

What Is the CARES Act Paycheck Protection Program and Are You Eligible?

April 19, 2020 Update

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) which contains the Paycheck Protection Program (PPP). The PPP provides for up to \$349 billion in loans to eligible small businesses under Section 7(a) of the Small Business Act. On April 2, 2020 the Small Business Administration (SBA) issued [interim final rules](#) to implement Section 1102 and 1106 of the Cares Act, followed by additional [interim final rules](#) that it issued on April 3, 2020 that are focused specifically on affiliation.¹ The two sets of interim final rules are intended to outline the key provisions of these sections. On April 3, 2020, the SBA also released guidance on the [affiliation rules](#) and their [application to faith-based organizations](#). On April 4, 2020, SBA issued [additional guidance](#) on affiliation as well as a broader list of eligibility questions. Treasury and SBA have also been issuing rolling updates to a PPP [Frequently Asked Questions](#) document since April 6, 2020. Also available is the final version of [SBA Form 2483](#), the PPP Borrower Application Form.

Below we answer questions regarding the scope of the PPP with updates to our prior alerts to reflect the additional guidance provided as of April 19, 2020.

How much can be borrowed under the Paycheck Protection Program?

Eligible borrowers can borrow up to \$10,000,000 (PPP Loans) determined as follows:

- 250% of the average total monthly payments by the company for payroll costs during either (i) the 12 month period ending December 31, 2019 or (ii) the 12 month period ending before the making of the loan application (unless (a) the company is a seasonal employer, in which case it can use a 12 week period beginning February 15, 2019, or at the election of the company, March 1, 2019, and ending June 30, 2019, or (b) the company was not in business during the period beginning on February 15, 2019 and ending on June 30, 2019, in which case the first two months of 2020 are used to determine the average total monthly payments), plus

¹ Both of these rules were subsequently published in the Federal Register on April 15, 2020; any comments on these interim final rules must be received by the SBA on or before May 15, 2020.

- The amount of any SBA Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL COVID-19 loan (because it does not have to be repaid).²

No personal guarantees are required for PPP Loans, and all are 100% guaranteed by the United States Government.

Is an applicant eligible?

Types of applicants that may apply for Paycheck Protection Program loans:

- Small business concerns, business concerns, nonprofit organizations,³ veterans organization,⁴ and Tribal business concerns that were in operation as of February 15, 2020.
- Individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals⁵ who file a Form 1040, Schedule C.⁶

SBA’s regulations prohibit certain types of entities from receiving 7(a), and therefore PPP, loan assistance. 13 C.F.R. § 120.110 contains a list of ineligible businesses.⁷

At the end of this alert, please find an eligibility questionnaire for use in determining eligibility.

² Loan amounts for sole proprietors and independent contractors are calculated based upon 2019 IRS Form 1040 net profit amount plus compensation paid to employees.

³ “Nonprofit organization” means an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 (the “Code”) and that is exempt from taxation under section 501(a) of the Code.

⁴ “Veterans organization” means an organization that is described in section 501(c)(19) of the Internal Revenue Code that is exempt from taxation under section 501(a) of such Code.

⁵ “Eligible self-employed individual” has the meaning given the term in section 7002(b) of the Families First Coronavirus Response Act (Public Law 116–127).

⁶ Partners in a partnership may not submit a PPP Loan application for themselves and must apply through the partnership.

⁷ Note, SBA has stated that a business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues if the existing standard in 13 C.F.R. § 120.110(g) is met or the following two conditions are satisfied: (a) the business’s legal gaming revenue (net of payouts but not other expenses) did not exceed \$1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business’s total revenue in 2019.

What certifications are required?

The CARES Act requires that eligible applicants must be able to make a few good faith certifications expressly laid out in the statute. SBA Form 2483 has implemented these certifications via two means.

First, the individual signing on behalf of the applicant must certify and authorize that, among other things:

- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. § 121.201 for the Applicant's industry.⁸
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.

Second, the authorized representative of the applicant must certify in good faith to a number of certification (by initialing individually next to each), including but not limited to the following certifications:

- The applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors.

