



SBA issues interim final rule clarifying changes to PPP loans for eligible businesses

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On April 2, 2020, the SBA issued its Interim Rule clarifying and changing the PPP loan program in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act).

Importantly for borrowers, the SBA expressly states that borrowers are responsible for certifying that they are eligible, and lenders are held harmless so long as they meet minimal requirements. However, a borrower will only be subject to criminal punishments for fraud or knowingly making a false statement on its application.

Eligibility

- The following are eligible to apply:
 - Companies with 500 or fewer employees whose principal place of residence is in the U.S.;
 - Companies that otherwise meet certain industry employee-based size standards;
 - Tax-exempt nonprofit organizations described in section 501(c)(3) of the IRC; and
 - Sole proprietorships, independent contractors, or eligible self-employed individuals.

Loan amount: (Average monthly “Payroll Costs” “from the last twelve months” for U.S. employees (capped at \$100,000)) X (2.5)

Forgiveness amount:

- The amount spent on payroll costs, rent, utilities, and certain interest “over the eight-week period following the date of the loan” is subject to forgiveness up to the principal amount of the loan.
- “Payroll costs” must make up 75% of the expenditure; the remaining 25% can be spent on non-payroll costs.

The SBA has not further clarified the loan forgiveness reduction calculation, instead stating that the “SBA will issue additional guidance on loan forgiveness.” For now, companies should be aware that the forgiveness amount is subject to being reduced by the mathematical formula in the Act, which takes into account whether the company has reduced full-time equivalent employees or

reduced salaries and wages more than 25%. The borrower can trigger an exemption provision by curing any reductions by June 30, 2020.

Terms:

- 1% interest
- 2-year maturity

Priority: “First-come, first-served.”

Affiliation rules

A small business concern is “subject to the SBA’s affiliation rules . . . unless specifically waived in the Act.” However, the SBA left open for now the question of how the affiliation rules will be interpreted for PPP; it intends to “promptly issue additional guidance with regard to the applicability of affiliation rules at 13 CFR §§ 121.103 and 121.301 to PPP loans.” Currently we understand that Congress, Treasury, and the SBA are considering relief for certain portfolio companies held by private equity and venture funds. Unless and until final guidance is provided by the SBA, current affiliation rules could disqualify many of the portfolio companies.

The continued lack of guidance on the affiliation rule means that many borrowers are left wondering whether or not they qualify for PPP loans due to an ownership structure that includes one or more other potentially affiliated entities. Under the affiliation rules, employees for all affiliated companies are counted when determining eligibility for the applicant for a PPP loan. Notably though, under the new clarifications regarding foreign ownership, foreign employees are no longer counted for purposes of determining eligibility for the borrower.

It remains unclear whether borrowers can submit applications for more than one potentially affiliated entity if their total employee count is less than 500 when aggregated together.

The affiliate rule was explicitly waived in the CARES Act with respect to: (1) food/accommodation services companies (NAISC Code 72), (2) franchises, and (3) companies that receive investments from SBICs.

Foreign ownership: The Act contained no restrictions on foreign-owned businesses, and the Rule does not add any restrictions on foreign-owned businesses. The Rule clarifies that only employees whose “principal place of residence is in the United States” are counted for purposes of determining eligibility.

Borrower certifications

The Act is silent about who was responsible for certifying eligibility—the borrower or the lender? The answer is now clear: the borrower is required to certify in good faith that it is eligible to apply. The lender is entitled to rely on the borrower’s certification and will be “held harmless for borrowers’ failure to comply with the program criteria.”

The borrower must submit documentation “necessary to establish eligibility” and will be required to submit a separate loan forgiveness application, which documents the use of the PPP loan proceeds.

If the buyer uses “PPP funds for unauthorized purposes, SBA will direct you to repay those amounts.” Borrowers could also be subjected “to additional liability such as charges for fraud.” “If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member or partner for the unauthorized use.”

If the borrower knowingly makes a false statement on its application, it is subject to punishment by “imprisonment of not more than thirty years” and/or fines of up to \$1,250,000.”

Lender requirements and hold harmless provision

Borrowers will apply for the PPP directly through SBA-approved lenders. Lenders are exempt from potential liability from enforcement actions so long as they meet certain minimal requirements. Lenders merely need to confirm receipt of borrower certifications contained in the PPP application form and other documents provided by the borrower. Each lender’s “underwriting obligation under the PPP is limited to the items” submitted by the borrower. The lender “does not need to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness.” The SBA “will hold harmless any lender that relies on such borrower documents and attestation from a borrower.”

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