

Supplemental FAQ for SBA Loans for Small Businesses under the CARES Act (Paycheck Protection Program)

On April 2, 2020, the U.S. Small Business Administration (“SBA”) published an [Interim Final Rule](#) (“IFR”) addressing the implementation of the Paycheck Protection Program (“PPP”) under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), discussed in our [initial FAQ](#).

On April 3, 2020, the SBA issued another [Interim Final Rule](#) (“Affiliation IFR”) that provided further guidance on the application of the SBA’s affiliation rules in connection with the PPP. The IFR and the Affiliation IFR were preceded by separate [U.S. Treasury Department guidance](#) issued on March 31, 2020 (“Treasury Guidance”).

This FAQ discusses the implementation of the PPP under the Treasury Guidance, the IFR, and the Affiliation IFR, and answers some of the most frequently asked questions that we are receiving from our clients. It is important to note that the PPP is complex, and the terms of its implementation continue to evolve. The information and guidance provided by the SBA and lenders is rapidly changing.

Q: Can I still apply?

Yes. On April 3, 2020, SBA released an updated loan application form, accessible [here](#), which contains the questions that program applicants are required to respond to, and certifications that they must make, to obtain a PPP loan.

The Treasury Guidance stated that lenders could begin accepting applications from small businesses and sole proprietorships on Friday, April 3, 2020. However, by Friday afternoon, many lenders had not started to accept applications because they were working to develop an application form and process that complies with the IFR released one day before.

A limited number of national and local banks began accepting applications on April 3. Other lenders made their application available over the weekend, and began accepting applications on Monday, April 6, 2020.

Numerous lenders are advising that they will only process PPP loan applications for existing clients, so clients looking to submit a PPP loan application should try to work with their existing lender first.

Time, and bank system and staffing resources are required for a bank to comply with "know your customer" rules when taking on new clients. Some banks have also concluded that they will not take on new customers for purposes of participation in the program in the ordinary course.

If your existing lender is not participating in the PPP loan program or if the lender application process is overly burdensome, we recommend that you consult [this tool](#) provided by the SBA to find an eligible lender near you. You can also take a look at [this list](#) of the top-100 most active lenders with the SBA.

The Treasury Guidance notes that PPP loans will be provided on a first-come first-served basis. The funding for the PPP loan program will almost certainly run out before the June 30, 2020 application deadline. Clients who intend to participate in the program should submit their application as soon as possible.

Under the Treasury Guidance, independent contractors and self-employed individuals are eligible to apply for a PPP loan starting April 10, 2020.

Q: What is the loan interest rate?

The interest rate is fixed at 1% under the IFR (an increase from the 0.5% rate that was described in the Treasury Guidance).

Q: What is the term of the loan?

Loans will mature in two years. There are no prepayment penalties or fees.

Q: When do I have to begin to make principal and interest payments on the loan?

You will not have to make any payments for six months following the date of disbursement of funds (repayment is automatically deferred for six months). However, interest will accrue over this period. The CARES Act also authorizes the SBA to defer loan payments for up to one year.

Q: How do I determine “payroll costs” for calculating the loan amount?

The IFR provides that “payroll costs” consist of “compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the



provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees.”

For independent contractors or sole proprietors that are applying for a loan, the IFR states that “payroll costs” include any wage, commissions, income, or net earnings from self-employment or similar compensation.

Q: Are insurance premiums for workers compensation included in the calculation of “payroll costs”?

No. Payments for workers compensation are not included in the calculation of payroll costs.

Q: Are payments to independent contractors included in the calculation of the loan amount?

No. The IFR states that payments to independent contractors are not included for purposes of determining payroll costs because independent contractors can separately apply for a PPP loan.

Q: Can owners include their salary in the payroll calculation?

It depends. If the owner is a W-2 employee, then salary compensation should be included in the calculation. If the owner is not a W-2 employee, then the owner’s compensation should be excluded.

However, sole proprietors and self-employed individuals can include wages, commissions, income, or net earnings from self-employment or similar compensation in the calculation of the loan amount for which they are eligible.

Q: How do I calculate the total number of employees I have for purposes of eligibility?

The IFR indicates that eligible borrowers must (i) have 500 or fewer employees whose principal place of residence is in the United States, or (ii) if applicable, meet the size standard in number of employees established by the SBA for the industry in which the applicant operates.

To determine the number of “employees,” applicants should include those hired on a full-time, part-time, or any other basis. The IFR makes clear that independent contractors are not included in the calculation because they have the ability to apply for a PPP loan on their own.



