

# SBA Paycheck Protection Program Update— Frequently Asked Questions

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*Certain provisions of the Coronavirus/Covid-19 economic stimulus legislation are subject to the issuance of government regulations and other government action, thus certain details regarding the legislation may be clarified or added.*

On April 6, the Small Business Administration (SBA) issued further **guidance** answering frequently asked questions (FAQs) from both borrowers and lenders regarding the implementation of the Paycheck Protection Program (PPP), established by Section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). The SBA noted that borrowers and lenders may rely on the guidance as the SBA's interpretation of the CARES Act and the Paycheck Protection Program Interim Final Rule (PPP Interim Final Rule) issued by the U.S. Department of the Treasury. Further, the guidance provided that the U.S. government will not challenge any lender actions under the PPP that conform to the guidance, the PPP Interim Final Rule, and any subsequent rule-making in effect at the time. Note, however, that the SBA has acknowledged that the guidance does not carry the force and effect of law independent of the statute and the regulations on which it is based. The FAQs and the SBA's responses are as follows:

**1. Question:** Paragraph 3.b.iii of the PPP Interim Final Rule provides that lenders must “[c]onfirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentations submitted with the borrower’s application.” Is a lender required to replicate every borrower’s calculations?

**Answer:** No. The borrower is responsible for providing an accurate calculation of payroll costs, and the borrower must attest to the accuracy of those calculations. However, the SBA expects lenders to perform a good faith review in a reasonable time of both the borrower’s calculations and the supporting documents regarding average monthly payroll costs. A lender should apply a level of diligence in reviewing the calculations that corresponds to the quality of supporting documentation supplied by the borrower. As an example, it would be reasonable for a lender to conduct a minimal review of calculations based on payroll reports from a recognized third-party payroll processor. If lenders find errors in a borrower’s calculations or a material lack of substantiation in the borrower’s supporting documentation, the lender should assist the borrower in remedying the error.

**2. Question:** Are small business concerns (as defined in Section 3 of the Small Business Act, 15 U.S.C. 632 (Section 3) required to have 500 or fewer employees to be eligible borrowers under the PPP?

**Answer:** No. Small business concerns with more than 500 employees can still be eligible to borrow under the PPP, provided they satisfy the existing statutory and regulatory definition of a “small business concern” under Section 3. A business can qualify if it meets the SBA employee-based or revenue-based size standards corresponding to the business’s primary industry. Businesses can go to [www.sba.gov/size](http://www.sba.gov/size) for information on the SBA’s industry size standards.

A business can also qualify under the PPP as a small business concern if it satisfied both tests of the SBA's "alternative size standard" as of March 27, 2020: (1) the business's maximum tangible net worth is less than or equal to \$15 million and (2) the business's average net income after deducting federal income taxes (note that this calculation excludes any carryover losses) for the two full fiscal years prior to the application date is less than or equal to \$5 million.

Unless otherwise ineligible, a business that qualifies as a small business concern under Section 3 may truthfully attest to its eligibility for PPP loans on the Borrower Application Form.

**3. Question:** Must a business qualify as a small business concern (as defined in Section 3) in order to participate in the PPP?

**Answer:** No. In addition to small business concerns, if a business has 500 or fewer employees whose principal place of residence is within the U.S. or the business meets the SBA's employee-based size standards for the relevant industry (if applicable), the business is eligible to participate in the PPP. Additionally, qualifying tax-exempt nonprofit organizations described in Section 501(c)(3) of the Internal Revenue Code (IRC), tax-exempt veterans organizations described under Section 501(c)(19) of the IRC, and tribal business concerns described in Section 31(b)(2)(C) of the Small Business Act are eligible for PPP loans, provided they have 500 or fewer employees whose principal place of residence is in the U.S. or they meet the SBA's employee-based size standards for the industry in which they operate.

**4. Question:** Are lenders required to make an independent determination regarding the applicability of affiliation rules under 13 C.F.R. 121.301(f) to borrowers?

**Answer:** No. The borrower is responsible for determining which entities (if any) are affiliates under 13 C.F.R. 121.301(f) and then determining the total employee head count of the borrower and its affiliates. Lenders may rely on borrowers' certifications as to affiliation determinations.

**5. Question:** Are borrowers required to apply the SBA's affiliation rules under 13 C.F.R. 121.301(f)?

**Answer:** Yes. Borrowers must apply the affiliation rules set forth in the **SBA's Interim Final Rule on Affiliation**. When the borrower certifies on the Borrower Application Form that it is eligible to receive a PPP loan, the borrower is certifying that it has applied the affiliation rules, if applicable, and is still eligible to receive a PPP loan. The SBA's existing affiliation exclusion rules apply to the PPP, including, for example, those exclusions under 13 C.F.R. 121.103(b)(2).

**6. Question:** If a minority shareholder, deemed to be in control of the business because the shareholder has the right to prevent a quorum or otherwise block action by the board of directors or shareholders (based on 13 C.F.R. 121.301(f)(1)), irrevocably relinquishes those rights, is the minority shareholder still considered to be an affiliate of the business?

**Answer:** No. A minority shareholder that irrevocably waives or relinquishes any of its existing rights specified in 13 C.F.R. 121.301(f)(1) would no longer be considered an affiliate of the business (provided that no other relationship triggers the affiliation rules).

**7. Question:** Does the CARES Act exclusion of employee compensation in excess of a \$100,000 annual salary from the definition of payroll costs apply to all employee benefits of monetary value?

