

President Signs Additional Appropriation for Small Business Relief into Law, SBA Clarifies Eligibility of Large Companies for PPP Loans

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President Trump signed H.R.266, the [Paycheck Protection Program and Health Care Enhancement Act](#) (the “**PPP/HCE Act**”) this afternoon following passage of the bill by both houses of Congress. The PPP/HCE Act provides additional funding for small business loan and grant programs administered by the Small Business Administration (“**SBA**”) in response to the COVID-19 pandemic. Additionally, the SBA released new guidance on the eligibility of various businesses for PPP loans.

The PPP/HCE Act also includes additional funding for hospitals and coronavirus testing, an overview of which can be found [here](#).

The PPP/HCE Act modifies and increases funding for the Paycheck Protection Program (“**PPP**”) and the SBA Economic Injury Disaster Loan (“**EIDL**”) program, as follows:

Paycheck Protection Program

- The PPP/HCE Act includes an additional \$310 billion for PPP funding, as the previous budget of \$349 billion was exhausted within 13 days by over 1.5 million applications.
- \$60 billion of this amount is set aside for lending by certain institutions, as follows:
 - \$30 billion is reserved for insured depository institutions and credit unions with assets between \$10 and \$50 billion; and
 - \$30 billion is set aside for community financial institutions, which is defined to include:
 - Community development financial institutions (“**CDFI**”);¹
 - Minority depository institutions (“**MDI**”);²

¹ A CDFI is defined as an institution that (i) has a primary mission of promoting community development; (ii) serves an investment area or targeted population; (iii) provides development services in conjunction with equity investments or loans, directly or through a subsidiary or affiliate; (iv) maintains, through representation on its governing board or otherwise, accountability to residents of its investment area or targeted population; and (v) is not an agency or instrumentality of the United States, or of any State or political subdivision of a State. 12 U.S.C. § 4702(5)(A). A current directory of CDFIs can be found [here](#).

² An MDI is defined as any depository institution that (i) if a privately owned institution, 51 percent of the stock is owned by one or more socially and economically disadvantaged individuals; (ii) if publicly owned, 51 percent of the stock is owned by one or more socially and economically disadvantaged individuals; and (iii) in the case of a mutual institution, the majority of the Board of Directors, account holders, and the community which it services is predominantly minority. 12 U.S.C. § 1463 note.

- Development companies;³ and
 - Intermediaries.⁴
- \$11 billion is appropriated to fund PPP administrative costs, bringing the amount devoted to PPP funding and administration under the PPP/HCE Act to \$321 billion.

Economic Injury Disaster Loans and Grants

- An additional \$60 billion is allotted to the EIDL program.
- Of this amount, \$50 billion is for direct loans to be used to prevent, prepare for, and respond to the coronavirus, and the remaining \$10 billion is earmarked to fund the forgivable advances contemplated under the Coronavirus Aid, Relief, and Economic Security (“**CARES**”) Act.
- Agricultural Enterprises⁵ with under 500 employees are now explicitly eligible for EIDL. This resolves the ambiguity in the initial CARES Act and accompanying guidance over whether farms could qualify for EIDL.

New Eligibility Guidance for PPP Loans

Although the PPP/HCE Act itself does not make any changes to address the recent criticism regarding the granting of PPP loans meant for small businesses to certain public companies, large restaurant chains, hedge funds and private equity firms, the SBA released further guidance on April 23, 2020 (the “**Recent Guidance**”) and an interim final rule on April 24, 2020 (the “**April 24 Rule**”), both of which address the eligibility of larger businesses for these loans. The April 24 Rule also provides additional guidance on a variety of other issues, including eligibility considerations relating to ESOPs, bankruptcy proceedings, legal gaming revenue, and government-owned hospitals.

³ A Development Company is defined as an “enterprise incorporated under State law with the authority to promote and assist the growth and development of small-business concerns in the areas covered by their operations.” 15 U.S.C. § 662(6).

⁴ An Intermediary is defined as “(i) a private nonprofit entity; (ii) a private, nonprofit community development corporation; (iii) a consortium of private, nonprofit organizations or nonprofit community development corporations; (iv) a quasi-governmental economic development entity (such as a planning and development district), other than a State, county, municipal government, or any agency thereof, if no application is received from an eligible nonprofit organization or the [SBA] determines that the needs of a region or geographic area are not adequately served by an existing, eligible nonprofit organization that has submitted an application; or (v) an agency of, or nonprofit entity established by, a Native American Tribal Government, that seeks to borrow or has borrowed funds from the [SBA] to make microloans to small business concerns...” 15 U.S.C. § 636(m)(11)(A).