The number of an applicant's employees must also include the employees of all of its affiliates, in accordance with the SBA's affiliation rules, unless the applicant is (i) in the "accommodation and food services" sector (having an NAICS code starting with "72"), (ii) operating as a franchise, or (iii) receiving financial assistance from a small business investment company.

Q: How do I determine whether I have affiliates?

Determining whether an entity has affiliates may require a complex facts and circumstances analysis, and the analysis is governed by regulations and guidance subject to interpretation. Applicants are required to make certain eligibility certifications in the PPP loan application, so it is important that they consult with their attorney to ensure that they are eligible to participate in the program under the SBA's affiliation rules.

The Affiliation IFR clarifies that the affiliation standards contained in [13 C.F.R. 121.103](#) do not apply to PPP borrowers, and that the rules contained in [13 C.F.R. 121.301](#) apply instead (although the rules are largely similar).

Generally, 13 C.F.R. 121.301 provides that entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

Examples of "control" that creates affiliation:

1. As a basic rule, ownership of 50% or more of the voting securities of a business will constitute control based on ownership alone and thus trigger affiliation between the business and its majority owner. Notably, this affiliation will also extend to any other business deemed to be controlled by the same majority owner.
2. A minority shareholder will be deemed to be affiliated with a company if the shareholder has the ability to prevent a quorum or otherwise block board or shareholder action.
3. If one or more officers, directors, managing members, or general partners of a business control the board and/or management of another business, the SBA may consider those companies affiliated based on common management.

The list of examples above is not exhaustive, and the SBA has the authority to consider the "totality of the circumstances." The SBA "may find affiliation even though no single factor is sufficient to constitute affiliation." [This guide](#) issued by



the SBA provides additional guidance for determining whether entities are affiliated.

Q: What evidence do I need to be able to certify that economic uncertainty makes the loan request necessary to support my ongoing operations?

Given the impact that COVID-19 has had on the overall economy and on the capital markets, this certification to be made in good faith is a low bar to loan eligibility. The impact of the coronavirus has subjected nearly every business to some material operational or financial uncertainty that may put jobs at risk.

Building up cash reserves in preparation for reduced demand, making changes to business operations, and/or adjusting wages and staffing, all provide evidence of the prerequisite economic uncertainty.

Q: What portion of the loan must be used for payroll costs?

Under the IFR and Treasury Guidance, 75% of the amount forgiven must be attributable to payroll costs. The other 25% of the amount forgiven may have been used for mortgage interest, rent obligations, utility payments, and interest on debt obligations that were incurred before February 15, 2020.

The IFR states that the SBA will issue additional guidance on loan forgiveness.

Q: If I lay off employees, do I need to rehire the same employees that were laid off to avoid a reduction in loan forgiveness?

No. Under the text of the CARES Act, the employer is only required to eliminate the reduction in the number of full-time equivalent employees by June 30, 2020 (as compared to the base period) to avoid a reduction in the loan forgiveness amount.

Q: If I restore my employees before June 30, but have to lay them off later, will that affect my eligibility for loan forgiveness?

Probably not. The Treasury Guidance provides that applicants requesting loan forgiveness are required to provide documents that verify the number of full-time equivalent employees and pay rates as of June 30, 2020, and certify that the documents are true as of such date.

The applicant must also certify that it used the amount forgiven to keep employees and make eligible mortgage interest, rent, and utility payments. The lender is required to make a decision on the request for forgiveness within 60 days.



As mentioned above, the IFR notes that the SBA will provide additional guidance on loan forgiveness, which will likely further clarify the employee retention requirements of loan forgiveness.

The applicant could be required to update their lender if additional layoffs are made during the 60-day period in which the lender is evaluating a forgiveness request, but the CARES Act provides that the certification is made and must be accurate as of June 30.

Q: Are LLCs eligible to apply for a PPP loan?

Yes. An LLC that meets the eligibility requirements may apply for a PPP loan.

Q: Can I use e-signature or e-consents if a borrower has multiple owners?

Yes, the IFR makes clear that e-signatures are acceptable.

Q: Can I apply for more than one PPP loan?

No. Under the IFR and Treasury Guidance, each applicant may only apply for one PPP loan. Accordingly, it will make sense for most businesses to apply for the maximum loan amount they may receive.

Q: Can I apply for a PPP loan after receiving an SBA Economic Injury Disaster Loan (“EIDL”) between January 31 and April 3, 2020?

If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

Q: Who can I contact to learn more?

[Contact](#) your primary Tonkon attorney to discuss your potential application for a PPP loan.

Tonkon Torp corporate finance attorneys Jeff Cronn (503.802.2048, jeff.cronn@tonkon.com) and Ferdie Ruplin (503.802.2029, ferdie.ruplin@tonkon.com) are also available to answer your questions on these loans.

