

## **Paycheck Protection Program Eligibility**<sup>1</sup>

Current as of April 26, 2020

*This document is for general informational purposes only and is not legal advice. Readers should consult their attorney, accountant, lender, and payroll provider to make determinations regarding their organization's specific eligibility and to ensure compliance with all applicable laws and regulations. Because every organization's situation is unique, it is important that readers seek appropriate advice before taking or refraining from taking any action as a result of this document.*

The Paycheck Protection Program (the "PPP") is a forgivable loan program administered by the Small Business Administration and delivered through financial institutions. On April 16, 2020, the initial \$349 Billion in loans authorized by Congress was exhausted. However, Congress recapitalized the program with an additional \$310 Billion on April 23, 2020. President Donald Trump signed the bill on April 24, 2020 and funding is expected to be available April 27, 2020.<sup>2</sup>

The PPP allows eligible borrowers to apply for forgivable loans from financial institutions, at 1% interest, for a term of two years, and with principal, interest, and fee payments deferred for the first 6 months of the loan. Ultimately the entire loan can be forgiven if the borrower uses the funds for eligible expenses throughout the 8-weeks following its receipt of the loan funds.<sup>3</sup> PPP loan applications will be accepted through June 30, 2020 or the earlier exhaustion of available funds.<sup>4</sup>

Note that each applicant for a PPP loan is required to certify that it is eligible to receive the loan, that current economic uncertainty makes the loan request necessary, and that all of the information it provides is true.<sup>5</sup> SBA guidance has clarified that when certifying need, Borrowers must take 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.<sup>6</sup> Note that the determination regarding loan eligibility is the responsibility of the applicant and not the lender, so applicants have to do a thorough analysis of their eligibility before submitting their application.<sup>7</sup> There are essentially three main considerations when determining whether an organization is eligible to apply:

1. What type of organization is it?
2. Was the organization operating as of February 15, 2020?
3. Does the organization satisfy the relevant size restrictions?

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<sup>1</sup> This document was drafted by Jonathan Murphy, an attorney with Fortif Law Partners, LLC in Birmingham, Alabama.

<sup>2</sup> See SBA Notice: PPP Resumes April 27, 2020 (last visited April 26, 2020) <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program#section-header-0>.

<sup>3</sup> See Paycheck Protection Program Loans FAQs, at Question 20 (April 24, 2020).

<sup>4</sup> See CARES Act Section 1102(a)(2)(36)(A)(iii).

<sup>5</sup> See SBA PPP Borrower Application Form (last visited April 26, 2020)

<https://www.sba.gov/sites/default/files/2020-04/PPP%20Borrower%20Application%20Form.pdf>.

<sup>6</sup> See Paycheck Protection Program Loans FAQs, at Question 31 (April 24, 2020) (this does not require that they be unable to obtain credit elsewhere). Note that if an organization applied for and received PPP funding but is unsure about whether it can defend its certification of need, the SBA has stated that if the organization repays the loan in full by May 7, 2020, it will be deemed to have made the required certification in good faith.

<sup>7</sup> See *id.* at Question 4.

## 1. What type of organization is it?

Eligible organizations include:

- Small Business Concerns;<sup>8</sup>
- ordinary business concerns;
- 501(c)(3) nonprofit organizations;
- 501(c)(19) veterans organizations;
- tribal concerns under the Small Business Act,
- self-employed individuals, sole proprietors, and independent contractors; and
- faith-based organizations that satisfy the requirements of 501(c)(3).<sup>9</sup>

## 2. Was the organization operating as of February 15, 2020?

The CARES Act requires that the organization have been in operation as of Feb. 15, 2020 and that the organization either had employees for whom it paid salaries and payroll taxes or paid independent contractors<sup>10</sup> (with obvious exceptions to the compensation requirement for sole proprietors, independent contractors, and self-employed individuals who apply).<sup>11</sup>

## 3. Does the organization satisfy the relevant size restrictions?

The size restrictions can vary significantly based on the entity and the industry. To be eligible as a “Small Business Concern,” an organization must:

- be organized for profit;
- be independently owned and operated;
- not be dominant in its field;
- be located in the United States; and
- operate primarily in the United States or contribute significantly to the United States’ economy.<sup>12</sup>

Additionally, the organization must satisfy either the SBA industry size standards or the SBA alternative size standard.<sup>13</sup> The SBA alternative size standard requires that, as of March 27, 2020:

- the business had a maximum tangible net worth of not more than \$15 million, and
- the business had an average net income after Federal income taxes (excluding any carry-over losses) of not more than \$5 million for the last two fiscal years before the date of the application.<sup>14</sup>

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<sup>8</sup> See 15 U.S.C. §632, 636; see also 13 C.F.R. §121.105.

