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New FAQs from SBA and the Department of the Treasury Provide Clarifications on the Paycheck Protection Program

Legal Update

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The Small Business Administration (SBA) and the Department of the Treasury have published FAQs on the Paycheck Protection Program (PPP), which they intend to update on a regular basis. Here are some key clarifications for borrowers as of April 7, 2020:

Small business concerns may qualify using SBA's employee-based size standards, revenue-based size standards or the new "alternative size standard."

- **Employee or Revenue Standards:** See sba.gov/size for industry size standards. Prior information on the PPP suggested only the employee-based standards should be considered for PPP eligibility.
- **Alternative Size Standard:** A business may qualify as a small business concern 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.

Other businesses are still eligible. Other businesses are eligible if they have 500 or fewer employees whose principal place of residence is in the United States **or** the business meets the SBA employee-based size standard for the industry in which it operates.

The \$100K annual cap applies to cash compensation only. The FAQs clarify that the exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, **not** to non-cash benefits, including:

- 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; and
- payment of state and local taxes assessed on compensation of employees.

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This conflicts with previous guidance which stated “payroll costs will be capped at \$100,000 annualized for each employee.”

Baseline period for determining average payroll costs. To resolve discrepancies between the CARES Act and the Interim Final Rule regarding the baseline period for determining average payroll costs, the FAQs indicate that borrowers can use **either** the previous 12 months or the 2019 calendar year. Seasonal business can use the period between February 15, 2019, or March 1, 2019, and June 30, 2019.

Payment to independent contractors cannot be included in payroll costs. Any amounts that an eligible borrower has paid to an independent contractor or sole proprietor should be excluded from the eligible business’ payroll costs. An independent contractor or sole proprietor will itself be eligible for a loan under the PPP, if it satisfies the applicable requirements.

Affiliation rules apply – with clarification on minority shareholder options. As clarified in Interim Final Rule on Affiliation, the general affiliation rules for business loans under 13 C.F.R. 121.301(f) apply for the PPP, except for the stated exclusions under the CARES Act. If a minority shareholder’s rights to control the business have triggered affiliation, this guidance clarifies that the minority shareholder can irrevocably waive such rights in order to no longer be considered an affiliate of the business.

Additional questions address the following:

- Using Professional Employer Organization (PEO) documentation for PPP purposes.
- Signatures from an authorized individual.
- Accounting for federal taxes when determining payroll costs.
- Lender obligations and online portals.

Did you file a PPP application based on prior guidance/rules? There is no need to do anything – the FAQs note that borrowers can rely on the laws, rules and guidance that were available at the time of the application. On the other hand, if your loan has not yet been processed and you would like to amend based on these FAQs, Treasury indicated that you may revise your applications.

Read the full FAQ