

Borrower's Guide to PPP Loans

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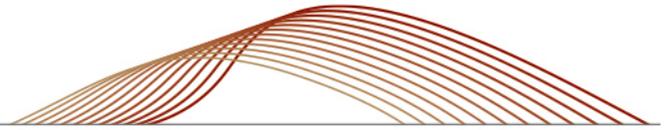
A centerpiece of the \$2 trillion stimulus Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), enacted on March 27, 2020, is the new loan program known as the Paycheck Protection Program (the "PPP"). The CARES Act allocated \$349 billion to the PPP with the aim to provide relief to U.S. small businesses expeditiously. An additional \$310 billion was allocated to the PPP with the enactment of the Paycheck Protection Program and Healthcare Enhancement Act ("CARES 2.0") on April 21, 2020. Subsequently, on June 5, 2020, the Paycheck Protection Flexibility Act of 2020 ("Flexibility Act") was signed into law, amending the CARES Act. The PPP program has been a moving target, as various questions and amendments were made to the rules and interpretations. We published our initial Borrower's Guide on April 8, 2020, and this update reflects changes through June 19, 2020. As new guidelines continue to emerge, you are urged to review carefully the rules as you proceed with the program.

The PPP loans are administered by the U.S. Small Business Administration (the "SBA") and originated by third-party lenders. Eligible companies can borrow up to \$10 million calculated based on payroll records (as described in [Question 17](#)) at a fixed interest rate of 1% for a two-year or five-year term.² Proceeds of the loans may be used to pay certain enumerated business expenses, including payroll, employee benefits, rent, utilities, and interest on mortgage and debt obligations. The loans may be forgiven in part or whole if they are used to retain and pay employees, rent, utilities, and interest on mortgage obligations during the period beginning on the date of loan disbursement and ending on the earlier of (a) December 31, 2020 or (b) 24 weeks following the loan disbursement date (the "Covered Period"); provided, however, that Borrowers that received PPP loans before June 5, 2020 may elect to use the eight-week covered period originally contemplated by the CARES Act, or in the case of payroll costs, either of the eight-week or 24-week period, as applicable, following the first pay period following the PPP loan disbursement date (the "Alternate Covered Loan Period").

The U.S. Department of the Treasury (the "Treasury") and the SBA have continued to issue guidance on their respective websites in the form of updates to an FAQ document (the "FAQ") and new Interim Final Rules on the PPP program, with the most recent guidance issued as recently as June 17, 2020.³ The updated guidance has collectively made material changes with respect to PPP eligibility, loan terms, use of the proceeds, and the application process and have provided some insight with respect to the expected loan forgiveness process.⁴

1. What basic things should you know about a PPP loan?

Timing: Eligible companies are encouraged to apply as soon as possible because PPP loans are given out on a "first-come, first-served" basis and the funding is limited. You may submit a PPP loan application to any lender that participates in the SBA's 7(a) loan program, starting on April 3, 2020



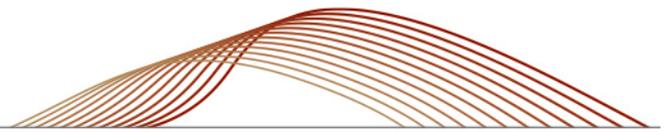
(if you are a small business and sole proprietorship) or April 10, 2020 (if you are an independent contractor and self-employed individual). The last day to apply is June 30, 2020. While a few banks began accepting applications on April 3, 2020, most existing 7(a) banks began accepting applications the week of Monday, April 6, in many cases just for existing customers. For more information, see [Question 14](#). The initial \$349 billion appropriated to the PPP program was exhausted within the first two weeks, but as mentioned above, an additional \$310 billion was appropriated to the PPP via CARES 2.0. In addition, a number of recipients of loans returned those funds to the program as new guidance became available indicating that they may not have been eligible. Therefore, as of June 12, 2020, approximately \$129 billion of the additionally appropriated funds remained available for new loans.⁵ The SBA has since made clear that third-party lenders must make loans in a single disbursement, with such disbursement to occur no later than 10 calendar days from the date of loan approval.⁶

Limited Use of Loan Proceeds: Proceeds from a PPP loan may be used for limited purposes: payroll costs, costs related to the continuation of healthcare benefits and insurance premiums, employee salaries and commissions, interest on mortgage obligations, rent and utility payments, interest on debt incurred before February 15, 2020, and refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. Additional guidance further makes clear that no more than 40% of the proceeds may be used towards the foregoing non-payroll costs.⁷ Using PPP funds for any other purpose may result in criminal liability in addition to an obligation to repay the SBA the misused amounts. For more information, see [Question 3](#) and [Question 4](#).

Eligibility: To be eligible for a PPP loan, an applicant generally must (i) have fewer than 500 employees whose principal place of residence is in the United States or (ii) be a “small business” under the applicable NAICS code employee size standard to be eligible for a PPP loan.⁸ The calculation of “number of employees” depends on application of affiliation principles described in [Question 13](#) below. The SBA further clarified that a business otherwise ineligible can additionally qualify for a PPP loan as a small business concern if it meets both tests in SBA’s “alternative size standard” as of March 27, 2020: (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.⁹

Documentation Required: As a part of your application, you will be asked to supply documentation substantiating your eligibility as well as your payroll records. Gathering these documents may take some time. Some lenders may require additional documentation if you are a new customer to a lending institution, so you should consult with your lender as to the documentation it requires as a part of the PPP loan application process. Moreover, if you intend to apply for loan forgiveness, you will need to provide additional documentation for determining the loan forgiveness amount and for the loan forgiveness reduction calculation. For more information on documentation required, see [Question 15](#).

Loan Forgiveness: If you take out a PPP loan, you can submit an application to the lender that is servicing the loan for part or all of the loan to be forgiven. You will need to satisfy certain requirements, such as maintaining your staff and payroll, in order to be eligible for the maximum forgiveness amount. The maximum forgiveness amount, which must be substantiated by documentation, is the sum of expenses you incur or pay during to the Covered Period and/or Alternate Covered Period to pay payroll costs and mortgage interest, rent and utilities payments; provided, however, that not more than 40% of the forgiven amount may be for non-payroll costs.¹⁰ You will need to submit the Loan Forgiveness Application and accompanying documents to your lender no later



than 10 months following the last day of the applicable covered period, and the lender must make a determination on your loan forgiveness request within 60 days of receiving your completed application. For more information, see [Question 18](#).

Basic Terms of PPP Loan: 1.00% fixed interest rate; two-year or five-year term depending on the date of the PPP loan origination (if originated before June 5, 2020, the term is two years, unless lender and borrower mutually agree to extend the maturity of such loans to five years; if originated on or after June 5, 2020, the term is five years); no collateral is required; no personal guarantee is required; no prepayment penalty; payment is deferred until (a) the date that the SBA remits the loan forgiveness amount to your lender, provided that you submit your loan forgiveness application to your lender within 10 months following the last day of the applicable covered period, or (b) that date that is 10 months following the last day of the applicable covered period if you do not timely submit a loan forgiveness application; interest accrual begins as of the date of disbursement. For more information, see [Question 19](#).

2. Where can you apply for a PPP loan?

You can apply for a PPP loan through any third-party lender or any federally insured depository institution, federally insured credit union, and Farm Credit System institution that has executed a participation agreement with the SBA under its 7(a) loan program. Other regulated lenders will be available to make these loans once they are approved and enrolled in the PPP program.¹¹ You should consult with your local lender as to whether it is participating in the SBA's 7(a) loan program. You can find eligible lenders in your area by visiting this [SBA online resource](#) or reviewing the [SBA's list of 100 most active SBA 7\(a\) lenders](#).

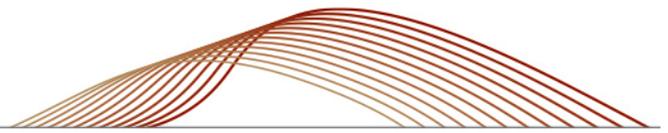
3. What can you use the PPP loans for?

PPP loans can be used for the following purposes: (a) "payroll costs" (defined in [Question 17](#)); (b) costs related to the continuation of group health benefits during periods of paid sickness, medical, or family leave, insurance premiums; (c) mortgage interest payments (but not prepayments or principal payments); (d) rent payments; (e) utility payments; (f) interest payments on any other debt obligations that were incurred before February 15, 2020; and (g) refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020.¹² Note that the Treasury and the SBA clarified on June 10, 2020 that no more than 40% (instead of 25%, which was the prior guidance) of the loan proceeds may be used towards non-payroll costs.¹³ This means that, for most businesses, the amount of loan proceeds they may use on non-payroll purposes would be constrained by the size of their payroll costs. More guidance on the relation between EIDL loans and PPE loans is provided below in [Question 16](#).

Based on the possibility of audits by the SBA and other oversight agencies, we understand that some lenders are suggesting and insisting on borrowers setting up a separate bank account for the PPP loan proceeds so as to show that the funds are used only for the permitted purposes.

