

April 09, 2020

SBA Releases Additional Guidance via Updates to Frequently Asked Questions on Paycheck Protection Program Loans

By: Paul Amiel, Jim Markus, Alex Grishman, Brent Beckert, Rachael Apfel, Henson Adams

On April 8, 2020, the Small Business Administration (“**SBA**”) provided additional guidance on the Paycheck Protection Program (“**PPP**”) through an update to the Frequently Asked Questions document (“**FAQs**”) originally published on April 2, 2020 and subsequently updated on April 6th and 7th. The PPP is a small business loan program established pursuant to the Coronavirus Aid, Relief, and Economic Security (“**CARES**”) Act signed by President Trump on March 27, 2020.¹

The FAQs guidance includes the following significant information:

1. Eligibility Requirements Clarified.

- a. Size. Small business concerns with more than 500 employees can still be eligible borrowers (even if not in the hotel or restaurant business) if²:
 - i. The business meets the SBA employee-based or revenue-based [size standard](#) corresponding to its primary industry; or
 - ii. As of March 27, 2020, the business met both tests in SBA’s “alternative size standard”: (1) maximum tangible net worth of the business is not more than \$15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million.
- b. Headcount Calculation.
 - i. Calculation Methodology. In calculating the number of employees for purposes of determining PPP eligibility, borrowers may use their average employment numbers over the same time period used to determine their average monthly payroll. Options: (A) for non-seasonal businesses, either 12-month period preceding loan application or calendar year 2019, (B) for seasonal businesses,

¹ Note that the Treasury Department and SBA previously released an Interim Final Rule on April 2, 2020 (the “**Initial Rule**”) and a subsequent Interim Final Rule on the applicability of certain affiliate rules on April 3, 2020 (the “**Subsequent Rule**”), and, together with the Initial Rule, the “**Interim Regulations**”). Borrowers and lenders may rely on the FAQs as SBA’s interpretation of the CARES Act and the Interim Regulations. The U.S. government will not challenge lender PPP actions that conform to the FAQs and to the Interim Regulations and any subsequent rulemaking in effect at the time of a borrower’s application.

² Please note that affiliate rules continue to apply to such size standard determinations. Additionally, even if your business meets one of the size standards listed here, we recommend consulting with your counsel to confirm whether your company is otherwise eligible to qualify as a “small business concern” under 15 U.S.C. 632 and applicable SBA regulations.

the period from February 15, 2019 or March 1, 2019 to June 30, 2019 and (C) for businesses that were not in business for the periods described in (A) or (B), the period from January 1, 2020 to February 29, 2020. Alternatively, borrowers may elect to use SBA's usual calculation: the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months). See further guidance for seasonal businesses in Section 1(d) below.

- ii. Payroll Processors. An eligible borrower may include in its employee headcount and payroll costs those employees that are paid through a third-party payer such as a payroll provider or Professional Employer Organization (PEO). The SBA acknowledges that eligible borrowers may use a PEO or similar payroll provider to process payroll and report payroll taxes, and the payroll documentation provided by such payroll provider or PEO that indicates the amount of wages and payroll taxes reported to the IRS for the borrower's employees will be considered acceptable PPP loan documentation. Such employees will not be considered employees of the payroll provider or PEO.
- c. Affiliation.
- i. Generally. It is the responsibility of the borrower to apply the [affiliation rules](#) published by the SBA on April 3, 2020. Those rules require a business to include the employees of all its "affiliates" in its own headcount for PPP loan eligibility.
 - ii. "Bad" Control Rights can be Removed Prior to Filing. A minority shareholder in a business is deemed to control the business if the shareholder has the right to prevent a quorum or otherwise block action by the board of directors or shareholders; *provided, however*, that if a minority shareholder irrevocably relinquishes those rights as specified in [13 C.F.R. 121.301\(f\)\(1\)](#), the minority shareholder would no longer be an affiliate of the business (assuming no other relationship that triggers the affiliation rules).
- d. Seasonal Businesses.
- i. When determining a borrower's eligibility, a lender may consider whether a seasonal borrower was in operation (a) on February 14, 2020 or (b) for an 8-week period between February 15, 2019 and June 30, 2019.
 - ii. For headcount calculations, the borrower may use average employees from either (a) February 15, 2019 through June 30, 2019, (b) March 1, 2019 through June 30, 2019, or (c) for a borrower that was not in business for the periods described in subsection (a) or (b), January 1, 2020 through February 29, 2020.
- e. Criminal Record. Businesses are ineligible if an owner of 20% or more of the equity of the applicant: (i) is presently incarcerated, on probation, on parole; subject to an indictment, criminal information, arraignment, or other means by which formal criminal

charges are brought in any jurisdiction; or (ii) within the last five years, for any felony, has been convicted; pleaded guilty; pleaded nolo contendere; been placed on pretrial diversion; or been placed on any form of parole or probation (including probation before judgment).

