



# The Paycheck Protection Program under the CARES Act REVISITED

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# Paycheck Protection Program

- SGR gave a webinar on the Paycheck Protection Program on April 2 and updated that webinar just yesterday (May 5) with a podcast due to changes in the interpretation of the Loan Program
- Today (May 6) **important** new guidance on the Loan Program was issued in the form of FAQs (<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>):
  - Whether Non-U.S. Employees are Included in Employee Count to determine Loan Program Eligibility
  - Extended Deadline for Return of Funds in Exchange for Deemed Compliance that the Good Faith Certification that the Loan Funds Were Necessary

# PPP FAQs - Interpretation

As of May 5, 2020

## **PAYCHECK PROTECTION PROGRAM LOANS** Frequently Asked Questions (FAQs)

The Small Business Administration (SBA), in consultation with the Department of the Treasury, intends to provide timely additional guidance to address borrower and lender questions concerning the implementation of the Paycheck Protection Program (PPP), established by section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). This document will be updated on a regular basis.

Borrowers and lenders may rely on the guidance provided in this document as SBA's interpretation of the CARES Act and of the Paycheck Protection Program Interim Final Rules ("PPP Interim Final Rules") ([link](#)). The U.S. government will not challenge lender PPP actions that conform to this guidance,<sup>1</sup> and to the PPP Interim Final Rules and any subsequent rulemaking in effect at the time.

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<sup>1</sup> This document does not carry the force and effect of law independent of the statute and regulations on which it is based.

# PPP FAQs - Headcount

3. **Question:** Does my business have to qualify as a small business concern (as defined in section 3 of the Small Business Act, 15 U.S.C. 632) in order to participate in the PPP?

**Answer:** No. In addition to small business concerns, a business is eligible for a PPP loan if the business has 500 or fewer employees whose principal place of residence is in the United States, or the business meets the SBA employee-based size standards for the industry in which it operates (if applicable). Similarly, PPP loans are also available for qualifying tax-exempt nonprofit organizations described in section 501(c)(3) of the Internal Revenue Code (IRC), tax-exempt veterans organization described in section 501(c)(19) of the IRC, and Tribal business concerns described in section 31(b)(2)(C) of the Small Business Act that have 500 or fewer employees whose principal place of residence is in the United States, or meet the SBA employee-based size standards for the industry in which they operate.

# PPP FAQs - Headcount

**20812**      **Federal Register** / Vol. 85, No. 73 / Wednesday, April 15, 2020 / Rules and Regulations

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2. What do borrowers need to know and do?

a. Am I eligible?

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry, and:

# PPP FAQs - Headcount

20818 Federal Register / Vol. 85, No. 73 / Wednesday, April 15, 2020 / Rules and Regulations

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How do SBA's affiliation rules affect my eligibility and apply to me under the PPP?

An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined in section 3 of the Small Business Act (15 U.S.C.

632), or (1) has 500 or fewer employees whose principal place of residence is in the United States or is a business that

operates in a certain industry and meets applicable SBA employee-based size standards for that industry, and (2) is a



# PPP FAQs - Headcount

44. **Question:** How do SBA's affiliation rules at 13 C.F.R. 121.301(f) apply with regard to counting the employees of foreign and U.S. affiliates?

**Answer:** For purposes of the PPP's 500 or fewer employee size standard, an applicant must count all of its employees and the employees of its U.S and foreign affiliates, absent a waiver of or an exception to the affiliation rules. 13 C.F.R. 121.301(f)(6). Business concerns seeking to qualify as a "small business concern" under section 3 of the Small Business Act (15 U.S.C. 632) on the basis of the employee-based size standard must do the same.<sup>18</sup>

# PPP FAQs - Headcount

## What Does the Guidance Mean

- Brings about Some Confusion because of FAQ 3, Interim Final Rule 1 (Posted April 2) and Interim Final Rule on Applicable Affiliation Rules (Posted April 3) Led Many to Believe (and PPP Loans Were Approved by Banks) that So Long as Applicant and Affiliated Companies Had No Greater than “500” US Resident Employees, Despite Worldwide Headcount Greater than “500”, Applicant Still Eligible for PPP Loan
- Now, Question whether Worldwide Headcount > 500 Disqualifies Applicant
- What If Application was Prior to Latest Guidance?

# PPP FAQs – Return of Funds

**31. Question:** Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

**Answer:** In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.<sup>11</sup>

# PPP FAQs – Return of Funds

**“(G) BORROWER REQUIREMENTS.—**

**“(i) CERTIFICATION.—**An eligible recipient applying for a covered loan shall make a good faith certification—

“(I) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;

“(II) acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;

“(III) that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and

“(IV) during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan.

# PPP FAQs – Return of Funds

**37. Question:** Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

**Answer:** See response to FAQ #31.<sup>14</sup>

# PPP FAQs – Return of Funds

**39. Question:** Will SBA review individual PPP loan files?

**Answer:** Yes. In FAQ #31, SBA reminded all borrowers of an important certification required to obtain a PPP loan. To further ensure PPP loans are limited to eligible borrowers in need, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application. Additional guidance implementing this procedure will be forthcoming.

The outcome of SBA's review of loan files will not affect SBA's guarantee of any loan for which the lender complied with the lender obligations set forth in paragraphs III.3.b(i)-(iii) of the Paycheck Protection Program Rule (April 2, 2020) and further explained in FAQ #1.<sup>15</sup>

# PPP FAQs – Return of Funds

**43. Question:** FAQ #31 reminded borrowers to review carefully the required certification on the Borrower Application Form that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA guidance and regulations provide that any borrower who applied for a PPP loan prior to April 24, 2020 and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith. Is it possible for a borrower to obtain an extension of the May 7, 2020 repayment date?

**Answer:** SBA is extending the repayment date for this safe harbor to May 14, 2020. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA’s interim final rule providing the safe harbor. SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.

# Summary about May 5 Guidance

- Cast into Question whether the Headcount Threshold (e.g. 500 Employees) Needs to Consider Worldwide Employees of Applicant and its (SBA Defined) “Affiliates”
- Extension of Deadline (From May 7 to May 14) to Return Borrowed Funds to Meet Safe Harbor of Deemed Compliance with Certification in Good Faith that the PPP Funds Were “Necessary”. Additional Guidance to Follow before May 14



# Additional Information

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