

UPDATE: Paycheck Protection Program FAQs (as of Tuesday, April 7, 2020)

Yesterday, the Small Business Administration (the **SBA**) published “Frequently Asked Questions” (the **FAQ** guidance regarding the Paycheck Protection Program (**PPP Loan**), enacted as part of the Coronavirus Aid, Relief, and Economic Security Act (**CARES Act**). Among other clarifications, below are some of the critical points that the SBA has clarified in the FAQ. The full FAQ can be found [here](#). The SBA intends to update this document on a regular basis.

Monthly Payroll Verification by Lender

A lender is not to replicate an applicant’s calculation of “monthly payroll costs.” A lender’s minimal review of calculations based on a payroll report by a recognized third-party payroll processor, for example, would be reasonable. If the lender identifies errors in the borrower’s calculation, the lender should work with the borrower to remedy the error. See FAQ #1.

Some Companies with More than 500 Employees can Apply for PPP Loan

Companies with more than 500 employees can qualify for the PPP loan if the company satisfies the existing statutory and regulatory definition of a “small business concern” under section 3 of the Small Business Act. A company can qualify if it meets the employee-based or revenue-based size standard corresponding to its primary industry. Visit www.sba.gov/size for the industry size standards.

Additionally, a business can qualify for a PPP loan as a small business concern if it meets both tests in the SBA’s “alternative size standard” as of March 27, 2020. This test is satisfied if: (1) maximum tangible net worth of the business is not more than \$15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million. See FAQ #2.

Minority Shareholder’s Control Rights May be Irrevocably Waived to Eliminate Affiliate Designation

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 there is no other relationship that triggers the affiliation rules). See FAQ #6.

Employee Compensation over \$100,000 Annually

The exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, and not to non-cash benefits. See FAQ #7.

Use of a Payroll Provider

Payroll documentation by a 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. See FAQ #10.

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Time Period to Determine Number of Employees and Payroll Costs for Loan Amount Calculation

Generally, borrowers can calculate their aggregate payroll costs using data either from the previous 12 months or from calendar year 2019. Borrowers may use their average employment over the same time periods to determine their number of employees, for the purposes of applying an 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 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). See FAQ #14.

Accounting for Federal Taxes when Determining Maximum Loan Amount, Allowable Uses of a PPP Loan, and Forgivable Loan Amount

Under the CARES Act, 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 Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees. As a result, 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. See FAQ #16.

Authorized Signatory on Behalf of the Borrower

A single individual who is authorized to sign on behalf of the borrower may sign the application. However, such individual is to be an authorized representative of the applicant, as indicated on the application form. The individual's signature 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% or more of the applicant's equity, contained in the application form. See FAQ #11

Updating Applications that have Already been Processed

Borrowers that have already submitted applications based on the PPP Interim Final Rule published on April 2, 2020 do not need to update their applications if they have been processed by a lender. Borrowers whose submitted applications have not yet been processed may revise their applications based on clarifications reflected in the FAQ. See FAQ #17.

For more information on the above program or for assistance in applying for the program, please contact Babst Calland Attorneys Moore Capito at 304.552.8986 or mcapito@babstcalland.com, Christian Farmakis at 412.394.5642 or cfarmakis@babstcalland.com or Andrew Terranova at 412.773.8717 or aterranova@babstcalland.com.

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