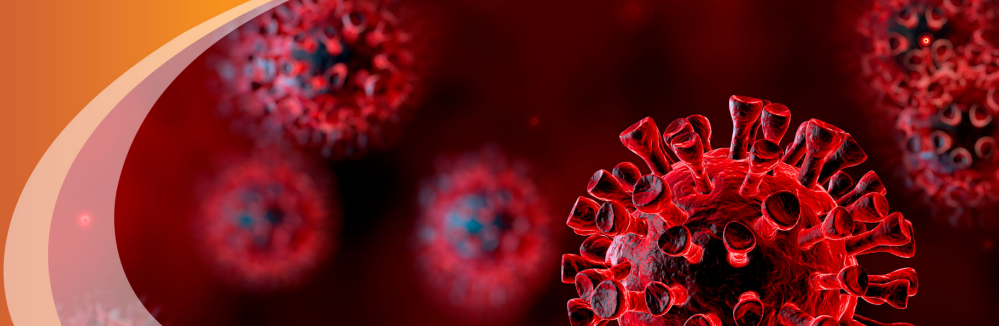
⁸ Note that this certification does not appear to contemplate eligibility for several categories of applicants that are eligible for a PPP loan under Section 1102 of the CARES Act as interpreted by the most recent Treasury/SBA guidance: (1) applicants with more than 500 employees but that qualify as a small business concern under the receipts-based size standard established by the SBA in 13 C.F.R. § 121.201 for the applicant's primary industry; (2) applicants with more than 500 employees that qualify as small business concern by meeting both elements of SBA's "alternative size standard" as of March 27, 2020; and (3) NAICS Sector 72 applicants with more than 500 employees but 500 or fewer employees at each physical location.

- Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.
- The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.
- During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under this program.
- I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.
- I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

What are “payroll costs”?

Payroll costs for U.S. employees generally mean:

- Salary, wage, commission, or similar compensation; payment of cash tip or equivalent;
- Payment for vacation, parental, family, medical, or sick leave;
- Allowance for dismissal or separation;
- Payment required for the provisions of group health care benefits, including insurance premiums;
- Payment of any retirement benefit; or
- Payment of State or local tax assessed on the compensation of employees,



Payroll costs include payments made to Professional Employer Organizations (PEO) and similar payroll providers to process payroll and report payroll taxes, even if the employees are not directly employed by the loan applicant.

Payroll costs are capped at \$100,000 in annual salary and exclude taxes imposed or withheld pursuant to the Federal Insurance Contributions Act or as income tax collected at the source. In addition, any compensation of an employee whose principal place of residence is outside of the United States is not included within payroll costs. The exclusion of compensation in excess of \$100,000 only applied to cash compensation and not to non-cash benefits, including employer contributions to retirement plans, and payments for benefits such as group health and insurance premiums.

Independent contractors have the ability to apply for a PPP Loan on their own so they do not count for purposes of a borrower's PPP Loan calculation.

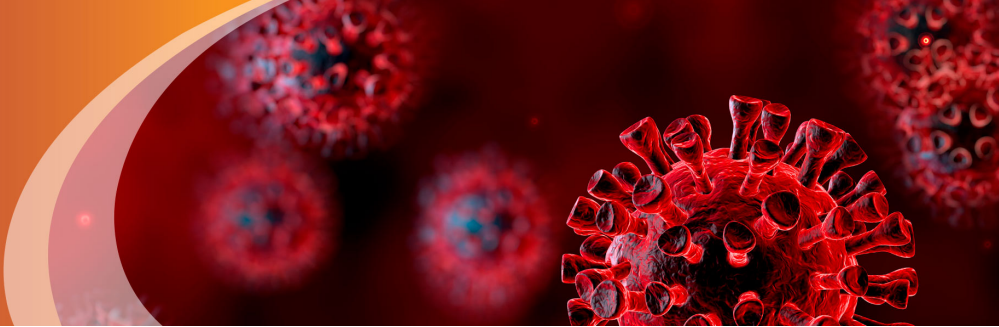
In that regard, for an independent contractor or sole proprietor in the United States, wage, commissions, income, or net earnings from self-employment or similar compensation are included within their payroll costs. However, any amount that is more than \$100,000 in 1 year is excluded in calculating payroll costs for the independent contractor or sole proprietor.

What can a PPP Loan be used for?

Permitted uses for PPP Loans include⁹:

- Payroll costs;
- Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- Employee salaries, commissions, or similar compensations; payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation);
- Rent (including rent under a lease agreement);
- Utilities;
- Interest on any other debt obligations that were incurred before the covered period;
- and

⁹ For sole proprietors and independent contracts, permitted uses are only allowed if the category of permitted uses was deducted from the person's 2019 taxes.