4. What are the consequences of misusing the PPP loan proceeds?

If you use PPP loan proceeds for any purpose other than those listed immediately above, the SBA will direct you to repay those misused amounts. If you knowingly use the PPP loan proceeds for an unauthorized purpose, you may be subject to additional criminal liability, such as charges for fraud. If one of your shareholders, members, or partners uses PPP loan proceeds for unauthorized purposes, the SBA will have recourse against such shareholder, member, or partner for the unauthorized use.¹⁴



5. Can you get more than one PPP loan?

No. Each eligible company may only apply for one PPP loan. This means that if you apply for a PPP loan, you should consider applying for the maximum amount.

6. Who determines eligibility—the SBA or the lenders?

The SBA has delegated authority to lenders to make eligibility determinations based on the criteria explained below. A borrower's ability to repay the loan is not a factor in eligibility consideration.

Furthermore, the [Interim Final Rule](#) (the "Interim Final Rule") and Question #31 of the FAQ indicate that the SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness.¹⁵ Lenders must comply with the applicable lender obligations set forth in the Interim Final Rule but lenders will be held harmless for borrowers' failure to comply with program criteria. Remedies for borrower violations or fraud are separately addressed in the Interim Final Rule.

7. How should the Borrower Application Form be filled out?

In this section, we provide practice tips and guidelines for certain complicated portions of the final [Borrower Application Form](#) that was posted to the Treasury's website as of April 2, 2020 and last revised on June 12, 2020 (the "Borrower Application Form") (starting from the beginning of the Borrower Application Form):

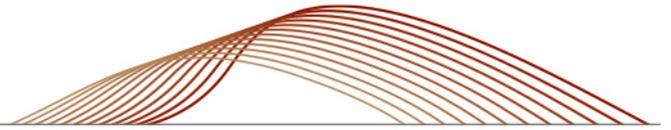
Average Monthly Payroll

Please see [Question 16](#) below for a description of how to calculate average monthly payroll.

Number of Employees

The Small Business Act provides that the term "employee" includes individuals employed on a full-time, part-time, or other basis. For eligibility determination purposes, we believe that "employees" should include furloughed, temporary and leased employees and K-1 partners.¹⁶ The [Interim Final Rule](#) provides that independent contractors should not be counted when calculating a borrower's number of employees for PPP loan purposes because independent contractors have the ability to apply for their own PPP loans.¹⁷ While section 2(a) of the first [Interim Final Rule](#) provides that only those employees whose residence is within the United States should be counted when calculating a borrower's (and the borrower's affiliates', if any) number of employees, the SBA has since clarified that the reference to the employees with residence within the United States is relevant only to the calculation of payroll for purposes of determining the PPP loan amount and the calculation of loan forgiveness.¹⁸ For eligibility determination purposes, employees of the entity and all of its domestic and foreign affiliates are included, irrespective of the residency of the employees.¹⁹

Furthermore, the SBA in the FAQ, last updated on May 27, 2020, indicates that an applicant, when determining the number of its (and its affiliates', if any) employees, may use the same time period that it uses to calculate its monthly average payroll for the maximum loan amount (i.e., the time period identified in the applicable Step 1 in [Question 16](#)).²⁰ For most business applicants, such time period would be the last 12 months (e.g., calendar year 2019 or March 2019 to March 2020). Alternatively, an applicant may elect to use 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).

The calculation of “number of employees” also depends on application of affiliation principles described in [Question 13](#) below.

Questions 1, 2, 5, and 6

These are all relatively straightforward questions, but answers may need to be confirmed with the applicant’s owners. The [Borrower Application Form](#) defines “owners” as they are defined in 13 C.F.R. § 120.10:

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the applicant is owned by a trust).

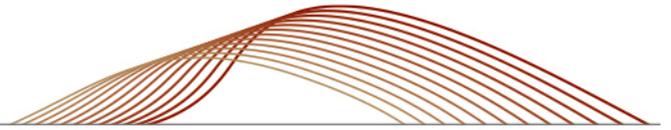
When determining whether a natural person or an entity is an owner of a company (be it corporation, limited liability company, or a partnership), we believe that both the economic rights and the voting rights of such person or entity should be taken into account. The federal regulation 13 C.F.R. § 120.10 is not dispositive. We expect the Treasury and the SBA to issue additional guidance on this subject.

Question 3

Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as Addendum A.

The purpose of this question is not entirely clear. As the National Venture Capital Association noted in its letter to the Treasury dated April 1, 2020, it is strange that 20+% owners and descriptions of their other owned businesses must be described in an addendum to the Borrower Application Form when the affiliation for investors with less than 50% ownership is likely to be determined by the control rights of individual investors or specific funds and not solely by a minority owner’s percentage ownership (as we explain in further detail in [Question 13](#) below).

Based on the [Interim Final Rule on Affiliation](#) posted to the Treasury’s website on April 3, 2020 (the “Interim Final Rule on Affiliation”), it appears that this question is related to the “common management” prong of affiliation analysis²¹ (as we explain in further detail in [Question 13](#) below). As such, responding to this question may be fairly daunting for venture capital—and private equity-backed applicants and will require applicants to request a fair amount of information from such owners. For example, if Fund Company A is a 20+% owner of the applicant, then it is fairly clear that all portfolio companies of Fund Company A in which it has a 20+% ownership stake are meant to be identified in Addendum A to the Borrower Application Form. However, often times, Fund Company A may be connected to a number of other funds, all of which have portfolio companies of their own, in light of the “common management” language included in this question. Accordingly, all portfolio



companies of the “Fund Companies” (i.e., the portfolio companies of Fund Company A, Fund Company B, etc.) would have to be identified if the “Fund Companies” are under common management, which may be the case.

In light of the foregoing, we recommend that all venture capital, private equity, and similar investment firms have at the ready a list of all companies in which the firm holds a 20+% interest and a short description of the firm’s relationship with such companies along the lines of: “All of the below companies are owned 20% or more by [Fund]. [Fund] is involved on the board of directors of the companies marked below with an asterisk, but there are no other common control relationships between or among these portfolio companies.”

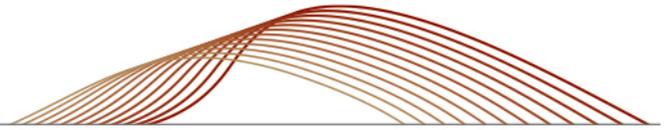
Some venture, private equity, and other investments funds have indicated that they are uncomfortable listing all of their other portfolio companies in which they hold more than 20% of the ownership. We are seeking guidance from lenders to see if they will accept some less detailed statement regarding ownership (such as listing the number of companies in which they hold more than 20%, and maybe only listing by name those companies with common directors) but are not aware of the SBA or any lender agreeing to abbreviated disclosure.

Certifications and Authorizations — The [Borrower Application Form](#) requires the authorized representative of the applicant signing the application to make various certifications and authorizations. Many of these are straightforward; others are more complicated. We have listed some of the noteworthy certifications below.

The following are the eligibility criteria based on the status of the applicant as of the date the applicant applies for the PPP loan (i.e., criteria not related to how the applicant plans to use loan proceeds):

- The applicant was in operation on February 15, 2020 (first item in the “Certifications” section); **and**
- The applicant had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC (first item in the “Certifications” section); **and**
- Current economic uncertainty makes the loan request necessary to support the ongoing operation of the applicant (second item in the “Certifications” section); **and**
- The applicant **(1)** is an independent contractor, eligible self-employed individual, or sole proprietor, **OR (2)** employs no more than the greater of 500 employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. § 121.201 for the applicant’s industry (third item in the “Certifications and Authorizations” section).

Most of the criteria are objective and subject to calculation. However, many companies and investors have asked about interpretation of the certification regarding “current economic uncertainty” requiring the loan, which is a subjective and future-looking certification. This is a “facts and circumstances” test, and there has been a great deal of debate among institutional investors about this issue. We recommend having a board level discussion of the actual need, whether the applicant would otherwise impose significant salary cuts or furlough or lay off employees without the PPP loan, the potential reputational risk to the applicant and its investors if it is later determined that there was no such need, and if the company expects to achieve a positive exit in the relatively near term.



On April 23, 2020, the SBA issued an updated FAQ with new FAQ #31 which addresses the need certification as follows:

31. Question: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, 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 on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

On April 24, 2020, the SBA issued and updated FAQ with new FAQ #37 which reads as follows:

37. Question: Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

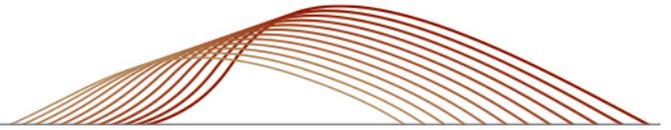
Answer: See response to FAQ #31.

