

SBA Paycheck Protection Program Clarifications

As businesses deal with COVID-19's effects, the Paycheck Protection Program (PPP) is generating huge interest but also operational challenges and continued questions on eligibility. The initial \$350 billion allocation was distributed by April 16, 2020, but on April 23, 2020, an additional \$310 billion was authorized (see BKD's article [New \\$484 Billion Relief Package – Additional PPP & EIDL Funds & Health Care & Testing Aid](#)).

This article covers the frequently asked questions (FAQ) about the PPP as updated by the SBA through April 23, 2020. Initial PPP details can be found in BKD's article [SBA Releases Details on Paycheck Protection Program](#). Details on sole proprietorship eligibility can be found at [New SBA PPP Rules & FAQ](#).

Highlights of the additional details include:

- New eligibility category added for tangible net worth of not more than \$15 million and average net income after federal taxes for the prior two full fiscal years is not more than \$5 million; the existing affiliation rules would apply in computing the \$5 million and \$15 million thresholds. This would allow employers that do not meet the headcount numbers to possibly qualify.
- Employers with fewer than 500 employees do not have to meet revenue thresholds in the SBA size-standards table.
- A gross payroll approach should be used for calculating payroll costs in determining the maximum loan amount. The same is true for the payroll costs for the calculation of the potential forgiveness amount. The guidance also clarifies that employer Federal Insurance Contributions Act (FICA) should not be included as a payroll cost.
- The \$100,000 salary limitation does not include healthcare, retirement benefits and state and local taxes.
- Applicants that use professional employer organizations (PEO) can provide payroll reports since the PEOs do not produce individual entity payroll tax documents.
- Borrowers can calculate their aggregate payroll costs using data either from calendar-year 2019 or from the previous 12 months from the application date. A business in operation for fewer than 12 months can use January and February of 2020 to calculate its average monthly payroll costs. These same time periods also can be used to calculate the number of employees instead of the SBA standard calculation.
- Lenders must make the first disbursement of loan proceeds within 10 days from the loan approval date.
- The eight-week period for loan forgiveness begins on the date of the first disbursement to the borrower.

Borrowers and lenders may rely on the laws, rules and guidance available when an application is filed; no action is required based on this FAQ's updated guidance.

A borrower that previously submitted a loan application that has not yet been processed may revise its application based on these clarifications, but this may cause further delays in loan processing.

Eligibility

Are small business concerns required to have 500 or fewer employees to be eligible borrowers in the PPP?

No. Small business concerns can be eligible borrowers even if they have more than 500 employees, if they satisfy the existing statutory and regulatory definition of a “small business concern” under Section 3 of the *Small Business Act*, 15 U.S.C. 632. A business can qualify if it meets the SBA employee-based **or** revenue-based size standard corresponding to its primary industry. Go to the SBA [website](#) for the industry size standards.

A business also can qualify for the PPP as a small business concern if it meets both tests in SBA’s “alternative size standard” as of March 27, 2020:

- Maximum tangible net worth of the business is not more than \$15 million, and
- The average net income after federal income taxes (excluding any carryover losses) of the business for the two full fiscal years before the application date is not more than \$5 million

A business that qualifies as a small business concern under §3 of the Small Business Act, 15 U.S.C. 632, may truthfully attest to its eligibility for PPP loans on the borrower application form, unless otherwise ineligible.

Does my business have to qualify as a small business concern to participate in the PPP?

No. In addition to small business concerns, a business is eligible for a PPP loan if the business has 500 or fewer U.S.-based employees **or** the business meets the SBA employee-based size standards for the industry in which it operates. PPP loans also are available for qualifying tax-exempt 501(c)(3) nonprofit organizations, tax-exempt 501(c)(19) veterans’ organizations and certain U.S.-based tribal businesses.

Are borrowers required to apply SBA’s affiliation rules?