- Uses otherwise available for loans made under Section 7(a) of the Small Business Act, which includes equipment and fixtures; working capital, inventory, seasonal line of credit or refinancing debt, including an EIDL loan.

Does a PPP Loan have to be repaid?

PPP Loans are subject to forgiveness for certain “covered expenses” incurred during the 8-week period following the date the PPP Loan proceeds are disbursed. Covered expenses are:

- Payroll costs;¹⁰
- Interest on covered mortgage obligations incurred before February 15, 2020;
- Rent obligations under leases in force before February 15, 2020; and
- Utilities for which service began before February 15, 2020.¹¹

The amount of principal that is forgiven is not included in gross income for tax purposes.

PPP Loan forgiveness is subject to formulaic reduction by multiplying the maximum forgiveness amount by the quotient obtained by dividing:

- The average number of full time employees employed during the 8 week period commencing on the date of the loan by
- Either (as selected by the borrower):
 - The average number of full time employees per month employed during the period February 15, 2019 through June 30, 2019; or
 - The average number of full time employees per month employed during the period January 1, 2020 through February 28, 2020 (unless a seasonal employer, in which case it is the average monthly full time employees between February 15, 2019 and June 30, 2019).

PPP Loan forgiveness is also subject to further dollar for dollar reduction by:

- Any reduction in the number of full time employees during the period February 15, 2020 through April 26, 2020; and

¹⁰ The SBA’s interim final rules clearly state that independent contractors do not count as employees for purposes of calculating loan forgiveness or the amount of the PPP Loan.

¹¹ Proper documentation will be required to prove these expenditures before forgiveness is approved.

- The amount of any reduction in total salary or wages of any employee earning less than \$100,000 in annual salary during the 8 week period following the making of the PPP Loan that exceeds 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed prior to the 8 week measurement period.

These further reductions can be mitigated if the company increases its workforce or the salary/wages it pays its employees by June 30, 2020.

The SBA further announced that not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs. This action was taken to implement the primary purposes of the CARES Act, which is wage preservation. The forgiveness amount will be reduced, dollar for dollar, by the amount that the borrower uses of the for non-payroll purposes.

Finally, for sole proprietors and subcontractors, the amount of loan forgiveness is capped at eight weeks of 2019 average net profit since these businesses generally do not have the same type of overhead expenses as traditional businesses.

After the 8-week period, requests for forgiveness are submitted to the lender that is servicing the PPP Loan with documentation verifying the number of full-time employees and pay rates as well as the payment of eligible mortgage, lease, and utility obligations. Decisions on the forgiveness amount must be made within 60 days.

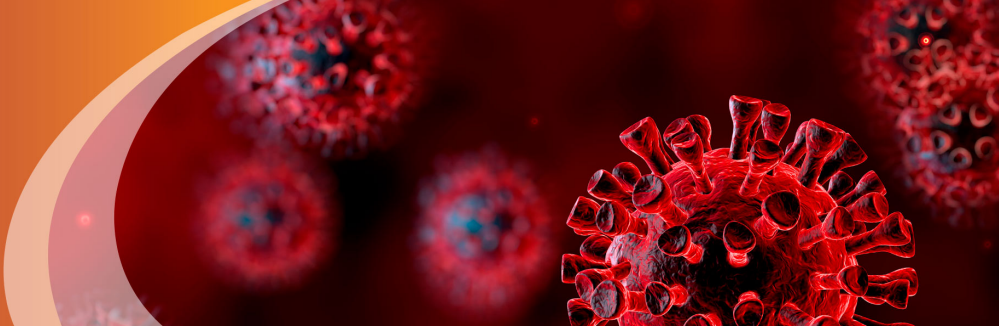
How are PPP Loans that are not forgiven repaid?

Any balance of a PPP Loan which is not forgiven must be repaid over a two-year period with interest at a fixed rate of 1% per annum. No payments will be required for a period of 6 months after the unforgiven portion of the PPP Loan is established. These loans are unsecured and do not require personal guarantees.

Can a borrower have a PPP Loan and an EIDL Loan?

A borrower can have both a PPP Loan and an EIDL Loan only if the EIDL loan is for a purpose other than payroll, health care benefits, mortgage interest, rent, utilities and loan interest. In the interim final rules, the SBA has stated that if an EIDL Loan was used for payroll costs, the applicant's PPP Loan must also be used to refinance the EIDL Loan.