<sup>9</sup> See CARES Act Section 1102(a)(2)(36)(D); see also SBA FAQ Regarding Participation of Faith-based Organizations in the PPP and EIDL (April 3, 2020) <https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf>.

<sup>10</sup> See CARES Act Section 1102(a)(2)(36)(F)(ii)(II).

<sup>11</sup> See *id.* at 1102(a)(2)(36)(D)(ii).

<sup>12</sup> See 15 USC §632, 636; see also 13 C.F.R. §121.105.

<sup>13</sup> See Paycheck Protection Program Loans FAQs, at Question 34 (April 24, 2020).

<sup>14</sup> See *id.*

Note that Small Business Concerns are not subject to the 500 employees or less limitation applicable to nearly all other eligible applicants.<sup>15</sup> Besides Small Business Concerns, all other eligible organizations are limited to the greater of 500 employees or the SBA employee-count size standards applicable to their industry.<sup>16</sup>

When counting employees, an organization should generally use the average number of employees for each pay period for the preceding 12 months.<sup>17</sup> Additionally, organizations must include all full-time, part-time, and temporary employees (but not independent contractors) in their calculations.<sup>18</sup>

It is also important to mention that an organization must include the employees of any of its affiliates. Effectively, the SBA's affiliation rules require an organization to count the employees of any organization that controls or has power to control it, or any third party that has the power to control both.<sup>19</sup> As part of the CARES Act, Congress removed some of the catch-all affiliation tests but did require the application of four tests to determine whether an affiliation exists.<sup>20</sup> The applicable affiliation rules include:

- Affiliation based on ownership;
- Affiliation arising under stock options, convertible securities, and agreements to merge;
- Affiliation based on common management; and
- Affiliation based on identity of interest (limited to close relatives).<sup>21</sup>

Limitations to the general application of the affiliation rules do exist and include:

- The applicant is in the accommodation or food business (NAICS 72) (limited to 500/location);
- The applicant is listed in the SBA Franchise Directory (limited to 500 employees per franchise);
- The applicant receives financial assistance from a Small Business Investment Company; or
- The applicant is a faith-based organization affiliated on the basis of shared religious beliefs.<sup>22</sup>

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<sup>15</sup> See *id.* at Question 2.

<sup>16</sup> See CARES Act Section 1102(a)(2)(36)(D)(ii); see also SBA Size Standards (last visited April 26, 2020) <https://www.sba.gov/federal-contracting/contracting-guide/size-standards>.

<sup>17</sup> See 13 CFR §121.106; see also Paycheck Protection Program Loans FAQs, at Question 14 (April 24, 2020).

<sup>18</sup> See 13 CFR §121.106; see also CARES Act Section 1102(a)(2)(36)(D)(v).

<sup>19</sup> See Applicable Affiliation Rules (April 3, 2020) <https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf>; see also PPP Affiliation Interim Final Rule (April 15, 2020) [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule%202\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule%202_0.pdf); see also Paycheck Protection Program Loans FAQs, at Question 4 (April 24, 2020).

<sup>20</sup> See CARES Act Section 1102(e).

<sup>21</sup> See Applicable Affiliation Rules (April 3, 2020) <https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf>

<sup>22</sup> See CARES Act Section 1102(a)(2)(36)(D)(iv); see also SBA FAQ Regarding Participation of Faith-based Organizations in the PPP and EIDL (April 3, 2020) <https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf>.

If an organization thinks it may have affiliates that would push its employee count over 500 employees, it should consult with its attorney and evaluate the affiliation tests closely before certifying that it is eligible.

Finally, since applicants are responsible for certifying their own eligibility, it is essential that interested applicants evaluate the eligibility factors closely. If an organization is interested in applying for a PPP loan, but is unsure about its eligibility, it should consult with its lender, accountant, attorney, and/or payroll provider to make a specific determination about whether or not it should apply.