

SBA Issues Guidance and New Application Form for Paycheck Protection Program Loans

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On the evening of April 2, 2020, the Small Business Administration (SBA) released an ["interim final rule,"](#) which provides guidance related to loans under the Paycheck Protection Program (PPP). The PPP was enacted as part of the CARES Act signed into law on March 27, 2020.

Our Nonprofit Special Alert, which is available on our website at www.nonprofitcpa.com, entitled ["CARES Act Signed into Law – Contains Massive Relief and Stimulus Provisions for Nonprofits"](#) contains a more comprehensive explanation of the PPP loan program and will be updated today to reflect this new guidance.

This Special Alert focuses on the most significant elements of the interim rule (referred to below as the SBA guidelines), including clarifications or shifts from earlier common understandings of the PPP.

- One of the requirements for eligibility to receive a PPP loan is that an organization must have 500 or fewer employees (unless it qualifies for certain very limited exceptions in the law that are not generally applicable for nonprofit organizations). Prior to the issuance of the SBA guidelines, it was unclear as to whether employees who reside outside the United States should be included in determining an organization's employee count for purposes of the 500-or-fewer threshold. The SBA guidelines clarify that the 500-or-fewer employee threshold is measured counting only employees whose principal place of residence is in the United States.
- The CARES Act references SBA laws and rules requiring organizations that are part of an affiliated or controlled group (as defined in SBA laws and rules) to aggregate their employee counts in determining whether they are within the 500-or-fewer employee threshold. The SBA guidelines indicate that the SBA will "promptly issue additional guidance" in this area. Accordingly, it appears that soon-to-be-issued additional guidance for determining the employee count may modify the applicability of the aggregation rules for organizations that are part of an affiliated or controlled group. We are hopeful that the new guidance will relax or even eliminate the aggregation requirement for nonprofit organizations.
- The SBA guidelines specifically express recognition of and deference to religious liberty concerns. The guidelines also indicate that the SBA will "promptly issue additional guidance" with regard to such concerns.
 - The guidelines state that all loans guaranteed by the SBA pursuant to the CARES Act will be made consistent with constitutional, statutory, and regulatory protections for religious liberty

and that “Nothing in [SBA nondiscrimination regulations] shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities.”

- The guidelines appear to add clarity with respect to the fact that some lending institutions were questioning whether churches and other religious organizations are eligible to receive PPP loans.
- The SBA guidelines address the process for calculating the amount that can be borrowed, providing a few simplistic examples. Below is an example that we believe represents a reasonable approach to making the calculation. (We do not represent that this method is the only acceptable approach or the best approach for any organization.)
 - Paycheck Protection Program Maximum Loan Amount Step-By-Step Illustration (Note: Illustration would be different for a seasonal employer or for an organization which obtained an Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020)
 - Step 1:
 - Determine the organization’s total annual payroll costs for the calendar year 2019. For this purpose, include gross wages before deducting any employee contributions for health care coverage and before deducting any employee retirement plan contributions. Do not include more than \$100,000 of gross wages for any employee. Do not include any employees in this calculation whose principal residence is outside the United States. (We believe it is reasonable to include clergy housing allowance in gross wages for this purpose, but individual lenders and future guidance could dictate otherwise.)
 - Step 2:
 - Add to the amount determined in Step 1 any employer contributions for health care benefits, including group health insurance premiums, and employer retirement plan contributions for the employees used in the Step 1 calculation. Also include any additional state and local taxes assessed on the compensation of those employees. The result is the organization’s annual payroll costs for purposes of determining the maximum loan amount allowed under the Paycheck Protection Program.
 - Step 3:
 - Divide the amount determined in Step 2 by 12 to arrive at average monthly payroll costs.
 - Step 4:
 - Multiply the amount determined in Step 3 times 2.5 to determine the maximum loan amount.
Note: Maximum loan amount is limited to the lower of the amount determined in Step 4 or \$10,000,000.
- Prior to issuance of the SBA guidelines, differences of professional opinion existed regarding whether payments to individual independent contractors should be included in “payroll costs.” Our understanding of the SBA guidelines is that payments to individual independent contractors of the type typically reported on Form 1099 are **not** to be included in an organization’s measurement of “payroll costs.”

- Prior to issuance of the SBA guidelines, differences of professional opinion existed as to whether gross or net wages (wages net of payroll tax withholding) should be used in computing “payroll costs” for purposes of determining the maximum loan amount. We believe that the use of an employee’s gross wages for that purpose is a reasonable interpretation of the SBA guidelines.
- Prior to issuance of the SBA guidelines, a lack of clarity existed related to whether employer-paid benefits such as group health insurance premiums and retirement plan contributions are to be factored into the \$100,000-per-employee limitation on “annual salary.” We believe that a reasonable interpretation of the SBA guidelines is that employer-paid benefits such as group health insurance premiums and retirement plan contributions are separate and apart from “annual salary” and should not be included in an employee’s compensation amount when applying the \$100,000-per-employee limitation.
- The SBA guidelines provide some examples of the types of documentation required to be submitted to the lender to establish eligibility for a PPP loan, including payroll processor records and payroll tax filings.
 - If a borrower does not have such documentation, other supporting documentation may be submitted, such as bank records, sufficient to demonstrate the qualifying payroll amount.
- The SBA guidelines impose a restriction on the use of the loan proceeds that was not clear in the CARES Act. At least 75% of the loan proceeds must be used for “payroll costs.”
- Regarding the amount of the loan to be forgiven, at least 75% of the loan forgiveness amount must be attributable to payroll costs.
 - Other than this 75% requirement, the SBA guidelines do not specifically address the detailed calculations of the loan forgiveness amount. The SBA guidelines indicate that the SBA will issue additional guidance in the future regarding the loan forgiveness calculations.
- The SBA guidelines clarified the terms of PPP loans (for any amount that is not forgiven):
 - An interest rate of 1% per annum will apply, with a maximum maturity of 2 years.
 - Payments will be deferred for 6 months.
 - Accrued interest will be forgiven in proportion to the portion of the loan amount that is forgiven.

The SBA guidance also indicates that the PPP loans will be issued on a first-come, first-served basis. An organization interested in availing itself of a PPP loan should contact its lender and submit an [application](#) as soon as possible.

More guidance will be forthcoming. The BMWL team will continue to monitor these developments and issue clarifying information as it becomes available.