⁵ An Agricultural Enterprise is defined as a “small business concern engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural-related industries.” 15 U.S.C. § 647.

- Necessity Certification.
 - As outlined in the existing regulations, to qualify for a PPP loan, borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”⁶
 - Under the Recent Guidance, to determine that the loan is necessary, borrowers must take into account their current business activity and access to “other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”
 - Though the mere fact of access to alternative sources of credit is likely not enough on its own to disqualify a company, the SBA notes in the Recent Guidance that “it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.”
 - Lenders may rely upon a borrower’s certification of necessity and have no obligation to confirm the necessity of the loan.
 - Any borrowers who applied for a PPP loan before April 23, 2020 and who, in light of the Recent Guidance or April 24 Rule, no longer believe in good faith that their eligibility certification was accurate will nevertheless be deemed to have made such certification in good faith if such loan is repaid in full by May 7, 2020.
- Private Equity Firms and Portfolio Companies
 - Hedge funds and private equity firms are ineligible to receive a PPP loan because such businesses are primarily engaged in investment or speculation. The April 24 Rule explains that “the Administrator, in consultation with the Secretary, does not believe that Congress intended for these types of businesses, which are generally ineligible for section 7(a) loans under existing SBA regulations, to obtain PPP financing.”
 - The affiliation rules in 13 CFR 121.301(f) apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control.⁷
- Other Eligibility Considerations
 - Government-Owned Hospitals: A hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue

⁶ See “[Paycheck Protection Program Loans – Frequently Asked Questions.](#)”

⁷ However, the CARES Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a PPP loan due to ownership by a state or local government, *provided*, that the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

- Gaming Revenues: A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues, and 13 CFR 120.110(g) is inapplicable to PPP loans. Businesses that received illegal gaming revenue remain categorically ineligible.
- ESOP Participation: Participation in an employee stock ownership plan (“ESOP”, as defined in 15 U.S.C. § 632(q)(6)) does not result in an affiliation between the business and the ESOP for purposes of the PPP.
- Bankruptcy:
 - If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, *either at the time it submits the application or at any time before the loan is disbursed*, the applicant is ineligible to receive a PPP loan.
 - If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant’s obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.
 - Lenders may rely on an applicant’s representation concerning the applicant’s or an owner of the applicant’s involvement in a bankruptcy proceeding.

In light of the foregoing, companies (and especially public companies) that have applied (or plan to apply) for a PPP loan and that can otherwise readily access alternative sources of debt or equity should promptly review the Recent Guidance and April 24 Rule in close consultation with their advisors.

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

For more information, please see the following resources:

1. PPP Resources from the SBA and Treasury Department:
 - a. [PPP Frequently Asked Questions](#) (updated April 23, 2020)
 - b. [Initial Rule](#) (released April 2, 2020)
 - c. [Subsequent Rule \(on Affiliation\)](#) (released April 3, 2020)
 - d. [New Rule \(on Additional Eligibility Guidance for Independent Contractors\)](#) (released April 14, 2020)

- e. [Top-Line Overview of the Program](#)
 - f. [Information Sheet for Lenders](#)
 - g. [Information Sheet for Borrowers](#) (updated April 2, 2020)
 - h. [Borrower Application Form](#) (updated April 3, 2020)
 - i. [Lender Application Form](#) (released April 2, 2020)
 - j. [Lender Agreement to participate in PPP](#) (released April 3, 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 24, 2020)
 - b. [Special Alert: SBA Releases Additional Guidance via New Interim Final Rule, Update to Frequently Asked Questions on Paycheck Protection Program Loans](#) (April 16, 2020)
 - c. [SBA Releases Additional Guidance via Updates to Frequently Asked Questions on Paycheck Protection Program Loans](#) (April 9, 2020)
 - d. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
 - e. [SBA Releases Interim Final Rule Outlining Additional Details on Paycheck Protection Program Loans](#) (April 3, 2020)
 - f. [What Franchise and Hospitality Companies Should Know! A Guide to CARES and Other Relief Programs](#) (April 2, 2020)
 - g. [Relief for Employers and Workers under the CARES Act](#) (updated March 29, 2020)
3. Resources on the EIDL Program:
- a. [SBA's COVID-19 Disaster Loan Program](#) (Haynes and Boone Alert, March 24, 2020)
 - b. [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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