2. Payroll Calculation.

- a. Excludes Cash Compensation in Excess of \$100,000. Payroll costs exclude any employee compensation in excess of an annual salary of \$100,000; *provided* that this exclusion does not apply to non-cash benefits, including (i) employer contributions to defined-benefit or defined-contribution retirement plans; (ii) payment for the provision of employee benefits consisting of group health care coverage; and (iii) payment of state and local taxes assessed on compensation of employees.
- b. Sick Leave Qualification. Payroll costs covered by PPP loans do not include qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (“**FFCRA**”). The FFCRA provides for a tax credit to reimburse employers for sick leave and extended FMLA leave payments required by the FFCRA. By excluding such paid leave from payroll costs covered by PPP loans, the CARES Act prevents employers from double-dipping FFCRA tax credits and PPP loan forgiveness. More information about the Paid Sick Leave Refundable Credit is available [here](#) and in our client alert on the FFCRA payroll tax credit [here](#).
- c. Excludes Independent Contractors and Sole Proprietors. In calculating the average monthly payroll amounts for purposes of determining the size of PPP loans, payments to independent contractors or sole proprietors should be excluded. Such independent contractors and sole proprietors may apply directly for their own PPP loan.
- d. Federal Taxes. When determining its payroll costs, a borrower should neither (i) reduce such payroll by taxes imposed on an employee and required to be withheld by the employer, nor (ii) include the employer’s share of payroll tax. The SBA provides the following example: “[A]n 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. The employee would receive \$3,500, and \$500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the \$4,000 in wages are excluded from payroll costs under the statute.”
- e. Timeframe for Calculating Loan Amount. In general, borrowers can calculate their aggregate payroll costs using data from either (i) the previous 12 months or (ii) calendar year 2019. For seasonal businesses, the borrower may use average monthly payroll from either (a) February 15, 2019 through June 30, 2019, (b) March 1, 2019 through June 30, 2019, or (c) for a borrower that was not in business for the periods described in subsection (a) or (b), January 1, 2020 through February 29, 2020.
- f. Timeframe for Loan Disbursement and Forgiveness Calculation.

- i. The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over the eight-week period following the loan. Under the FAQs, the SBA clarified that this eight-week period begins on the on the date the lender makes the first disbursement of the PPP loan to the borrower (not the date of borrower's application).
 - ii. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.
 3. Reduced Verification Requirements for Lenders. To streamline processing and incentivize participation in the program, lenders are not required to make an independent determination as to (i) the applicability of affiliation rules to a borrower, (ii) employee headcount of the borrower and its affiliates (if any), or (iii) the accuracy of payroll cost calculations. Rather, lenders are subject to the following:
 - a. Affiliation and Headcount. Lenders are permitted to rely on a borrower's certifications as to which entities (if any) are its affiliates, and the headcount of the borrower and its affiliates.
 - b. Payroll Documentation. Lenders are expected to perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning average monthly payroll costs. Additionally, as the Initial Final Rule indicates, lenders may rely on borrower representations, including with respect to amounts required to be excluded from payroll costs. However, if a lender identifies errors in the borrower's calculations or a material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue.
 - c. Beneficial Ownership Information. If a PPP loan is being made to an existing customer, and the lender has already collected, certified or verified beneficial ownership information in accordance with the FinCEN Rule CDD requirements, the lender does not need to re-verify such information. Additionally, if federally insured depository institutions and federally insured credit unions eligible to participate in the PPP program have not yet collected beneficial ownership information on existing customers, such institutions do not need to collect and verify beneficial ownership information for those customers applying for new PPP loans (except to the extent required by internal BSA compliance policies).
 4. Single Individual May Sign on Behalf of Applicant and Owners as Authorized Signatory. An individual's signature as an "Authorized Representative of Applicant" is a representation that the signatory is authorized to make the certifications. Lenders may rely on that representation and accept a single individual's signature on that basis.
 5. Additional Lender Guidance
 - a. Online Portals. Lenders are permitted to use their own online portals and an electronic form they create to collect information and certifications from the borrower, *provided*, that (i) the form asks for the same information (using the same language) as the Borrower Application Form and (ii) lenders send the data to SBA using SBA's interface.

- b. Form of Promissory Note. Lenders may use their own promissory note or the [SBA form](#) of promissory note.

While the FAQs guidance provides additional clarity on administration of the PPP loan program, the SBA has indicated that borrowers and lenders who filed or approved a loan application based on the PPP Final Interim Rule published on April 2, 2020 are not required to take any action based on the updated FAQs guidance. Rather, borrowers and lenders may rely on the guidance available at the time of the relevant application.

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

For more information, please see the following resources:

1. Resources from the SBA and Treasury Department:

- a. [PPP Frequently Asked Questions](#) (updated April 8, 2020)
- b. [Interim Final Rule](#) (released April 2, 2020)
- c. [Top-Line Overview of the Program](#)
- d. [Information Sheet for Lenders](#)
- e. [Information Sheet for Borrowers](#) (updated April 2, 2020)
- f. [Borrower Application Form](#) (updated April 2, 2020)
- g. [Lender Application Form](#) (released April 2, 2020)
- h. [Lender Agreement to participate in PPP \(for Federally Insured Depository Institutions, Federally Insured Credit Unions, Farm Credit System Institutions\)](#) (released April 3, 2020)
- i. [Lender Agreement to participate in PPP \(for Non-Bank and Non-Insured Depository Institution Lenders\)](#) (released April 8, 2020)
- j. [SBA Form of Promissory Note](#) (April 7, 2020)

2. 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 April 9, 2020)
- b. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
- c. [SBA Releases Interim Final Rule Outlining Additional Details on Paycheck Protection Program Loans](#) (April 3, 2020)
- d. [What Franchise and Hospitality Companies Should Know! A Guide to CARES and Other Relief Programs](#) (April 2, 2020)
- e. [Relief for Employers and Workers under the CARES Act \(updated March 29, 2020\)](#)



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

Haynes and Boone

Paul Amiel (Partner, Finance): Paul.Amiel@haynesboone.com

Jim Markus (Partner, Finance): James.Markus@haynesboone.com

Alex Grishman (Partner, Finance): Alexander.Grishman@haynesboone.com

Brent Beckert (Associate, Corporate Law): Brent.Beckert@haynesboone.com

Rachael Apfel (Associate, Corporate Law): Rachael.Apfel@haynesboone.com

Henson Adams (Associate, Labor & Employment): Henson.Adams@haynesboone.com