

CARES Act: Paycheck Protection Program (PPP) FAQs

On April 6, 2020, the Small Business Administration (the "SBA") in consultation with the Department of the Treasury released additional guidance reflecting the implementation of the Paycheck Protection Program ("PPP") of the CARES Act in a Frequently Asked Questions (FAQs) format (the "FAQ"), and plans to update the guidance regularly. You can find the FAQ [here](#). The FAQ makes clear that borrowers and lenders may rely on the guidance available at the time of their applications' submission or approval, so they are not required to revise applications based on these FAQs. Going forward, we recommend that all borrowers consult the [Department of Treasury's website](#) for current guidance before making an application.

The April 6th FAQ confirms among other things that:

- A lender's verification duty with respect to payroll costs is limited to a good faith review of the borrower's calculations and supporting documents and does not require the lender to replicate such calculations.
- A small business with more than 500 employees may still qualify for the PPP if it meets the SBA size standard corresponding to its primary industry or the SBA's "alternative size standard".
- The [SBA's Interim Final Rule on Affiliation](#) applies to the PPP, and each borrower must certify on its application it is eligible for a PPP loan after application of the affiliation rules, if applicable. Minority shareholders of potential borrowers may relinquish their negative control rights to avoid characterization as an affiliate of such borrower, but such surrender must be irrevocable. Further guidance on the affiliation rules is available [here](#).
- The exclusion from "payroll costs" of any employee's compensation in excess of an annual salary of \$100,000 applies only to cash compensation and does not limit the inclusion of non-cash benefits like employer contributions to benefit and insurance plans and any employer payment of state and local payroll taxes on behalf of an employee.
- A borrower may calculate its aggregate payroll costs using data from the previous 12 months or from calendar year 2019, with alternatives available for seasonal business and those not in business for the period from February 15, 2019 through June 30, 2019. Amounts a borrower has paid to an independent contractor or sole proprietor are excluded from its payroll costs calculation.
- Payroll costs are calculated on a gross basis without regard to federal taxes that are imposed or withheld, such as FICA and income taxes required to be withheld from employees. As a result, payroll costs include the taxes imposed on an employee and required to be withheld by the employer, but payroll costs do *not* include the employer's share of federal payroll tax.

Additional information on the Paycheck Protection Program, and other key provisions of the CARES Act, can be found in our [April 3rd alert](#).

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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