Borrowers are required to reconsider their need certification based on the updated guidance, but questions remained as to the interpretation of "access to other liquid sources of liquidity" and the meaning of "significantly detrimental to the business." The May 7th safe harbor date in FAQ #31 was subsequently extended through May 18, 2020.²²

On May 13, 2020, the SBA issued an updated FAQ with new FAQ #46 providing additional guidance in making the need certification:

46. Question: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

Answer: When submitting a PPP application, all borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original



principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

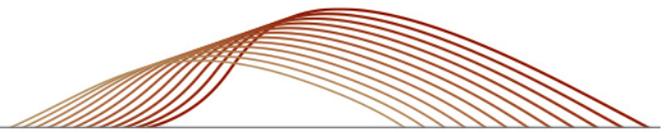
Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

The updated guidance provides an additional safe harbor for any borrower that together with its affiliates (to the extent required to be included as affiliates under the PPP interim final rule on affiliates), has a loan with an original principal balance of less than \$2 million, in that the need certification will be deemed to be made in good faith. For loans in excess of \$2 million, if the SBA makes a determination that there is no adequate basis for the need certification, then borrower will have the opportunity to repay the funds, and if the borrower repays the funds in full, the SBA will not pursue administrative enforcement action or referrals to other agencies for enforcement. Note that the Department of Justice, IRS may still elect to pursue enforcement proceeding notwithstanding the SBA's election to decline to proceed with administrative proceedings or referral does not prevent other enforcement.

Some other noteworthy certifications required on the [Borrower Application Form](#) to be made by the authorized representative of the applicant signing the application include the following:

All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rules (fifth item in the "Certifications and Authorizations" section).

This certification, along with certain others provided in the Borrower Application Form, relate to eligibility based on the intended uses of proceeds of the loan. Please see Question 3 for a description of permitted uses.



The applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (“SBA”) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) (the Paycheck Protection Program Rule) (second item in the “Certifications and Authorizations” section).

Among other things, this certification incorporates the affiliation principles described in further details in [Question 13](#) below.

8. When must the Certifications and Authorizations under the Borrower Application Form be true?

The [Borrower Application Form](#) obligates the applicant to certify as of the date of submission that the applicant is eligible to receive a loan under the rules in effect at the time the Borrower Application Form is submitted that have been issued by the SBA implementing the PPP under Division A, Title I of the CARES Act (the Paycheck Protection Program Rule). Accordingly, any measures to become eligible should be taken prior to application submission.

9. If an applicant meets the eligibility requirements for a PPP loan, can the applicant still be deemed ineligible?

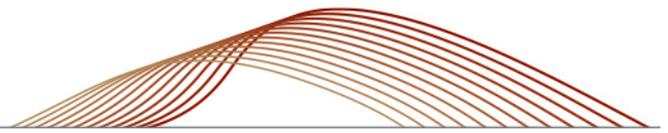
Yes. Section 2(c) of the [Interim Final Rule](#) excludes persons from obtaining PPP loans if they are ineligible to obtain SBA loans generally pursuant to existing regulations under 13 C.F.R. § 120.110.²³ Section 120.110(b) explicitly excludes “financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances).” The statute also excludes passive businesses owned by developers and landlords that do not actively use or occupy assets acquired or improved with the loan proceeds, life insurance companies, businesses located in a foreign country, pyramid sale distribution plans, businesses deriving more than a specified amount of annual revenue from legal gambling activities and private clubs, and businesses, which limit the number of memberships for reasons other than capacity.²⁴ For a full list of excluded businesses, see 13 C.F.R. § 120.110. However, although non-profit businesses are listed among the types of excluded persons in such federal regulation, both the CARES Act and the [Interim Final Rule](#) explicitly override this and provides eligibility for non-profit businesses.²⁵

10. Do affiliation principles apply when calculating the number of employees?

Yes. Title I of the CARES Act provides that statutory provisions relating to affiliations apply to determinations of employee headcount. Under the Small Business Act, affiliated businesses, including other businesses owned by a controlling entity, are aggregated for purposes of counting employees, calculating revenue, or otherwise testing the size of a small business. Before SBA published the FAQs, last updated on May 27, 2020, there were different schools of thought among practitioners on which affiliation tests should apply. More detail on the affiliation rules is laid out in [Question 13](#) below, but note that, as a general matter, the affiliation rules are not bright line tests, but have been developed over time in response to various factual circumstances. Therefore, consultation with your attorneys at Paul Hastings or elsewhere is highly recommended. These rules are very complicated.

11. Do any waivers apply to affiliation?

Yes—for purposes of the PPP, the SBA’s affiliation standards are waived for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a



North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681).

12. What is an “affiliate?” How is control determined?

The SBA’s internal compliance manual for assessing affiliation²⁶ provides that (1) affiliation exists when one business controls or has the power to control another or when a third party (or parties) controls or has the power to control both businesses, (2) control may arise through ownership, management, or other relationships or interactions between the parties, and (3) control may be affirmative or negative (such as instances where a minority shareholder has the ability, under the business’ charter, by-laws, or shareholder’s agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders).

In determining whether affiliation exists, the SBA may consider all connections between the concern and a possible affiliate. Even though no single factor is sufficient to constitute affiliation, the SBA may find affiliation on a case-by-case basis where there is clear and convincing evidence based on the totality of the circumstances.

13. How do the SBA affiliation rules apply to a business?

Majority owner? (Potential affiliation based on §301(f)(1) voting equity ownership)

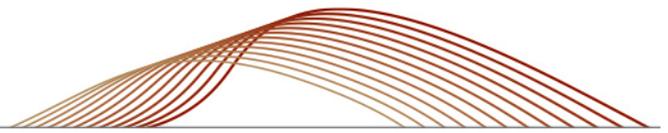
Ownership, or the power to control, 50% or more of a business’s voting stock constitutes a showing of ownership and accordingly, triggers affiliation between the business and its majority owner. The SBA’s internal compliance manual provides the following example:

Company A is the majority owner of Companies B, C, and D (54.5%, 81%, and 60% respectively). Company A has the power to control Companies B, C, and D. The companies (A, B, C, and D) are all affiliated.

In the foregoing example, each company will be ineligible for PPP on the basis of number of employees if the aggregate number of employees among the four entities is greater than 500. Note that affiliation will extend to businesses deemed to be controlled by the same owner, even if the control is due to position/negative controls (which we explain in further detail below). Accordingly, in the foregoing example, if Company A held less than 50% of the voting stock of Company B, but nonetheless has significant positive/negative controls over governance activity, then Company B’s employees would still be aggregated for purposes of the calculation.

The foregoing analysis does not change where the majority owner is a “holding” company. The SBA has previously determined that a holding company owning 50+% of a business’s stock, despite characterizing itself as an “investment entity” without an active role in the management or operation of the contractor’s business, was nonetheless an affiliate for purposes of the SBA size determination—which would mean that all of the holding company’s various majority-owned subsidiaries would be aggregated for these purposes of determining eligibility of a PPP loan.

Majority owners, by definition, would be disclosed on Addendum A to the Borrower Application Form (as discussed in [Question 7](#) above).



Significant but not majority owner? (Potential affiliation based on §301(f)(1) voting equity ownership)

Certain SBA affiliation rules provide that ownership of, or the power to control, a block of voting stock *that is large compared to all other outstanding blocks of stock* constitutes a showing of ownership and accordingly, triggers affiliation between the business and such significant owner. However, in the [Interim Final Rule on Affiliation](#), posted to the Treasury's website on April 3, 2020, the Treasury clarified that the SBA affiliation rules applicable to PPP loan eligibility are contained within 13 C.F.R. §121.301(f) ("§301(f)").²⁷

In §301(f), a significant minority holding (according to percentage ownership) alone does not alone constitute affiliation. However, a minority investor may still be affiliated with a company based on the minority investor's common management with the business or control rights over the business (each as discussed in further detail below).

Significant minority owners would be disclosed on Addendum A to the Borrower Application Form (as discussed in [Question 7](#) above), which requires disclosure of all 20+% owners. However, the disclosure of such owners on Addendum A would not alone mean that they are affiliated with the applicant (and thus may not require aggregation of employees of such owners' other affiliated businesses with those of the applicant).

Multiple minority owners that together own a large share? (Potential affiliation based on §301(f)(1) voting equity ownership)

Certain SBA affiliation rules provide that if two or more persons each owns or controls (or has the power to control) less than 50% of voting stock and (i) the minority holdings are all approximately equal in size, and (ii) all of the minority holdings taken together are large compared to any other stock holdings, affiliation is presumed to exist with each of those persons.

However, based on the clarification provided in the [Interim Final Rule on Affiliation](#), minority holdings (according to percentage ownership) will not alone constitute affiliation for purposes of PPP loan eligibility. However, a minority investor may still be affiliated with a company based on the minority investor's common management with the business or control rights over the business (each as discussed in further detail below).