Yes. Borrowers must apply the affiliation rules set forth in SBA’s interim final rule on affiliation. A borrower must certify on the borrower application form that the borrower is eligible to receive a PPP loan, and that certification means that the borrower is a small business concern, meets the applicable SBA employee-based or revenue-based size standard or meets the tests in SBA’s alternative size standard, after applying the affiliation rules, if applicable. SBA’s existing affiliation exclusions apply to the PPP, including, *e.g.*, the exclusions under 13 CFR 121.103(b)(2).

The affiliation rule based on ownership states that SBA will deem a minority shareholder in a business to control the business if the shareholder has the right to prevent a quorum or otherwise block action by the board of directors or shareholders. If a minority shareholder irrevocably gives up those rights, is it still considered to be an affiliate of the business?

No. If a minority shareholder in a business irrevocably waives or relinquishes any existing rights specified in [13 C.F.R. 121.301\(f\)\(1\)](#), the minority shareholder would no longer be an affiliate of the business (assuming no other relationship that triggers the affiliation rules).

My small business is a seasonal business whose activity increases from April to June. Considering activity from that period would be a more accurate reflection of my business’s operations. However, my small business was not fully ramped up on February 15, 2020. Am I still eligible?

In evaluating a borrower’s eligibility, a lender may consider whether a seasonal borrower was in operation on February 15, 2020, or for an eight-week period between February 15, 2019, and June 30, 2019.

I pleaded guilty to a felony crime a very long time ago. Am I still eligible for the PPP?

Yes. Businesses are only ineligible if an owner of 20 percent or more of the equity of the applicant is presently incarcerated, on probation or on parole; subject to an indictment, criminal information, arraignment or other means by which formal criminal charges are brought in any jurisdiction; or, within the last five years, for any felony, has been convicted, pleaded guilty, pleaded nolo contendere, been placed on pretrial diversion or been placed on any form of parole or probation (including probation before judgment).

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

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 *Coronavirus Aid, Relief, and Economic Security Act* (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, 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 ability to access other sources of liquidity sufficient to support 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 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.**

Loan Amount Calculations

The CARES Act excludes from the definition of payroll costs any employee compensation in excess of an annual salary of \$100,000. Does that exclusion apply to all employee benefits of monetary value?

No. The exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, not to noncash benefits, including:

- Employer contributions to defined-benefit or defined-contribution retirement plans
- Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums
- Payment of state and local taxes assessed on compensation of employees

Do PPP loans cover paid sick leave?

Yes. PPP loans cover payroll costs, including costs for employee vacation, parental, family, medical and sick leave. However, the CARES Act excludes qualified sick and family leave wages for which a [credit](#) is allowed under the *Families First Coronavirus Response Act*.

What if an eligible borrower contracts with a third-party payer such as a payroll provider or a PEO to process payroll and report payroll taxes?

A PEO may file a single Form 941 using its own employer identification number (EIN) for all the employees it provides service for regardless of how many different businesses employ those workers. Payroll documentation

provided by the payroll provider that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower's employees will be considered acceptable PPP loan payroll documentation. Relevant information from a Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, attached to the PEO's or other payroll provider's Form 941, Employer's Quarterly Federal Tax Return, should be used if it is available; otherwise, the eligible borrower should obtain a statement from the payroll provider documenting the amount of wages and payroll taxes. **Employees of the eligible borrower will not be considered employees of the eligible borrower's payroll provider or PEO.**

What time period should borrowers use to determine their number of employees and payroll costs to calculate their maximum loan amounts?

Borrowers can calculate their aggregate payroll costs using data either from the previous 12 months or from calendar-year 2019. For seasonal businesses, the applicant may use average monthly payroll for the period between February 15, 2019—or March 1, 2019—and June 30, 2019. An applicant that was not in business from February 15, 2019, to June 30, 2019, may use the average monthly payroll costs for the period January 1, 2020, through February 29, 2020.

Borrowers may calculate their average number of employees over the same time periods to determine eligibility under the employee-based size standard. Alternatively, borrowers may elect to use SBA's usual calculation: the average number of employees per pay period in the 12 completed calendar months prior to the loan application date (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).

Should payments that an eligible borrower made to an independent contractor or sole proprietor be included in calculations of the eligible borrower's payroll costs?