How does a company apply for a PPP Loan?



PPP Loans are “first come, first served,” and an eligible borrower may only receive one PPP Loan. Therefore, the SBA interim final rules recommend that a company apply for the maximum amount allowed in an application. In addition to submitting the application, a company will need to submit payroll documentation supporting the payroll costs that it uses to determine the amount that it can borrow. All owners of 20% or more of the equity of the company must be named on the application, and certain questions set forth on the application have to be answered both for the company and the identified owners.

Starting April 3, 2020, small businesses and sole proprietorships can apply for and receive PPP Loans through existing SBA lenders.

Starting April 10, 2020, independent contractors and self-employed individuals can apply for and receive PPP Loans through existing SBA lenders.

Other regulated lenders, including banks and credit unions will be available to make these loans as soon as they are approved and enrolled in the program.

A list of SBA lenders can be found at www.sba.gov.

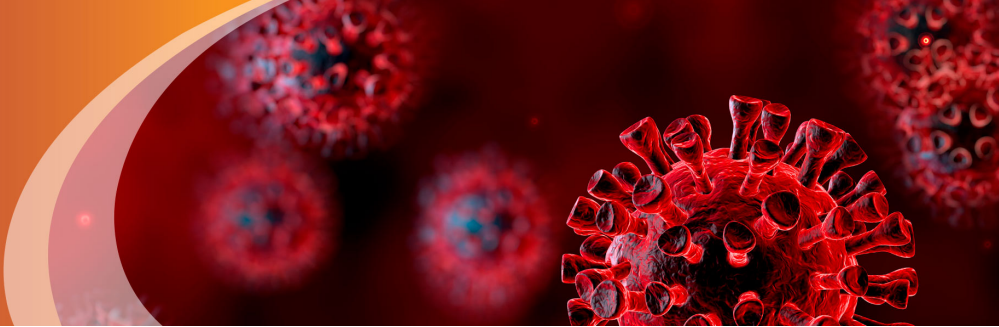
A copy of the application can be located at <https://www.sba.gov/sites/default/files/2020-04/PPP%20Borrower%20Application%20Form.pdf>.

Eligibility Questionnaire

There are a number of different tests to determine if an applicant is eligible for a PPP loan—an applicant should consider each avenue. Eligibility can be based on any one of the applicable tests.

For business concerns that are small under the Small Business Act – note that Questions 1 and 2 are alternative tests, and the applicant can be eligible for a PPP loan if it meets either test:

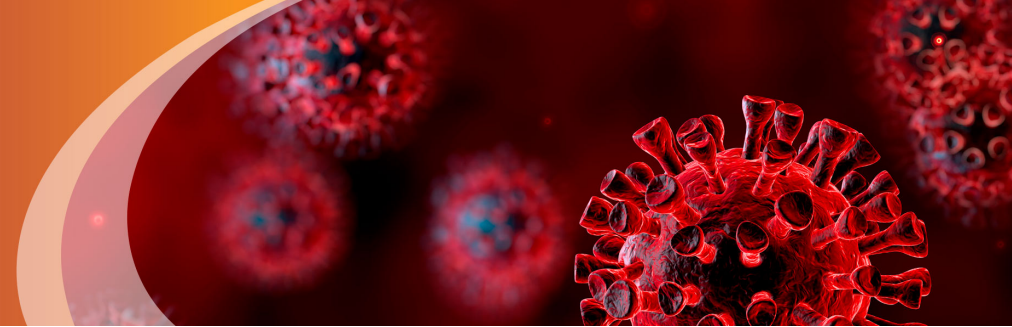
Question 1:	Does the applicant qualify as a small business under the size standard for its primary NAICS Code? Generally there are two types of size standards – receipts
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	<p>based and employee based.</p> <ul style="list-style-type: none"> • Receipts-Based Size Standard: if, over the most recently completed three (3) fiscal years,¹² the average annual receipts of the applicant and its affiliates under 13 C.F.R. § 121.301(f) falls below the relevant size threshold, the applicant is eligible, or • Employee-Based Size Standard: if, over the most recently completed twelve (12) months, the average annual employee count¹³ of the applicant and its affiliates under 13 C.F.R. § 121.301(f) falls below the relevant size threshold, the applicant is eligible.
<p>Question 2:</p>	<p>As of March 27, 2020, do the applicant and its affiliates under 13 C.F.R. § 121.301(f) satisfy both of the following:</p> <ul style="list-style-type: none"> • Maximum tangible net worth of the applicant and affiliates is not more than \$15 million; and • 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.