Minority owners, so long as they hold 20+% of voting interest, would be disclosed on Addendum A to the Borrower Application Form (as discussed in [Question 7](#) above). However, the disclosure of such owners on Addendum A would not alone mean that they are affiliated with the applicant (and thus may not require aggregation of employees of such owner's other affiliated businesses with those of the applicant).

Voting stock is widely held? (Potential affiliation based on §301(f)(1) voting equity ownership)

If no individual, business, or entity is found to control an applicant, the SBA will deem the Board of Directors or President or Chief Executive Officer ("CEO") (or other officers, managing members or partners who control the management of the applicant business) to be in control of the applicant. The SBA's compliance manual provides the following example:

In a widely held corporation where no one stockholder has a block of voting stock sufficient to give it control or the power to control the concern, control instead rests in



the Board of Directors and the CEO or President. This means that any business controlled by the Board or by the CEO or President is an affiliate of the business concern in question, unless the Board and CEO or President can rebut this presumption.

Minority owner with control rights? (Potential affiliation based on §301(f)(1) minority control)

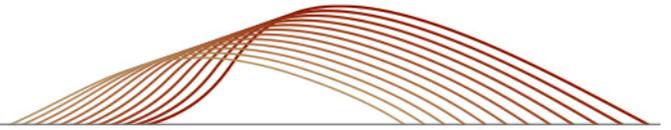
§301(f)(1) provides that the SBA will deem a minority shareholder to be in control, if that individual or entity has the ability, under the applicant's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

The SBA, through various guidance and case law from the Office of Hearings and Appeals ("OHA"), has accepted that certain customary negative commitments—i.e., the power to block certain decisions contained in so-called "protective provisions"—do not in and of themselves give shareholders control. The fine line appears to be the control over extraordinary decisions vs. day-to-day operations, wherein the investor's ability to "block ordinary actions essential to operating the company" becomes problematic.²⁸

Specifically, the SBA has recognized via OHA case law that a minority investor's control over or ability to block any of the following decisions or actions of a company (including through a director that is required to approve or holds a veto) may constitute "negative control":²⁹

1. Making, declaring, or paying distributions or dividends other than tax distributions;
2. Establishing a quorum at a meeting of stockholders (and likely, by extension, at a meeting of the board);
3. Approving or making changes to the company's budget or approving capital expenditures outside the budget;
4. Determining employee compensation;
5. Hiring and firing officers and executives;
6. Blocking changes in the company's strategic direction;
7. Establishing or amending an incentive or employee stock ownership plan;
8. Incurring or guaranteeing debts or obligations;
9. Initiating or defending a lawsuit;
10. Entering into contracts or joint ventures;
11. Amending or terminating leases; or
12. Incurring expenses over \$5,000.

Conversely, the SBA has recognized via OHA case law that the following controls or supermajority provisions do not necessarily constitute "negative control" of the minority investor (designed to

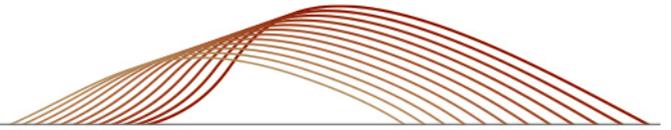


prevent the majority's ability to control the company's operations or to conduct the company's business) and instead are simply protective of the minority shareholders' investment:³⁰

1. Selling all or substantially all of the company's assets;
2. Placing an encumbrance or lien on all or substantially all of the company's assets;
3. Engaging in any action that could result in a change in the amount or character of a company's capital contributions;
4. Changing the company's line of business or entering into a substantially new business;
5. Engaging in a merger transaction;
6. Issuing additional stock/equity;
7. Adding new members;
8. Amending the organizational documents of a company, including bylaws;
9. Filing for bankruptcy;
10. Amending the governing documents to materially alter the rights of the existing owners;
11. Dissolving the company;
12. Increasing, decreasing, or reclassifying the authorized capital of the company;
13. Increasing or decreasing the size of the board;
14. Entering into a confession of judgment;
15. Disposing of the goodwill of the company;
16. Committing to take any action that would make it impossible for the company to carry on its ordinary course of business; or
17. Accepting additional capital contributions from a member.

We note that OHA case law explaining what may or may not constitute negative control, including the cases cited above, are generally pursuant to the SBA's general affiliation rules under 13 C.F.R. § 121.103, not §301(f) (the applicable standard of PPP loan eligibility). Although the rules and language pertaining to minority control rights in the two sections are quite similar, the SBA may nonetheless apply different standards to §301(f) analysis. Accordingly, the lists above of "problematic vs. unproblematic" negative controls may be over- or under-inclusive. It should be noted as well, that the SBA may look at the overall set of rights and that no one right in and of itself may tip the balance.

Many companies are examining their charters and various stockholders agreements and seeking to amend or waive control provisions. In the FAQ, last updated on May 27, 2020, the SBA clarified that in order for a waiver or relinquishment of control rights to be effective for a determination of non-affiliation, that waiver must be "irrevocable" (assuming no other relationship triggers the



affiliation rules).³¹ Therefore, a “springing” waiver that goes away upon payment of the loan would not be effective.

Certain ownership/equity rights (e.g., options, convertible securities, etc.) (Potential affiliation based on §301(f)(2))

§301(f) provides that in determining size, the SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. The SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised. The SBA’s compliance manual provides the following example:

If Company A holds an option to purchase a controlling interest in Company B, the situation is treated as though Company A had exercised its rights and had become owner of the controlling interests in Company B. Company A and B are affiliates. In addition, all companies controlled by Company A will be considered affiliates of Company B.

However, agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered “agreements in principle” and are thus not given present effect.

Significantly, §301(f)(iv) provides that (1) an individual, business, or other entity that controls one or more other businesses cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so and that (2) the SBA will not give present effect to individuals’, businesses’, or other entities’ ability to divest all or part of their ownership interest in order to avoid a finding of affiliation. This may impact certain measures that applicants may consider taking in order to become eligible, as discussed above.

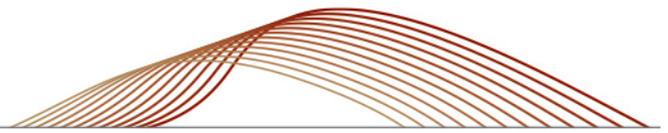
Common management with another business?

§301(f)(3) provides that affiliation arises where (i) the CEO or President of the applicant business (or other officers, managing members, or partners who control the management of the business) also controls the management of one or more other businesses, (ii) a single individual, business, or entity that controls the Board of Directors or management of one business applicant also controls the Board of Directors or management of one of more other businesses, or (iii) a single individual, business, or entity controls the management of the applicant business through a management agreement.

The SBA’s internal compliance manual provides the following examples:

Controlling members of Company A’s Board of Directors occupy three out of five positions in Company B’s Board of Directors. The two companies (A and B) are affiliated. In addition, all businesses controlled by Company A will be considered affiliates of Company B.

A controlling member of Company A’s Board of Directors has veto rights over the majority decisions of Company B’s Board of Directors. By possessing such negative control, Company A has control of the Board of Directors of Company B and the two companies (A and B) are affiliated. In addition, all companies controlled by Company A will be considered affiliates of Company B.



Identity of interest between other businesses or individuals?

§301(f)(4) provides that affiliation also may exist when there is an identity of interest between close relatives, as defined in 13 C.F.R. § 120.10, with identical or substantially identical business or economic interests (such as where the close relatives operate concerns in the same or similar industry in the same geographic area). Where the SBA determines that interests should be aggregated, an individual or business may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

14. When does the loan application begin? Do you need to apply as soon as possible?

Small businesses and sole proprietorships can apply for and receive loans to cover their payroll and other certain expenses through existing SBA lenders starting April 3, 2020. For independent contractors and self-employer individuals, the starting date is April 10, 2020. Other regulated lenders will be available to make these loans as soon as they are approved and enrolled in the program. It was initially recommended that applicants apply as soon as possible because funds were limited, and it was unknown how long it would take for lenders to process applications. As noted above, additional funds were appropriated, but we note that the application deadline on **June 30, 2020** has not yet been extended, so if you have not yet applied, you should apply as soon as possible.

15. What is the loan application process?

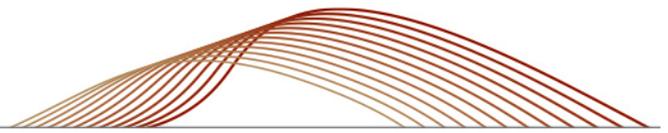
You can apply for a PPP loan through any third-party lender or any federally insured depository institution, federally insured credit union, and Farm Credit System institution that has executed a participation agreement with the SBA under its 7(a) loan program.³² You can find eligible lenders in your area by visiting this [SBA online resource](#) or reviewing the [SBA's list of 100 most active SBA 7\(a\) lenders](#).