No. Any amounts that an eligible borrower has paid to an independent contractor or sole proprietor should be excluded from the eligible business's payroll costs. **An independent contractor or sole proprietor will itself be eligible for a loan under the PPP, if it satisfies the applicable requirements.**

How should a borrower account for federal taxes when determining its payroll costs for purposes of the maximum loan amount, allowable uses of a PPP loan and the amount of a loan that may be forgiven?

Payroll costs are calculated on a gross basis without regard to, *i.e.*, not including subtractions or additions based on, federal taxes imposed or withheld, such as the employee's and employer's share of FICA and income taxes required to be withheld from employees. Payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax. For example, an employee who earned \$4,000 per month in gross wages, from which \$500 in federal taxes was withheld, would count as \$4,000 in payroll costs. The employee would receive \$3,500, and \$500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the \$4,000 in wages are excluded from payroll costs under the statute.

Loan Forgiveness

The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week period; when does that eight-week period begin?

The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than 10 calendar days from the date of loan approval.

For Lenders

Do lenders have to replicate every borrower's payroll calculation?

No. Providing an accurate calculation of payroll costs is the responsibility of the borrower, and the borrower must attest to the accuracy of those calculations. Lenders are expected to perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning average monthly payroll cost. The level of diligence by a lender should be informed by the quality of supporting documents supplied by the borrower. Minimal review of calculations based on a payroll report by a recognized third-party payroll processor, for example, would be reasonable. If lenders identify errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the error.

Are lenders required to make an independent determination regarding applicability of affiliation rules to borrowers?

No. It is the responsibility of the borrower to determine which entities (if any) are its affiliates and determine the employee headcount of the borrower and its affiliates. Lenders are permitted to rely on borrowers' certifications.

May lenders accept signatures from a single individual who is authorized to sign on behalf of the borrower?

Yes. However, the borrower should bear in mind that, as the borrower application form indicates, only an authorized representative of the business seeking a loan may sign on behalf of the business. An individual's signature as an "Authorized Representative of Applicant" is a representation to the lender and to the U.S. government that the signer is authorized to make the certifications, including with respect to the applicant and each owner of 20 percent or more of the applicant's equity, contained in the borrower application form. **Lenders may rely on that representation and accept a single individual's signature on that basis.**

Are lenders permitted to use their own online portals and an electronic form that they create to collect the same information and certifications as in the borrower application form, in order to complete implementation of their online portals?

Yes. Lenders may use their own online systems and a form they establish that asks for the same information (using the same language) as the borrower application form. Lenders are still required to send the data to SBA using SBA's interface.

Are PPP loans for existing customers considered new accounts for FinCEN Rule CDD purposes? Are lenders required to collect, certify or verify beneficial ownership information in accordance with the rule requirements for existing customers?

If the PPP loan is being made to an existing customer and the necessary information was previously verified, you do not need to re-verify the information. Furthermore, if federally insured depository institutions and federally insured credit unions eligible to participate in the PPP program have not yet collected beneficial ownership information on existing customers, such institutions do not need to collect and verify beneficial ownership information for those customers applying for new PPP loans, unless otherwise indicated by the lender's risk-based approach to BSA compliance.

Do lenders have to use a promissory note provided by SBA or may they use their own?

Lenders may use their own promissory note or an SBA form of promissory.

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Do lenders need a separate SBA Authorization document to issue PPP loans?

No. A lender does not need a separate SBA Authorization for SBA to guarantee a PPP loan. However, lenders must have executed SBA Form 2484 to issue PPP loans and receive a loan number for each originated PPP loan. Lenders may include in their promissory notes for PPP loans any terms and conditions, including those relating to amortization and disclosure, that are not inconsistent with §1102 and §1106 of the CARES Act, the PPP interim final rule and guidance and SBA Form 2484.

Conclusion

BKD will continue to follow this developing situation. As with most topics related to COVID-19, changes are being made rapidly. Please note that this information is current as of the date of publication. Visit [BKD's COVID-19 Resource Center](#) to learn more. If you have questions, contact your **BKD Trusted Advisor™** today.

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