¹² SBA’s implementation of the Small Business Runway Extension Act of 2018 did not impact the time period over which applicants for SBA financial assistance measure size against receipts-based standards. See 13 C.F.R. § 121.104(c)(4) (“For the Business Loan and Disaster Loan Programs, annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three.”).

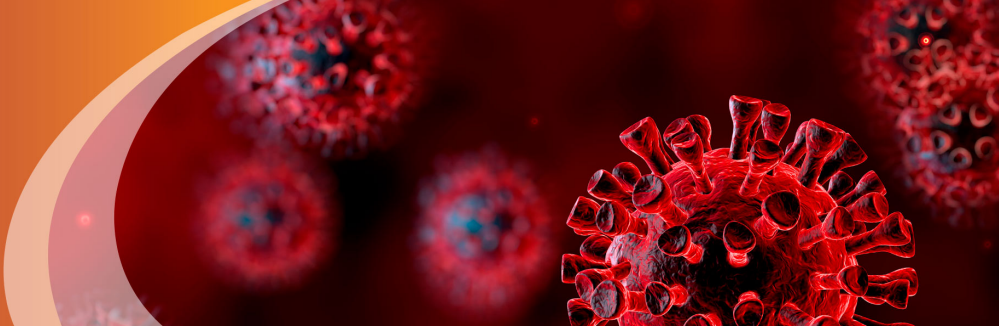
¹³ Note, neither the CARES Act nor SBA’s interim final rules have revised, or otherwise indicated that, SBA’s regulations regarding inclusion of the number of employees of all domestic and foreign affiliates has been superseded. See 13 C.F.R. § 121.106(b)(1) (“The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.”); 13 C.F.R. §121.301(f)(8) (“In determining the concern’s size, SBA counts the receipts, employees (§ 121.201), or the alternate size standard (if applicable) of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.”). The latest FAQ suggests that the applicant can alternatively use employee count from calendar year 2019 in a manner consistent with the period for calculation of the loan amount



Expanded eligibility for faith-based organizations:

Question 1:	<p>What is the relevant measure of whether the applicant is eligible?</p> <ul style="list-style-type: none"> • Whether the applicant has 500 or fewer employees¹⁴ whose principal place of residence is in the United States. • (SBA’s FAQ on faith-based organizations notes that some industries—including “religious organizations”—are currently listed in the size standards table with a monetary cap on annual receipts rather than an employee-based size standards cap. But a receipts-based standard cannot be used to determine PPP eligibility for nonprofit organizations.)
Question 2:	<p>Do the SBA’s affiliation rules apply to the applicant?</p> <ul style="list-style-type: none"> • The applicant is exempt from affiliation if the relationship of a faith-based organization to another organization is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion → skip to question 4.
Question 3:	<p>If the applicant’s relationship to another organization is not based on religious teaching or belief or otherwise constitutes a part of the exercise of religion, does the applicant have affiliates under 13 C.F.R. § 121.301(f)?</p> <ul style="list-style-type: none"> • Does the applicant control or have the power to control third parties? • Does another entity or individual have the power to control the applicant as well as to control other third-parties? <p>(Note that this is a detailed, fact-specific analysis for which companies should consult with counsel, particularly if unfamiliar with the SBA tests.)</p>

¹⁴ For all 500-employee analyses for expanded eligibility categories here and below, employee count is determined based on the average number of employees for each of the pay periods for the preceding completed calendar months prior to the date of loan application. Again, the latest FAQ suggests that the applicant can alternatively use the employee count from calendar year 2019 in a manner consistent with the period for calculation of the loan amount.