Your PPP loan request must include documents that verify the number of full-time equivalent (“FTE”) employees and pay rates, as well as the payments on eligible mortgage, lease, and utility obligations.³³ As a part of the PPP loan application form, you must certify that the documents you provide are accurate and that the proceeds and the forgiveness amount will only be used for the permitted purposes (as described in [Question 3](#) above).

Depending on the circumstances of the business and the specific lender’s requirement, you may need to submit additional documentation. As a borrower, you will be asked to submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. If you do not have any the aforementioned documentation, then you will need to provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount. Moreover, if you intend to apply for loan forgiveness, you must provide additional documentation for the relevant time periods (either 24 weeks or eight weeks immediately following the first loan disbursement), for determining the forgiveness amount and for the loan forgiveness reduction calculation (as described in [Question 18](#) below).

16. What is the maximum amount you can borrow?

You may borrow up to 250% of your business’s average monthly “payroll costs” (explained in [Question 17](#) below) from the year prior to the loan, up to a total maximum of \$10 million. To calculate your business’s average monthly “payroll costs,” follow the steps listed below that are applicable for



your situation. The below steps also appear in SBA guidance entitled [“How to Calculate Maximum Loan Amounts – By Business Type”](#).

Note that, effective with respect to any loan that was not yet fully disbursed as of April 30, 2020, businesses that are part of a single corporate group shall in no event receive more than \$20 million of PPP loans in the aggregate. For purposes of this limit, businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent.³⁴

Most Case Scenario (for non-seasonal businesses formed for at least a full year):

If you are an S corporation or C corporation:

Step 1: Compute 2019 payroll costs by adding the following:

- 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S.;

For example, if there are only three employees whose cash compensation exceeds \$100,000, each of whom has cash compensation of \$225,000, then you would subtract \$375,000 because you will need to subtract \$125,000 (which is how much each such employee’s cash compensation exceeds \$100,000) three times.

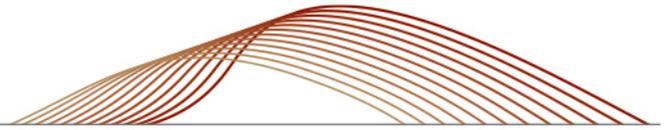
- 2019 employer health insurance contributions (portion of IRS Form 1120 line 24 or IRS Form 1120-S line 18 attributable to health insurance);
- 2019 employer retirement contributions (IRS Form 1120 line 23 or IRS Form 1120-S line 17); and
- 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).

Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).

Step 3: Multiply by 2.5.

Step 4: If you have any outstanding amount of an Economic Injury Disaster Loan (“EIDL”), which you received between January 31, 2020 and April 3, 2020, add the outstanding amount, less the amount of any “advance” under an EIDL COVID-19 loan.

The corporation’s 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with the filed business tax return (IRS Form 1120 or IRS 1120-S) or other documentation of any retirement and health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date.



If you are a partnership:

Step 1: Compute 2019 payroll costs by adding the following:

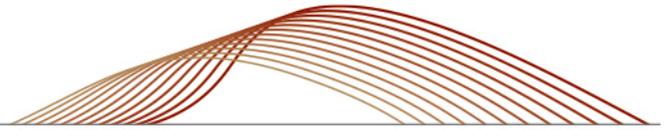
- 2019 Schedule K-1 (IRS Form 1065) Net earnings from self-employment of individual U.S. based general partners that are subject to self-employment tax, computed from box 14a (reduced by any section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties) multiplied by 0.9235, up to \$100,000 per partner (if 2019 schedules have not been filed, fill them out);
- 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, if any, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S.;
- 2019 employer contributions for employee health insurance, if any (portion of IRS Form 1065 line 19 attributable to health insurance);
- 2019 employer contributions to employee retirement plans, if any (IRS Form 1065 line 18); and
- 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms), if any.

Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).

Step 3: Multiply by 2.5

Step 4: If you have any outstanding amount of an EIDL which you received between January 31, 2020 and April 3, 2020, add the outstanding amount, less the amount of any “advance” under an EIDL COVID-19 loan.

The partnership’s 2019 IRS Form 1065 (including K-1s) and other relevant supporting documentation if the partnership has employees, including the 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements) along with records of any retirement or health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. If the partnership has employees, a payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish the partnership was in operation and had employees on that date. If the partnership has no employees, an invoice, bank statement, or book of record establishing the partnership was in operation on February 15, 2020 must instead be provided.



If you are an LLC, you should follow the instructions that apply to your tax filing situation.

If you are an independent contractor or sole proprietor (self-employed) and have no employees:

Step 1: Find your 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value). If this amount is over \$100,000, reduce it to \$100,000. If this amount is zero or less, you are not eligible for a PPP loan.

Step 2: Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).

Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5.

Step 4: If you have any outstanding amount of an EIDL, which you received between January 31, 2020 and April 3, 2020, add the outstanding amount, less the amount of any “advance” under an EIDL COVID-19 loan.

Your 2019 IRS Form 1040 Schedule C must be provided to substantiate the applied-for PPP loan amount. You must also provide a 2019 IRS Form 1099-MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record establishing you were self-employed in 2019 and a 2020 invoice, bank statement, or book of record establishing you were in operation on February 15, 2020.

If you are an independent contractor or sole proprietor (self-employed) and have employees:

Step 1: Compute your 2019 payroll costs by adding the following:

- 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value); if this amount is over \$100,000, reduce it to \$100,000; and if this amount is less than zero, set this amount at zero;
- 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amount paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S.;
- 2019 employer contributions for employee health insurance (portion of IRS Form 1040 Schedule C line 14 attributable to health insurance);
- 2019 employer contributions to employee retirement plans (IRS Form 1040 Schedule C line 19); and
- 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).

Step 2: Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).

Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5.



Step 4: If you have any outstanding amount of an EIDL, which you received between January 31, 2020 and April 3, 2020, add the outstanding amount, less the amount of any “advance” under an EIDL COVID-19 loan.

Your 2019 IRS Form 1040 Schedule C, IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with documentation of any retirement or health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date.

If you are a new business that was not in operation during the period from February 15, 2019 and ending on June 30, 2019:

Step 1: Aggregate “payroll costs” from the period beginning on January 1, 2020 and ending on February 29, 2020 for employees whose principal place of residence is the United States. For what constitutes “payroll costs,” see [Question 17](#) below.

Step 2: To the extent not already taken into account when calculating Step 1, make sure the annualized cash compensation for each employee is capped at \$100,000. Subtract the amount of cash compensation paid to each employee in excess of \$100,000, for each such employee.

Step 3: Divide by 2 to calculate the average monthly “payroll costs.”

Step 4-5: Same as described as for Most Case Scenario.

If you are a seasonal business (as determined by the SBA):

Step 1: Aggregate “payroll costs” from the period beginning on your choice of February 15, 2019 or March 1, 2019 and ending June 30, 2019 for employees whose principal place of residence is the United States. For what constitutes “payroll costs,” see [Question 17](#) below.

Step 2: To the extent not already taken into account when calculating Step 1, make sure the annualized compensation for each employee is capped at \$100,000. Subtract the amount of compensation paid to each employee in excess of \$100,000, for each such employee.

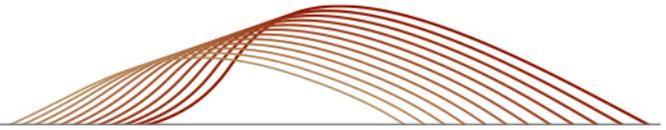
Step 3: Divide by 2 to calculate the average monthly “payroll costs.”

Step 4-5: Same as described as for Most Case Scenario.

17. What costs are included in payroll costs?

For businesses: “Payroll costs” consist of any compensation to employees (whose principal place of residence is in the U.S.) in the form of:

1. Salaries, wages, or commissions (as noted above, capped at \$100,000 per employee);
2. Cash tips or the equivalent (calculated based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips);
3. Payments for vacation, parental, family, medical, or sick leave;



4. Allowance for separation or dismissal;
5. Payments for the provision of employee benefits consisting of group health care coverage, including insurance premiums and retirement; and
6. Payments of state and local taxes assessed on compensation of employees.

As noted in [Question 16](#) above, the annualized compensation (cash compensation directly to the employee) for each employee is capped at \$100,000. In other words, for each employee whose compensation is \$100,000 or more, only \$8,333 per month can be included in the calculation of average monthly payroll costs, in addition to the cost of health and retirement benefits and the state and local taxes assessed on that employee's actual compensation (i.e., not capped at \$100,000), each prorated for the applicable time period.

For an independent contractor or sole proprietor: "Payroll costs" consist of wage, commissions, income, or net earnings from self-employment or similar compensation.

Moreover, the CARES Act expressly excludes from the definition of "payroll costs" (i) any compensation to an employee whose principal place of residence is outside of the United States, (ii) qualified sick and family leave wages for which a credit is allowed under the Families First Coronavirus Response Act, and (iii) federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee's and employer's share of Federal Insurance Contributions Act and Railroad Retirement Act taxes and income taxes required to be withheld from employees.

