

## CARES Act: Additional Guidance on the Paycheck Protection Program

The Small Business Administration ("SBA"), in consultation with the U.S. Department of the Treasury ("Treasury"), continues to issue guidance on the Paycheck Protection Program ("PPP") by updating its [Frequently Asked Questions \(the "FAQs"\)](#) release. The updated FAQs as of May 6, 2020 included additional guidance regarding (i) SBA review of PPP loans, (ii) impact of past layoffs on loan forgiveness, (iii) non-profit hospital qualification under the CARES ACT, (iv) PPP funds return deadline, and (v) applicant employee size standard. Additionally, on April 30, 2020, the SBA released the [Interim Final Rule on Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders \(the "Interim Final Rule"\)](#), which provides that a single corporate group is subject to a \$20 million aggregate limit for all PPP loans received.

### Background

The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") was signed into law on March 27, 2020. The CARES Act authorizes up to \$349 billion in forgivable loans to small businesses through the PPP administered by the SBA. On April 24, 2020, \$484 billion of additional coronavirus relief was approved, which includes an additional \$310 billion in funding for the PPP. Pursuant to the PPP, if a borrower of a PPP loan makes payroll cost, rent, mortgage interest, or utility payments during the 8-week period following the PPP loan origination, such borrower's obligation to repay the principal and interest on the PPP loan is eligible for up to 100% forgiveness. The amount forgiven may be subject to reduction if the borrower reduces its employees' salaries or its workforce headcount, or if the borrower's payroll costs during such 8-week period are less than 75% of the amount sought to be forgiven.

The SBA recently [reported](#) that during the period from April 27, 2020 to May 1 2020, with the second outlay of federal funds, the SBA has approved a total of 2.21 million loans through 5,432 lenders, in an aggregate amount of \$175.74 billion. Approximately 47 percent of the new loans were made through small lenders with less than \$50 billion in assets and about 90% of the total number of loans were made in amounts of \$150,000 or less. The average loan size for the second round of federal funding during that period was \$79,000.

Since PPP's inception, lenders and applicants have reportedly encountered challenges and confusion with the PPP. On April 6, 2020, the SBA and the Treasury began to release and regularly provide retroactive guidance on the PPP in a FAQs format (link [here](#)).

On April 23, 2020, the SBA added FAQ No. 31, which provided that the CARES Act requires PPP loan applicants to certify, in good faith, that "[c]urrent economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient." FAQ No. 31 also provided that if an applicant who applied for a PPP loan prior to April 24, 2020 has reconsidered its certification and concluded that it does not meet the criteria, the applicant may return the PPP loan proceeds by May 7, 2020, in which case it will be deemed to have made the necessity certification in good faith. FAQ No. 43, issued on May 5, 2020, further extends this safe harbor period to May 14, 2020 (see detailed discussion regarding FAQ No. 43 below). If found "knowingly making a false statement to obtain a guaranteed loan from SBA," an applicant may face significant liability including fines of up to \$1,000,000 and imprisonment for up to 30 years. The lack of official clarification on the meaning of "necessary" is provoking confusion and anxiety among businesses that had obtained PPP loans prior to the guidance release. Since the guidance release, a number of businesses that received PPP loans have announced that they have returned, or intend to return the funds received. It is reported that as of April 28, 2020, 25 public companies have disclosed the return of over \$160 million in PPP loans received.

You can find our past alerts on the FAQs and the CARES Act [here](#).

### **Updates of interest in the FAQs as of May 6, 2020**

#### **FAQ No. 39: SBA will review all PPP loans over \$2 million.**

Following FAQ No. 31, which reminds all borrowers that a “good faith” certification of “necessity” is required for obtaining a PPP loan, the SBA released FAQ No. 39 on April 29, 2020, which states that the SBA will review all PPP loans in excess of \$2 million, in addition to other loans as appropriate. FAQ No. 39 does not provide any details regarding SBA’s review standard, but indicates that additional guidance relating to the applicable review procedures will be forthcoming.

#### **FAQ No. 40: A borrower’s PPP loan forgiveness amount will not be reduced if the borrower offers to rehire a laid-off employee and the employee declines.**

FAQ No. 40, issued on May 3, 2020, clarifies a question regarding the impact of past layoffs on loan forgiveness. The SBA and the Treasury intend to issue an interim final rule to exclude from the loan forgiveness reduction calculation under the CARES Act any laid-off employees whom the borrower offered to rehire. The rule will state that “to qualify for [such] exception, the borrower must have made a good faith, written offer of rehire, and the employee’s rejection of that offer must be documented by the borrower.” The rule will also state that an employee who rejects the rehire offer “may forfeit [its] eligibility for continued unemployment compensation.”

#### **FAQ No. 42: A non-profit hospital exempt from taxation under Section 115 of the Internal Revenue Code (“IRC”) will be treated as a “nonprofit organization” for purposes of the PPP under Section 1102 of the CARES Act if the hospital reasonably determines that it is an organization described in Section 501(c)(3) under the IRC.**

Under Section 1102 of the CARES Act, a nonprofit organization is defined as “an organization that is described in Section 501(c)(3) of the Internal Revenue Code of 1986 and that is exempt from taxation under Section 501(a) of such Code.” FAQ No. 42, released on May 3, 2020, states that a non-profit hospital exempted from taxation under Section 115 of the IRC will qualify as a “nonprofit organization” under Section 1102 of the CARES Act if the hospital reasonably determines through “a written record maintained by the hospital” that it is an organization described in Section 501(c)(3) under the IRC.

#### **FAQ No. 43: The safe-harbor period for returning PPP funds extends to May 14, 2020.**

Pursuant to FAQ No. 31, a borrower needs to certify in good faith on its PPP loan application that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” If a borrower who applied for a PPP loan prior to April 24, 2020 has reconsidered its certification and concluded that it does not meet the criteria, the deadline to return the PPP loan proceeds and be deemed to have made the necessity certification in good faith was May 7, 2020. FAQ No. 43, issued on May 5, 2020, extends this safe harbor period by one week to May 14, 2020. Borrowers do not need to apply for the extension, which is automatically granted by the SBA.

#### **FAQ No. 44: 500-employee size standard for applicants includes employees of foreign affiliates.**

In FAQ No. 3 released on April 6, 2020, the SBA provides that the employee size standard for PPP loan eligibility is “500 or fewer employees whose principal place of residence is in the United States.” FAQ No. 44 issued on May 5, 2020 clarifies that when determining its eligibility for PPP loans under the 500-employee size standard, absent a waiver or an exception, the borrower must count “all of its employees and the employees of its U.S. and foreign affiliates.”

**SBA Interim Final Rule – \$20 million limit on PPP loans received for a single corporate group.**

On April 30, 2020, the SBA released the Interim Final Rule, which specifies that businesses that are part of a single corporate group are subject to an aggregate limit of \$20 million in PPP loans received. Such limit is immediately effective with respect to any loan that has not yet been fully disbursed as of April 30, 2020. The Interim Final Rule also states that a PPP loan applicant is responsible for notifying the lender if the applicant has applied for or received PPP loans in excess of the \$20 million limit. Failure to do so by an applicant will be regarded as a use of PPP funds for unauthorized purposes, and the loan will not be eligible for forgiveness. Lenders may rely on an applicant's representation concerning such applicant's compliance with this limitation.

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