

SBA Extends Loan Repayment Safe Harbor Date, Provides Additional Guidance on Employees of Foreign Affiliates

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On May 6, 2020, the Small Business Administration (“**SBA**”) issued updates to the [Frequently Asked Questions document](#) (“**FAQs**”), originally published on April 2, 2020 and updated regularly thereafter, extending the date for the PPP Certification of Necessity Safe Harbor and clarifying how employees of foreign affiliates are counted. 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, 2020,¹ and supplemented by the Paycheck Protection Program and Health Care Enhancement Act (the “**PPP/HCE Act**”), which provided additional funding for the program.

The latest FAQs guidance includes the following information:

1. Certification of Necessity Safe Harbor. The repayment deadline for the Certification of Necessity Safe Harbor has been extended from May 7, 2020, to May 14, 2020.
 - a. All PPP loan borrowers must certify in good faith that “current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
 - b. Any borrower who applied for a PPP loan prior to April 24, 2020 and repays the loan in full by this deadline will be deemed by the SBA to have made the certification of necessity in good faith.
 - c. This extension will be automatically implemented, and borrowers do not need to apply for it.
 - d. Any borrower who repays its loan by this deadline will be treated as if it had not received a covered PPP loan for purposes of the Employee Retention Credit and will be eligible for that credit as long as it is eligible in all other respects.
 - e. The SBA will review all loans in excess of \$2 million, as well as other loans at its discretion, for compliance with this certification following the borrower’s application for loan forgiveness.
 - f. Falsely certifying that a loan request is necessary may not only render an applicant’s loans ineligible for forgiveness, but could also potentially lead to liability under the False Claims Act, as outlined in our [May 5 alert](#).
2. Counting Employees of U.S. and Foreign Affiliates. To determine whether an applicant has 500 or fewer employees for PPP qualification purposes, the applicant must count its own employees and those of both

¹ Note that the Treasury Department and SBA previously released an Interim Final Rule on April 2, 2020 (the “**Initial Rule**”) and subsequent Interim Final Rules on April 3, 2020, April 14, 2020, April 24, 2020, April 28, 2020, a second Rule on April 28, 2020, April 30, 2020, and May 5, 2020 (together with the Initial Rule, the “**Interim Regulations**”). Links for each Interim Final Rule are provided below. Borrowers and lenders may rely on the FAQs as SBA’s interpretation of the CARES Act and the Interim Regulations, but they do not carry the force of independent law. 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.



U.S. and foreign affiliates, barring a waiver of, or exception to, the affiliation rules. Business concerns seeking to qualify as “small business concerns” under Section 3 of the Small Business Act based on their number of employees must follow the same approach.

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. 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. [How to Calculate Loan Amounts](#)
- j. [Search Tools: Find an Eligible Lender](#)

2. Prior SBA Guidance on the Paycheck Protection Program:

- a. [PPP Frequently Asked Questions](#) (updated May 6, 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)

3. Prior Haynes and Boone Guidance on the Paycheck Protection Program:

- a. [Could Retention of PPP Loan Funds Create False Claims Act Liability?](#) (updated May 6, 2020)
- b. [President Signs Additional Appropriation for Small Business Relief into Law, SBA Clarifies Eligibility of Large Companies for PPP Loans](#) (April 24, 2020)
- c. [Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program](#) (updated May 7, 2020)
- d. [Special Alert: SBA Releases Additional Guidance via New Interim Final Rule, Update to Frequently Asked Questions on Paycheck Protection Program Loans](#) (April 16, 2020)
- e. [SBA Releases Additional Guidance via Updates to Frequently Asked Questions on Paycheck Protection Program Loans](#) (April 9, 2020)
- f. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
- g. [SBA Releases Interim Final Rule Outlining Additional Details on Paycheck Protection Program Loans](#) (April 3, 2020)
- h. [What Franchise and Hospitality Companies Should Know! A Guide to CARES and Other Relief Programs](#) (April 2, 2020)
- i. [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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