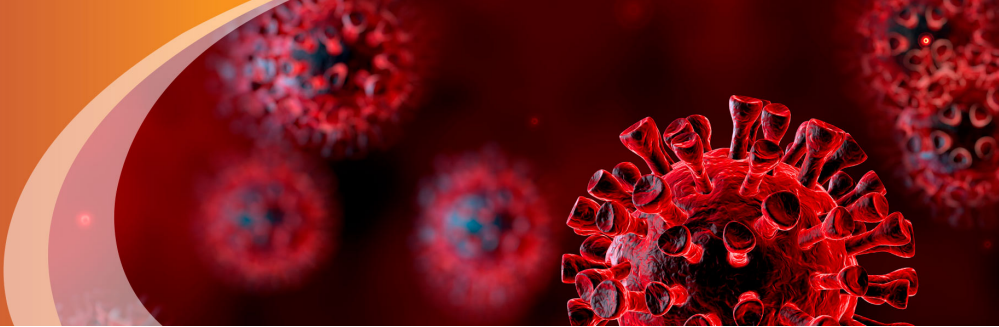


Question 4:	<p>How many employees does the applicant and its affiliates, if relevant, have at each location?</p> <ul style="list-style-type: none"> • If 500 or fewer employees whose principal place of residence is in the United States, the applicant should be eligible.
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Expanded eligibility for hotels, restaurants, and other entities with a NAICS code beginning with 72:

Question 1:	<p>What is the relevant measure of whether the applicant is eligible?</p> <ul style="list-style-type: none"> • Whether the applicant has 500 or fewer employees at each physical location whose principal place of residence is in the United States.¹⁵ • (Note, applicants with a NAICS code beginning with 72 that have more than 500 employees at each physical location but which fall under their applicable size standard (total for all locations) for their NAICS code, the analysis in the preceding section applies.)
Question 2:	<p>Do the SBA’s affiliation rules apply to the applicant?</p> <ul style="list-style-type: none"> • The applicant is exempt from SBA’s affiliation rules only if it has 500 or fewer employees at each physical location whose principal place of residence is in the United States → skip to question 4.
Question 3:	<p>If the applicant has more than 500 employees at each physical location whose principal place of residence is in the United States, does the applicant have affiliates under 13 C.F.R. § 121.301(f)?</p>

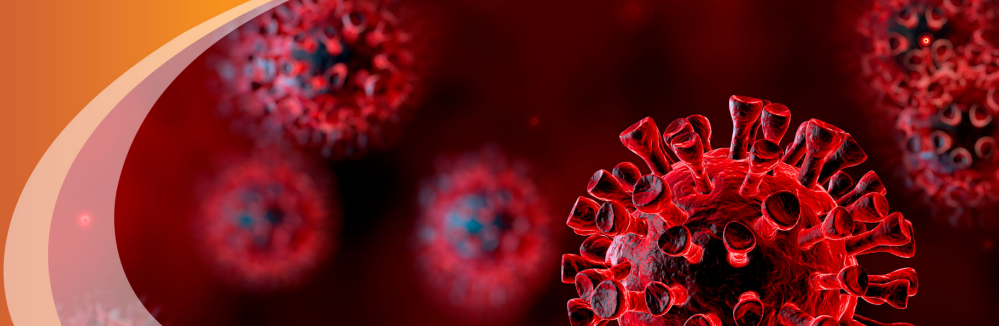
¹⁵ Although the CARES Act did not state that only employees whose principal place of residence is in the United States would be counted for purposes of determining an applicant’s eligibility against a 500-employee standard, this is how SBA implemented the PPP in the two interim final rules. However, the two rules do not specifically address how this applies to the NAICS 72 exceptions. Given that terms should be consistently defined within in the same Section, it is reasonable to interpret the term “employee” for the Section 1102 enhanced eligibility consistently to include only those whose principal place of residence is in the United States, BUT this does not change the definition of an employee under the standard small business analysis. There, 13 C.F.R. § 121.106(b)(1) includes employees without limit and includes employees of foreign affiliates.



	<ul style="list-style-type: none"> • Does the applicant control or have the power to control third parties? • Does another entity or individual have the power to control the applicant as well as to control other third-parties? <p>(Note that this is a detailed, fact-specific analysis for which companies should consult with counsel, particularly if unfamiliar with the SBA tests.)</p>
<p>Question 4:</p>	<p>How many employees does the applicant and its affiliates, if relevant, have at each location?</p> <ul style="list-style-type: none"> • Applicant with more than one physical location that employs for each physical location not more than 500 employees whose principal place of residence is in the United States shall be eligible to receive a covered loan, and it is exempt from affiliation analysis. • If applicant has more than 500 employees at any one physical location whose principal place of residence is in the United States, it is not exempt from affiliation analysis.