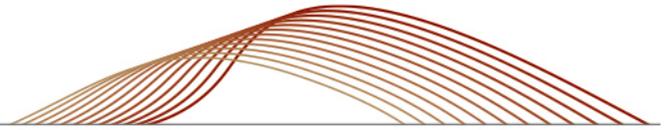
Note that while "payroll costs" include payments of state and local taxes assessed on compensation of employees, the SBA made clear in the FAQ, last updated on May 27, 2020, that "payroll costs" are to be calculated without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld.³⁵ In other words, employer-side federal taxes imposed on compensation of employees are excluded from payroll costs.

18. How does loan forgiveness work?

Amount of Loan Forgiveness:

The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest, so long as the applicant keeps salary and employee counts the same. Costs eligible for forgiveness include payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the applicable covered period (which generally refers to the 24 weeks following the loan disbursement date, unless loan disbursement date occurs after July 16, 2020, in which case Covered Period ends on December 31, 2020). Note that borrowers that received PPP loans before June 5, 2020 can choose to have its cover period be either the eight weeks or the 24 weeks following the loan disbursement date.

The Treasury clarified on June 10, 2020 that at least 60% of the loan amount must be used for "payroll costs" (as defined in [Question 17](#) above), and that no more than 40% of the loan proceeds can be forgiven for non-payroll costs.³⁶ This 60/40 ratio requirement means that, for most businesses, the amount of loan forgiveness will be constrained by the size of their payroll costs over the Covered Period or Alternate Covered Loan Period, as applicable.



For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. According to the Treasury guidance, this is to ensure that the core purpose of the statute is effectuated and that these finite sources are devoted primarily to payroll. Independent contractors do not count for determining a borrower's PPP forgiveness. Finally, it is worth noting that only loan proceeds spent on payroll and other eligible costs during the covered period will qualify for forgiveness.

Loan Forgiveness Reduction Calculation:

Your loan forgiveness amounts can be reduced on two different bases: (1) reduction in pay for certain employees and (2) reduction in the number of full-time equivalent (FTE) employees.

(1) Reduction in pay for certain employees

First, the amount of loan forgiveness will also be reduced dollar-for-dollar by the amount of any reduction in total salary or wages of any employee, who did not receive during any single pay period in 2019 wages or salary at an annualized rate of more than \$100,000, during the Covered Period or the Alternate Covered Loan Period, as applicable, to the extent such reduction exceeds 25% of the total salary or wages of such employee during the most recent full quarter prior to the first loan disbursement that such employee was employed.³⁷

(2) Reduction in the number of FTE employees

Second, the amount of loan forgiveness will be reduced proportionally by any reduction in the number of "full-time equivalent" (FTE) employees retained during the Covered Period or the Alternate Cover Loan Period, as applicable, compared to one of two prior pay period time periods (described below) determined by the borrower.

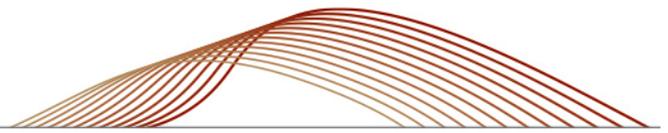
If (X), which equals the average number of FTE employees in Covered Period, is greater than (Y), determined as either:

- The average number of FTE employees employed by the borrower in the period beginning on February 15, 2019 and ending on June 30, 2019,
- The average number of FTE employees employed by the borrower in the period beginning on January 1, 2020 and ending on February 29, 2020,

then the amount forgiven will not be reduced. Note that special rule applies for "seasonal employer" as determined by the SBA.³⁸

The choice of the 2/15/19–6/30/19 or the 1/1/20–2/29/20 dates is at the election of the borrower (unless a seasonal business). This means that companies that grew quickly in the second half of 2019 may be able to reduce their head count *vis a vis* their January 2020 employment without reducing forgiveness. Conversely, businesses that contracted over 2019 will not be adversely impacted by their pre-COVID reductions and would be able to choose the more recent time period.

To calculate the number of full-time equivalent (FTE) employees, you need to take into account all of your full-time and part-time employees. Your full-time employees would each be counted as 1 FTE employee, and your part-time employee may each be counted as a fraction of 1 FTE. To calculate the FTE for your part-time employees, for each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth. A simplified method that assigns a



1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours may be used at the election of Borrower.³⁹

FTE reductions in the following cases do not apply: the FTE of (1) any positions for which the Borrower made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period which was rejected by the employee;⁴⁰ and (2) any employees who during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours.⁴¹

In addition, during the period beginning on February 15, 2020 and ending on December 31, 2020, FTE reductions will not be taken into account for the determination of loan forgiveness if an eligible recipient, in good faith, is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.⁴²

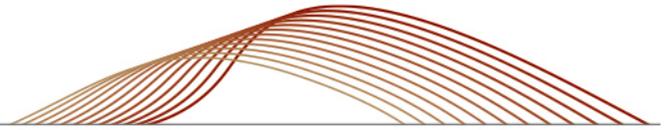
Exceptions to Loan Forgiveness Reductions:

Businesses that re-hire laid off or furloughed workers or raise wages to make up for salary reductions during COVID-19 will not be penalized by the loan forgiveness reduction calculation above and are therefore still entitled to full forgiveness, if these reductions are eliminated by December 31, 2020.⁴³ This can be seen as an opportunity for businesses, whose loan forgiveness amount would otherwise be reduced on one or both of the bases described above, to redeem themselves and once again become eligible for the full forgiveness amount. This provision is aimed to incentivize employers to use the PPP loan proceeds to rehire workers and restore pay cuts that may have been caused by COVID-19.

The reduction in the amount of loan forgiveness calculation above will not apply if the following remediation events occur (as applicable):

- To remediate reduction in number of FTE employees: If the reduction in the number of FTE employees between February 15, 2020 and April 26, 2020 is completely eliminated by December 31, 2020. This is a simple quantitative test—the SBA will look at the number of FTE employees on February 15 and compare that number to the number of FTE employees on December 31, 2020; or
- To remediate reduction in pay for certain employees: If the salary or wages of one or more employees was reduced between February 15, 2020 and April 26, 2020, and the employer has subsequently restored pay by December 31, 2020.

Obviously, this is only necessary to calculate, if the loan forgiveness reduction calculations above result in a cut-back in loan forgiveness. We believe, though it has not been confirmed by the SBA, that the full employment restoration test is a binary test—either it is met, in which case there is full forgiveness of loan used for qualified expenses, or it is not, in which case the loan forgiveness reduction calculations are in effect.



Obtaining Forgiveness:

Borrower must fill out and submit a loan forgiveness application, along with necessary documentations, to its lender.⁴⁴ Borrowers may use the [Form 3508EZ](#) or complete the application electronically through its lender.⁴⁵ A lender originating a loan will need to collect paperwork from the borrower in connection with the forgiveness and essentially make an application to the SBA for that forgiveness. A lender may request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of last week of the applicable covered period.

As initially drafted and adopted the CARES Act deemed recipients of loan forgiveness as ineligible to defer payment of any of your future share of Social Security taxes during 2020, as otherwise allowed under the CARES Act.⁴⁶ The Flexibility Act has amended the CARES Act such that if you received loan forgiveness, you will remain eligible for deferral of employer payroll taxes.

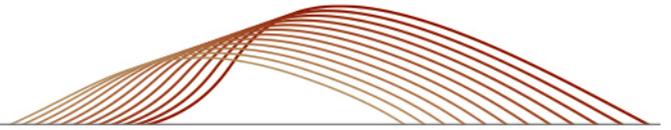
19. For the remainder of the loan that is not forgiven, what are the key loan terms? Can the terms of a PPP loan change if you choose a different third-party lender?

Certain terms of the PPP loan are fixed and cannot be changed by third-party lenders. All PPP loans have a maturity of two or five years (depending the loan origination date) and an interest rate of 1.00%. Please note that, while the CARES Act provides that a loan will have a maximum maturity of up to 10 years and an interest rate not to exceed 4.00%, the Treasury and the SBA have both updated the terms of the PPP loans as of April 2, 2020, changing the interest rate from 0.50% to 1.00% and setting the term to two years if originated prior to June 5, 2020 (provided that lender and borrower may mutually agree to extend to a five-year term), or five years if originated on or after June 5, 2020.⁴⁷

There will be no prepayment penalty, meaning you will be able to repay the loan at any time before the maturity date. There is no collateral or personal guarantee required. All loans will be processed by third-party lenders under delegated authority of the SBA, and the lenders are permitted to rely on the certifications of the borrowers in order to determine eligibility of the borrower and the use of loan proceeds.

