal place of residence is in the United States.¹
4. In no event, however, may PPP funds be used to support non-U.S. workers or operations under any circumstances.

¹ Importantly, the Foreign Affiliates Rule is promulgated by (and thus binding on) the SBA, which may enforce violations of the PPP or provide referrals to other agencies. Without further clarification or guidance, borrowers should understand that the Department of Justice or other civil and criminal enforcement agencies may take a different view on this proposed safe harbor. Borrowers who received funds prior to May 5, 2020 based on this interpretation are encouraged to consult with qualified legal counsel prior to retaining the funds based on the SBA’s proposed safe harbor.

SBA Loan Forgiveness Application. The Application includes step-by-step instructions for the calculations required to confirm eligibility for loan forgiveness, including payroll costs and nonpayroll expenses eligible for forgiveness (consisting of rent, mortgage and utility payments). Below are some highlights from the Application.²

1. Borrowers may calculate payroll costs using either the eight-week period beginning on the date of the loan disbursement (the “**Covered Period**”)³ or an “alternative payroll covered period” that begins on the first day of their first pay period following their PPP Loan Disbursement Date (the “**Alternative Covered Period**”).
2. Consistent with the SBA’s recent [FAQ Guidance](#), the Application includes an exemption from the loan forgiveness reduction formula for terminated employees, to the extent that borrowers made good-faith, written employment offers which were subsequently rejected by the employees.
3. Payroll costs are generally eligible for forgiveness if paid or incurred during the Covered Period or Alternative Covered Period so long as such payments are nevertheless paid on or before the next payroll date, even if this date lies outside the Covered Period. Payroll costs are considered incurred on the day that the employee’s pay is earned.
4. To qualify for forgiveness, nonpayroll costs must be paid or incurred during the Covered Period, and borrowers cannot rely on the Alternative Covered Period for such expenses. Nonpayroll costs incurred during the Covered Period must be paid on or before the next regular billing date.
5. Equipment leases and other personal property leases are eligible for forgiveness as “covered rent obligations,” so long as they were in force before February 15, 2020.
6. Borrowers are required to attach a worksheet (or obtain an equivalent report from their payroll system or payroll processor) concerning employee names, identifiers, cash compensation, and whether any forgiveness reductions are applicable. Additional documentation concerning proof of expenditures on approved nonpayroll costs is also required and is outlined in Page 10 of the Application.
7. To qualify for forgiveness, borrowers are required to make additional certifications regarding the use of funds and accuracy of submitted payroll, mortgage, utility and lease documentation, tax documents, and other supporting documents.⁴

Given the fast pace of developments, businesses are encouraged to seek advice from qualified legal counsel before applying for a PPP loan.

² According to Treasury Secretary Mnuchin, additional guidance on these forgiveness matters will be released shortly.

³ The Covered Period is the eight-week (56-day) period commencing on the PPP Loan Disbursement Date.

⁴ As outlined in our prior [alert](#), such certifications must be reviewed carefully in light of the potential for civil and criminal penalties, including under the False Claims Act. If you have any questions concerning your ability to make such certifications, please consult qualified legal counsel.

For more information, please see the following resources:

1. PPP Resources from the SBA and Treasury Department:

- a. [Top-Line Overview of the Program](#)
- b. [Information Sheet for Lenders](#)
- c. [Information Sheet for Borrowers](#) (updated April 2, 2020)
- d. [Borrower Application Form](#) (updated April 3, 2020)
- e. [Lender Application Form for Federally Insured Depository Institutions, Federally Insured Credit Unions, and Farm Credit System Institutions \(4/3/2020\)](#) (released April 3, 2020)
- f. [Lender Application Form for Non-Bank and Non-Insured Depository Institution Lenders \(4/8/2020\)](#) (released April 8, 2020)
- g. [Lender Agreement to participate in PPP](#) (released April 3, 2020)
- h. [PPP Program Loan Report](#) (updated April 16, 2020)
- i. [Loan Forgiveness Application](#) (released May 15, 2020)
- j. [How to Calculate Loan Amounts](#)
- k. [Search Tools: Find an Eligible Lender](#)

2. Prior SBA Guidance on the Paycheck Protection Program:

- a. [PPP Frequently Asked Questions](#) (updated May 13, 2020)
- b. [Interim Final Rule 1](#) (originally posted April 2, 2020)
- c. [Interim Final Rule on Applicable Affiliation Rules](#) (originally posted April 3, 2020)
- d. [Interim Final Rule on Additional Eligibility Criteria and Requirements for Certain Pledges of Loans](#) (originally posted April 14, 2020)
- e. [Interim Final Rule on Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility](#) (originally posted April 24, 2020)
- f. [Interim Final Rule Additional Criterion for Seasonal Employers](#) (originally posted April 27, 2020)
- g. [Interim Final Rule on Disbursements](#) (originally posted April 28, 2020)
- h. [Interim Final Rule on Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders](#) (originally posted April 30, 2020)

- i. [Interim Final Rule on Nondiscrimination and Additional Eligibility Criteria](#) (originally posted May 5, 2020)
 - j. [Interim Final Rule on Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request](#) (originally posted on May 8, 2020)
 - k. [Interim Final Rule on Loan Increases](#) (originally posted May 13, 2020)
 - l. [Interim Final Rule on Eligibility of Certain Electric Cooperatives](#) (originally posted May 14, 2020)
 - m. [Interim Final Rule on Treatment of Entities with Foreign Affiliates](#) (originally posted May 18, 2020)
3. Prior Haynes and Boone Guidance on the Paycheck Protection Program:
- a. [Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program](#) (updated May 7, 2020)
 - b. [SBA Issues New Guidance on Certification of Necessity Safe Harbor](#) (May 13, 2020)
 - c. [SBA Extends Loan Repayment Safe Harbor Date, Provides Additional Guidance on Employees of Foreign Affiliates](#) (May 7, 2020)
 - d. [Could Retention of PPP Loan Funds Create False Claims Act Liability?](#) (updated May 6, 2020)
 - e. [President Signs Additional Appropriation for Small Business Relief into Law, SBA Clarifies Eligibility of Large Companies for PPP Loans](#) (April 24, 2020)
 - f. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
 - g. [What Franchise and Hospitality Companies Should Know! A Guide to CARES and Other Relief Programs](#) (April 2, 2020)
 - h. [Relief for Employers and Workers under the CARES Act](#) (updated March 29, 2020)
4. Resources on the EIDL Program:
- a. [Looking for an Alternative to PPP? Taking a Second Look at the Economic Injury Disaster Loan Program](#) (Haynes and Boone Alert, May 1, 2020).
 - b. [SBA's COVID-19 Disaster Loan Program](#) (Haynes and Boone Alert, March 24, 2020)
 - c. [SBA EIDL Resource Page](#)



Additional Questions? Contact a member of the Haynes and Boone [Finance](#) or [Corporate](#) Practice Groups at Haynes and Boone, including the following individuals:

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