**Answer:** No. The exclusion of compensation in excess of a \$100,000 annual salary applies only to cash compensation and excludes noncash benefits. Examples of excluded noncash benefits are employer contributions to defined-benefit or defined-contribution retirement plans; payments for providing employee benefits such as group health care coverage, including insurance premiums; and payments of state and local taxes assessed on employee compensation.

**8. Question:** Do PPP loans cover sick leave?

**Answer:** Yes. PPP loans cover payroll costs, which include costs of employee sick leave (as well as costs for employee vacation and parental, family, and medical leave). However, the CARES Act does exclude qualified sick and family leave wages for

which a credit is allowed under Sections 7001 and 7003 of the Families First Coronavirus Response Act (Public Law 116-127). Information about the Paid Sick Leave Refundable Credit can be found [here](#).

**9. Question:** Is a seasonal small business that was not operating at full capacity as of February 15, 2020 still eligible under the PPP?

**Answer:** A lender may consider whether a seasonal small business was in operation on February 15, 2020, or for an eight-week period between February 15, 2019, and June 30, 2019, for eligibility purposes.

**10. Question:** What if an eligible borrower contracts with a third-party payer such as a payroll provider or a professional employer organization (PEO) to process payroll and report payroll taxes?

**Answer:** In the event that a borrower reports wage and other data on the employer identification number of a PEO or other payroll provider as required under some state registration laws, payroll documentation provided by the payroll provider indicating the amount of wages and payroll taxes attributable to the borrower's employees as reported to the IRS will be considered acceptable payroll documentation under the PPP. Borrowers should use, if it is available, relevant information from a Schedule R Form (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. If that information is not available, eligible borrowers should instead obtain a statement from the payroll provider documenting the amount of wages and payroll taxes. Additionally, the eligible borrower's employees will not be considered employees of the eligible borrower's payroll provider or PEO.

**11. Question:** May lenders accept signatures from a single individual authorized to sign on behalf of the borrower?

**Answer:** Yes. However, borrowers must note that only an authorized representative of the business seeking a loan is permitted to sign on behalf of the business. The individual's signature as an "authorized representative of applicant" is a representation to the lender and the U.S. government that

the signatory is authorized to make the certifications on the Borrower Application Form on behalf of the business and each owner of 20 percent or more of the applicant's equity, if any. Lenders may rely on that representation and accept an individual signatory's signature on that basis.

**12. Question:** I pleaded guilty to a felony crime "a very long time ago." Am I still eligible under the PPP?

**Answer:** Yes. Businesses are ineligible only if an owner of 20 percent or more of the applicant's equity is *presently* incarcerated; is on probation or parole; is subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdictions; or, *within the past 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 judgement).

**13. Question:** May lenders use their own online portals and an electronic form the lenders created to collect the same information and certifications as in the Borrower Application Form, in order to complete implementation of their online portals?

**Answer:** Yes. Lenders may use their own online systems and a form they establish that asks for the same information as on the Borrower Application Form. Lenders must use the same language as on the Borrower Application Form. Ultimately, lenders are still required to send the data to the SBA using the SBA's interface.

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

**Answer:** Borrowers may calculate their aggregate payroll costs using data either from the previous 12 months or from calendar year 2019. Seasonal businesses may use average monthly payroll for the period beginning either February 15, 2019, or March 1, 2019, and ending 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 use their average employment over the same time periods to determine the number of employees for purposes of applying an employee-based size standard. Alternatively, borrowers may elect to use the SBA's usual calculation: the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months).

**15. Question:** Should payments to an independent contractor or sole proprietor be included in the eligible borrower's calculations of payroll costs?

**Answer:** No. Eligible borrowers should exclude any amounts paid to an independent contractor or sole proprietor from the calculation of payroll costs. An independent contractor or sole proprietor will itself be eligible for a loan under the PPP, provided it satisfies the applicable requirements

**16. Question:** 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.

**Answer:** Under the CARES Act, payroll costs are calculated on a gross basis without regard to federal taxes imposed or withheld, such as the employee's or employer's share of Federal Insurance Contributions Act (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. As an example, if any employee earns \$4,000 per month in gross wages from which \$500 in federal taxes was withheld, the income would count as \$4,000 in payroll costs. While the employee would receive \$3,500 and \$500 would be paid to the federal government, the employer-side federal payroll taxes imposed on the \$4,000 in wages are excluded from the payroll costs under the statute.

The SBA arrived at this result by interpreting the definition of "payroll costs" in the CARES Act, which excludes "taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period," which is February 15, 2020, to June 30, 2020, as meaning payroll costs are calculated on a gross basis without subtracting federal taxes that are imposed on the employee or withheld from employee wages. The SBA noted that this interpretation is consistent with the text of the statute and advances the legislative purpose of ensuring workers remain paid and employed.

**17. Question:** I filed or approved a loan application based on the version of the PPP Interim Final Rule published on April 2, 2020. Do I need to take any action based on the updated guidance in these FAQs?

**Answer:** No. Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application. However, if a borrower previously submitted a loan application that has not yet been processed, the borrower may revise the application based on clarifications in the FAQs.

**18. Question:** Are PPP loans for existing customers 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?

**Answer:** If a lender is making a PPP loan to an existing customer and the necessary information was previously verified, the lender does not need to reverify the information. Furthermore, federally insured depository institutions and federally insured credit unions eligible to lend under the PPP that have not yet collected beneficial ownership information on existing customers do not have 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 Bank Secrecy Act compliance.

***To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).***

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