

## **SBA Issues Interim Final Rule for Paycheck Protection Program: Key Takeaways for Your Loan Application**

Hinckley Allen Corporate & Business

April 8, 2020

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*This article was originally published on April 3, 2020 and has been updated based on the April 8, 2020 updates to the SBA's Paycheck Protection Program Loans Frequently Asked Questions ("FAQs"), found [here](#).*

On April 2, 2020, the Small Business Administration ("SBA") issued an interim final rule (the "Guidance") related to the implementation of the Paycheck Protection Program (the "PPP") under the CARES Act. The Guidance can be found at this [link](#). The FAQs provide further clarity with respect to the PPP and the Guidance.

The Guidance and FAQs may influence whether and how a business completes its PPP loan application. Below is a summary of the key aspects of the Guidance.

### **Eligibility for PPP Loans**

- Existing SBA affiliation rules will apply when determining if a business meets the requirement that it have 500 or fewer employees (or a higher threshold to the extent one of the exceptions set forth in the CARES Act applies).
- The SBA issued additional guidance on the affiliation rules and their applicability to PPP loans. The four tests to determine whether affiliation based on control applies include (1) affiliation based on ownership, (2) affiliation arising under stock options, convertible securities, and agreements to merge, (3) affiliation based on management, and (4) affiliation based on identity of interest. More information on the affiliation rules can be found in our [SBA Issues Affiliate Rules for Paycheck Protection Program](#) client alert.
- A minority shareholder that can prevent a quorum or otherwise block action by the board of directors or shareholders is considered an affiliate of the applicant, but will no longer be an affiliate if such minority shareholder irrevocably waives or relinquishes those existing rights.
- The provisions setting forth examples of ineligible businesses for purposes of the existing SBA 7(a) loan program apply to the PPP. The [SBA's Standard Operating Procedures](#) referenced in the Guidance contain a lengthy list of "ineligible businesses."

### **Calculation of Loan Amount**

- The Guidance did not clarify an inconsistency as to what time period a business should use to calculate its "payroll costs" when determining its maximum loan amount. However, the SBA's subsequent FAQs clarified that a business can use its payroll costs in the prior 12 months *or* its payroll costs in calendar year 2019. Applicants should clarify with their lenders which period of time the lender believes they should use for purposes of submitting their applications.
- Payments to independent contractors are **not** included in the calculation of "payroll costs" for businesses. Rather, independent contractors can apply for their own PPP loan.
- The exclusion of compensation in excess of \$100,000 annually applies **only** to cash compensation, not to non-cash benefits, like 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, or payment of state and local taxes assessed on compensation of employees.

### **Supporting Documentation**

Applicants should be prepared to submit the following supporting documentation with their application:

- Payroll processor records
- Payroll tax filings
- 1099s (for applicants that are independent contractors)
- Income and expense records (for applicants that are sole proprietors)
- To the extent the items above are not available, applicants should submit other supporting documentation, such as bank records, sufficient to demonstrate the calculation of payroll costs.

For businesses that contract with payroll providers or Professional Employer Organizations, the 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 business'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 (if not available, a statement from the payroll provider documenting the amount of wages and payroll taxes will suffice).

### **Loan Forgiveness**

- Payments to independent contractors cannot be factored into the loan forgiveness amount.
- Principal *plus* accrued interest is eligible for forgiveness.
- Not more than 25% of the loan forgiveness amount may be attributable to non-payroll expenses such as rent, utilities, and mortgage interest.

### **Loan Interest Rate**

- Loans will be subject to an interest rate of 1% (not 0.5%, as stated in materials previously published by the SBA, or 4%, the cap stated in the CARES Act).

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*We are here to help answer specific questions and offer advice on your options. Feel free to contact any member of our Corporate & Business Group.*

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