Although the previous guidance stated that payments for PPP loans are deferred for only six months, the Treasury and SBA clarified its payment deferral guidance on June 10, 2020 that payments for PPP loans are deferred for at least for 10 months after the end your loan forgiveness cover period (which would be 24 weeks after the loan disbursement if your loan was made on or after June 5, 2020; if your loan was made before June 5, 2020, you could choose between 24 weeks and eight weeks after the loan disbursement date).⁴⁸ Furthermore, if you submit a loan forgiveness application within 10 months after the end of your loan forgiveness cover period, payments will be further deferred until such loan forgiveness application is processed by the SBA (i.e., SBA either remits the loan forgiveness amounts to your lender or notifies your lender that no loan forgiveness is allowed).⁴⁹ However, note that the 1.00% interest will accrue during the deferment period.

However, SBA's latest FAQ makes clear that third-party lenders may use their own promissory note and include in their promissory notes for PPP loans any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with Section 1102 and 1106 of the CARES Act, the Interim Final Rule and guidance and SBA Form 2484 (Lender Application Form).⁵⁰ This means that the terms of your PPP loan may be different if you choose a different third-party lender. Based on what we are hearing in the market, we understand that some major banks are requiring additional,



more stringent representations, warranties and covenants that are based on SBA and treasury guidance. For instance, one commercial bank requires borrowers to retain at least 90% of its workforce, at full compensation and benefits, until September 30, 2020.

Note that if you receive a PPP loan, unless such loan is repaid prior to May 18, 2020, you will be ineligible for the refundable employee retention tax credit provided under the CARES Act.⁵¹

Moreover, all PPP loans are 100% guaranteed by the SBA. You will not be required to make any up-front guarantee fee payment to the SBA. Moreover, Agents (i.e., someone who assists a lender with originating, disbursing, servicing, liquidating or litigation SBA loans) are not allowed to collect fees from you or be paid out of the PPP loan proceeds. Agent fees should be paid by the third-party lender out of the fees that such lender receives from the SBA.

A PPP loan may be sold on the secondary market after the loan is fully disbursed. The SBA has indicated it will issue guidance regarding purchases of loans sold in the secondary market.⁵²

20. If your business is owned or controlled, in part or in whole, by a foreign person or entity, can you still be eligible for a PPP loan?

Yes, as long as certain additional requirements are satisfied. As noted above in [Question 7](#), when calculating an applicant business' number of employees, all employees of the entity and all of its domestic and foreign affiliates are included in the count, irrespective of the residency of the employees. In other words, an applicant business which has a foreign affiliate that has 500+ employees living outside of the United States must include those employees in determining the overall employee count will not be eligible for a PPP loan, unless it is subject to an alternative size standard based on its primary industry or one of the affiliation waivers.

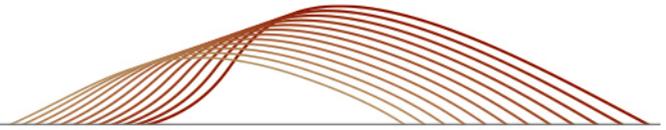
As a general overview, the PPP is available to "small business concerns." Pursuant to the CARES Act and the Small Business Act, the SBA has the authority to set criteria for what businesses qualify as such. The SBA has defined a "business concern" as "a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor." This means that even if your business is 51% owned and controlled by people or entities who are not U.S. citizens, your business may still be eligible for a PPP loan.

At a very high level, a business must be owned or controlled by persons who are lawfully in the U.S. and have appropriate work visa. Additional specific rules may apply, depending on the person's immigration status and the circumstances of the business. We would suggest that a company owned or controlled by a foreign national to consult with attorneys at Paul Hastings or elsewhere before applying for a PPP loan.

21. What if you've already submitted an application for a PPP loan and learn that the certifications required or the rules have changed or been clarified?

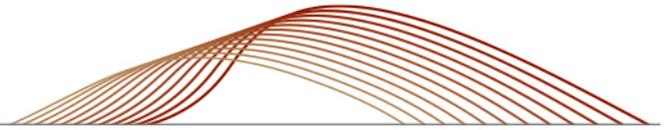
If you have already filed a PPP loan application which has already been approved, you may generally rely on the laws, rules and guidance available at the time of the relevant application; provided however, you will need to check the specific guidance for each update. For example, with respect to the need certification, businesses should review the certification in light of FAQ #31 to make a determination as to whether there is an adequate basis for the need certification. If there is not, it

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may be necessary to repay the loan proceeds.⁵³ If you have already filed a PPP loan application which has not yet been processed, you may be required by your lender to revise your application based on new guidance published by the Treasury and SBA.





If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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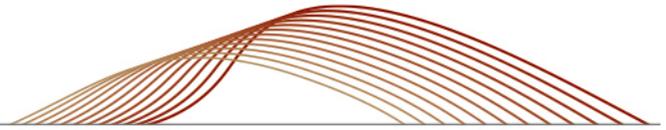
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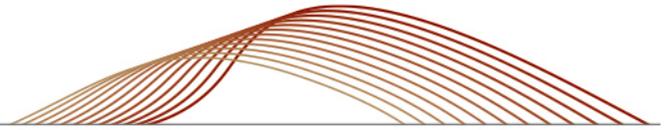
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- ¹ This guide would not have been possible without the significant contributions of Theresa S. Clark, Shreya Gupta, Ryan Samii, and Vivian Tsai.
 - ² The U.S. Department of the Treasury and the U.S. Small Business Administration issued new guidance on April 2, 2020, setting the interest rate to 1.0%, which is lower than the maximum interest rate specified in the CARES Act and higher than the 0.5% rate established in earlier published guidance. U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes, Paycheck Protection Program, RIN 3245-AH34: <https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf>. The Flexibility Act and new guidance issued by the U.S. Department of the Treasury and the SBA on June 17, 2020, provides a maturity of two years for PPP loans made before June 5, 2020, unless the borrower and lender mutually agree to extend the maturity of such loans to five years, and a maturity of five years for those PPP loans made on or after June 5, 2020. U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes, Paycheck Protection Program—Revisions to the Third and Sixth Interim Final Rules, RIN 3245-AH51: <https://home.treasury.gov/system/files/136/PPP-IFR--Revisions-to-the-Third-and-Sixth-Interim-Final-Rules.pdf>.
 - ³ Treasury Department's webpage dedicated to the PPP loans: <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses>; SBA's webpage dedicated to the PPP loans: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.
 - ⁴ See U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> (last updated on May 27, 2020); see also U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes, Paycheck Protection Program – Revisions to the First Interim Final Rule, RIN 3245-AH49: <https://home.treasury.gov/system/files/136/PPP-IFR-Revisions-to-First-Interim-Final-Rule.pdf>; see also footnote 2, U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes, Paycheck Protection Program – Revisions to the Third and Sixth Interim Final Rules, RIN 3245-AH51.
 - ⁵ U.S. Small Business Administration, Paycheck Protection Program (PPP) Report (last updated June 14, 2020): <https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf>.
 - ⁶ U.S. Small Business Administration, Interim Final Rule, 13 C.F.R. Part 120, Business Loan Program Temporary Changes; Paycheck Protection Program, RIN 3245-AH38, section III.1(a): <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Disbursements.pdf> (“The Administrator, in consultation with the Secretary, determined that requiring a single loan disbursement will best serve the interests of both borrowers and lenders and promote the purposes of the CARES Act.”); see also footnote 4, Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): page 6, question 20.
 - ⁷ Initially Treasury and the SBA issued guidance that limited the use of proceeds to no more than 25% towards non-payroll costs. The Flexibility Act and subsequent Interim Final Rules have amended the existing guidance to provide that no more than 40% may be used towards non-payroll costs. U.S. Small Business Administration <https://home.treasury.gov/system/files/136/PPP-IFR-Revisions-to-First-Interim-Final-Rule.pdf>.
 - ⁸ See footnote 2, U.S. Small Business Administration, Interim Final Rule, 13 C.F.R. Part 120, Business Loan Program Temporary Changes; Paycheck Protection Program, RIN 3245-AH34, section III.2(a).