Expanded eligibility for other types of entities with a NAICS code that does *not* begin with 72:

<p>Question 1:</p>	<p>What is the relevant standard against which size eligibility will be measured for the applicant?</p> <ul style="list-style-type: none"> • Whether the applicant has 500 or fewer employees whose principal place of residence is in the United States, or, • If the applicant is subject to a larger employee-based size standard under the applicant’s primary NAICS , the number of employees of the applicable size standard or fewer.
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<p>Question 2:</p>	<p>Do the affiliation rules apply to the applicant?</p> <ul style="list-style-type: none"> • If the applicant operates as a franchise that is assigned a franchise identifier code by the SBA¹⁶ <u>or</u> receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 – then the SBA affiliation rules do not apply → skip to Question 4 • If the applicant is not a franchise or receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958, answer Question 3. • Are any of the other affiliation exemptions of 13 C.F.R. § 121.103(b) applicable?
<p>Question 3:</p>	<p>Does the applicant have affiliates under 13 C.F.R. § 121.301(f)?</p> <ul style="list-style-type: none"> • Does the applicant control or have the power to control third parties? • Does another entity or individual have the power to control the applicant as well as to control other third-parties? <p>(Note that this is a detailed, fact-specific analysis for which companies should consult with counsel, particularly if unfamiliar with the SBA requirements.)</p>
<p>Question 4:</p>	<p>For the 500 employee threshold, how many employees whose principal place of residence is in the United States does the applicant – and any affiliates under 13 C.F.R. § 121.301(f), if applicable – employ?</p> <p>For a larger employee-based size standard under the applicant’s primary NAICS, how many employees does the applicant – and any affiliates under 13 C.F.R. § 121.301(f), if applicable – employ?</p>

Resources

¹⁶ The SBA’s Franchise Directory is here available here: <https://www.sba.gov/document/support--sba-franchise-directory>.

- Form 2483, PPP Borrower Application Form:
<https://www.sba.gov/sites/default/files/2020-04/PPP%20Borrower%20Application%20Form.pdf>
- Interim Final Rule, published in the Federal Register on April 15, 2020:
<https://www.govinfo.gov/content/pkg/FR-2020-04-15/pdf/2020-07672.pdf>
- Interim Final Rule regarding Affiliation, published in the Federal Register on April 15, 2020: <https://www.govinfo.gov/content/pkg/FR-2020-04-15/pdf/2020-07673.pdf>
- Interim Final Rule on Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, to be published in the Federal Register on April 20, 2020:
<https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-08257.pdf>
- SBA Guidance regarding Affiliation: <https://www.sba.gov/sites/default/files/2020-04/Affiliation%20rules%20overview%20%28for%20public%29%20v2.pdf>
- FAQ regarding Participation of Faith-Based Organizations in the PPP and EIDL:
<https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf>
- Additional SBA guidance on affiliation: <https://nvca.org/wp-content/uploads/2020/04/April-4-SBA-Guidance-on-Affiliation.pdf>
- Treasury and SBA FAQ (note that this document is being updated regularly):
<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>
- April 16, 2020 SBA Report on PPP Loans:
<https://home.treasury.gov/system/files/136/SBA%20PPP%20Loan%20Report%20Deck.pdf>

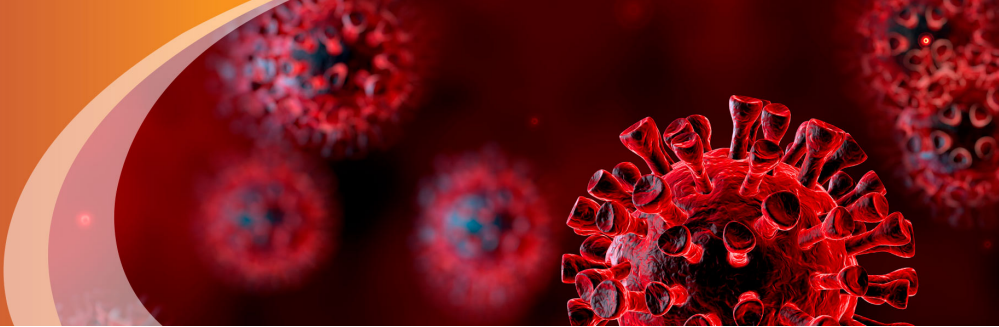
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