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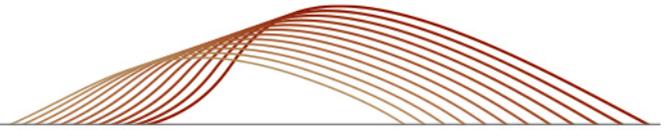
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- ⁹ See footnote 4, U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): pages 1-2, question 2.
- ¹⁰ On the final Borrower Application Form, which was posted to the Treasury's website as of April 2, 2020 and last revised on June 12, 2020, the certification clearly states that "not more than 40% of the forgiven amount may be for non-payroll costs." The application can be accessed at: <https://home.treasury.gov/system/files/136/PPP-Borrower-Application-Form-Revised-June-12-2020.pdf>.
- ¹¹ According to SBA's FAQ guidance, third party lenders that are not yet enrolled in the 7(a) loan program may begin to issue PPP loans by either submitting (i) the SBA Form 2484 (the Lender Application Form for the Paycheck Protection Program) or (ii) the SBA Form 3507 (the CARES Act Section 1102 Lender Agreement for Non-Bank and Non-Insured Depository Institution Lenders) along with relevant attachments. Submission of the SBA Form 3507 will need to be approved. For more information, see footnote 4, U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): pages 6-7, questions 21 and 22.
- ¹² See footnote 2, U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes; Paycheck Protection Program, RIN 3245-AH34, section III.2(r).
- ¹³ See footnote 4, U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes, Paycheck Protection Program – Revisions to the First Interim Final Rule, RIN 3245-AH49, section III.1(o) ("However, to receive full loan forgiveness, a borrower must use at least 60 percent of the PPP loan for payroll costs, and not more than 40 percent of the loan forgiveness amount may be attributable to nonpayroll costs.").
- ¹⁴ *Id.*, section III.2(s).
- ¹⁵ *Id.*, section III.1.
- ¹⁶ See U.S. Small Business Administration, Interim Final Rule on Additionally Eligibility Criteria and Requirements for Certain Pledges of Loans, 13 CFR Parts 120, Business Loan Program Temporary Changes, Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, RIN 3245-AH36, section III.1(a): <https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf> ("[T]he self-employment income of general active partners may be reported as a payroll costs, up to \$100,000 annualized, on a PPP loan application filed by or on behalf of the partnership.").
- ¹⁷ *Id.*, section III.2(h).
- ¹⁸ *Id.*, section III.2(a).
- ¹⁹ U.S. Small Business Administration, Interim Final Rule on Treatment of Entities with Foreign Affiliates, 13 CFR Parts 120 and 121, Business Loan Program Temporary Changes, Paycheck Protection Program – Treatment of Entities with Foreign Affiliates, RIN 3245-AH44, section III.1: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Treatment-of-Entities-with-Foreign-Affiliates.pdf> ("[T]o calculate the number of employees of an entity for purposes of determining eligibility for the PPP, an entity must include all employees of its domestic and foreign affiliates, except in those limited circumstances where the affiliation rule expressly do not apply to the entity.").
- ²⁰ See footnote 4, U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): pages 4-5, question 14.
- ²¹ U.S. Small Business Administration, Interim Final Rule on Affiliation, 13 CFR Part 121, Business Loan Program Temporary Changes, Paycheck Protection Program, RIN 3245-AH35, footnote 2: <https://home.treasury.gov/system/files/136/SBA%20IFR%20202.pdf> ("In order to help potential borrowers identify other businesses with which they may be deemed to be affiliated under the common management standard, the Borrower Application Form, SBA Form 2483, released on April 2, 2020, requires applicants to list other businesses with which they have common management. The information supplied by the applicant in response to that information request should be used by applicants as they assess whether they have affiliates that should be included in their number of employees reported on SBA Form 2483.").
- ²² See footnote 4, U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): page 15, question 47 ("SBA is extending the repayment date for this safe harbor [identified in FAQ #31] to May 18, 2020, to give borrowers an opportunity to review and consider FAQ#46. Borrowers do not need to apply for this extension.").
- ²³ See footnote 2, U.S. Small Business Administration, Interim Final Rule, 13 C.F.R. Part 120, Business Loan Program Temporary Changes; Paycheck Protection Program, RIN 3245-AH34, section III.2(c).
- ²⁴ 13 C.F.R. § 120.110.
- ²⁵ See footnote 2, U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes; Paycheck Protection Program, RIN 3245-AH34, section III.2(a); CARES Act, Section 1102(b)(1).



- ²⁶ See U.S. Small Business Administration, *Small Business Compliance Guide Size and Affiliation* (March 2014) (available at https://www.sba.gov/sites/default/files/affiliation_ver_03.pdf).
- ²⁷ See footnote 21, U.S. Small Business Administration, Interim Final Rule on Affiliation, 13 CFR Part 121, Business Loan Program Temporary Changes, Paycheck Protection Program, RIN 3245-AH35, section III.2(a).
- ²⁸ Size Appeal of Southern Contracting Solutions III LLC, SBA No. SIZ-5956, at 10 (2018).
- ²⁹ See, e.g., Size Appeal of Team Waste Gulf Coast LLC, SBA No. SIZ-5864, at 7 (2017); Size Appeal of DHS Systems LLC, SBA No. SIZ-5211 (2011); Size Appeal of Environmental Restoration LLC, SBA No. SIZ-5395, at 7 (2012); Size Appeal of: Carntribe-Clement 8ajv # 1, LLC, Appellant, SBA No. SIZ-5357 (June 13, 2012); Size Appeal of: Southern Contracting Solutions, LLC, SBA No. SIZ-5956, 2018 (S.B.A.), 2018 WL 4492382.
- ³⁰ Size Appeal of S. Contracting Sols. III LLC, SBA No. SIZ-5956, at 12 (2018); Size Status of Carntribe-Clement 8AJV # 1 LLC, SBA No. SIZ-5357, at 15 (2012); Size Appeal of EA Engineering, SBA No. SIZ-4973, at 3 (2008); Size Appeal of Dooleymack Government Contracting LLC, SBA No. SIZ-5086, at 7 (2009).
- ³¹ See footnote 4, U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): page 3, question 6.
- ³² See U.S. Small Business Administration, Paycheck Protection Program (PPP) Information Sheet: Borrowers, available at <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf>.
- ³³ *Id.*
- ³⁴ See U.S. Small Business Administration, Interim Final Rule on Corporate Groups and Non-Bank and Non-Bank Insured Depository Institution Lenders, 13 CFR Part 120, Business Loan Program Temporary Changes; Paycheck Protection Program Requirements – Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders, RIN: 3245-AH39, section III.1: <https://home.treasury.gov/system/files/136/IFR--Corporate-Groups-and-Non-Bank-and-Non-Insured-Depository-Institution-Lenders.pdf> (“[B]usinesses that are part of a single corporate group shall in no event receive more than \$20,000,000 of PPP loans in the aggregate”).
- ³⁵ See footnote 4, U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): page 5, question 16.
- ³⁶ See footnote 13.
- ³⁷ CARES Act, Section 1106(d)(3).
- ³⁸ U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes; Paycheck protection Program – Requirements – Loan Forgiveness, RIN 3245-AH46, section III.5(b): <https://home.treasury.gov/system/files/136/PPP-IFR-Loan-Forgiveness.pdf> (“In the case of seasonal employer, either of the two preceding methods or a consecutive 12-week period between May 1, 2019 and September 15, 2019.”).
- ³⁹ *Id.*, section III.5(d): (“The Administrator recognizes that not all borrowers maintain hours-worked data, and has decided to afford such borrowers this flexibility in calculating the full-time equivalency of their part-time employees.”).
- ⁴⁰ *Id.*, section III.5(a). See also footnote 4, U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): page 13, question 40.
- ⁴¹ See footnote 39, U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes; Paycheck protection Program – Requirements – Loan Forgiveness, RIN 3245-AH46, section III.5(h).
- ⁴² U.S. Small Business Administration, Loan Forgiveness Application Instructions for Borrowers: https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Instructions_1_0.pdf.
- ⁴³ CARES Act, Section 1106(d)(5), as amended by Flexibility Act.
- ⁴⁴ A copy of the loan forgiveness application can be located at: <https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>.
- ⁴⁵ See footnote 43.
- ⁴⁶ CARES Act, Section 2302(a)(3).
- ⁴⁷ See footnote 4, U.S. Small Business Administration, Interim Final Rule, 13 CFR Part 120, Business Loan Program Temporary Changes; Paycheck Protection Program, RIN 3245-AH49, section III.1(b) (“For loans made before June 5, 2020, the maturity is two years; however, borrowers and lenders may mutually agree to extend the maturity of such loans to five years. For loans made on or after June 5, 2020, the maturity is five years”).
- ⁴⁸ *Id.*, section III.1(c) (“If you do not submit to your lender a loan forgiveness application within 10 months after the end of your loan forgiveness covered period, you must begin paying principal and interest [on or after the date that is 10 months after the end of your loan forgiveness covered period]”).



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- ⁴⁹ *Id.*, section III.1(c) (“If you submit to your lender a loan forgiveness application within 10 months after the end of your loan forgiveness covered period, you will not have to make any payments of principal or interest on your loan before the date on which SBA remits the loan forgiveness amount on your loan to your lender (or notifies your lender that no loan forgiveness is allowed).”).
- ⁵⁰ See footnote 4, U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): pages 6-7, questions 19 and 21. Please note that SBA Form 2484 (Lender Application Form) can be located at: <https://home.treasury.gov/system/files/136/PPP-Lender-Application-Form-Fillable.pdf>.
- ⁵¹ CARES Act, Section 2301(j).
- ⁵² See footnote 2, U.S. Small Business Administration, Interim Final Rule, 13 C.F.R. Part 120, Business Loan Program Temporary Changes; Paycheck Protection Program, RIN 3245-AH34, section III.4(d).
- ⁵³ See footnote 4, U.S. Small Business Administration, Paycheck Protection Program Loans Frequently Asked Questions (FAQs): pages 6, question 17.