



SHARTSIS FRIESE LLP

Client Alert: SBA Issues FAQ on the Paycheck Protection Program

On April 7, the Small Business Administration (SBA) and the Department of the Treasury issued additional guidance in the form of frequently asked questions (the FAQ) regarding the new Paycheck Protection Program Loans (PPP Loans) created by the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

The FAQ provides that borrowers and lenders may rely on the guidance provided in the FAQ as SBA's interpretation of the CARES Act and of the SBA's Paycheck Protection Program Interim Final Rule issued on April 2 (see our Client Alert [here](#)). The FAQ will be updated on a regular basis. This Client Alert summarizes key updates from the FAQ as it was published on Treasury's website on April 8.

Clarification of the PPP Loan Program

While the FAQ in part summarizes positions taken by the SBA in the Interim Final Rule, it also provides additional guidance with respect to several aspects of the PPP Loan program, including the following:

- ***\$100,000 Annual Payroll Costs Cap Excludes Non-Cash Compensation*** - Under the CARES Act, payroll costs exclude any employee compensation in excess of an annual salary of \$100,000. Significant confusion has arisen among lenders, borrowers and their advisers regarding whether this \$100,000 cap applies only to cash compensation or to all benefits allocable to an employee. The FAQ clarifies that the exclusion applies only to cash compensation and does not apply to non-cash benefits, including:
 - employer contributions to defined-benefit or defined-contribution retirement plans;
 - payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and
 - payment of state and local taxes assessed on compensation of employees.
- ***Treatment of Federal Payroll Taxes*** - The CARES Act also provides that payroll costs exclude federal withholding taxes imposed or withheld during the period from February 15 and June 30, 2020. This provision has led to some uncertainty regarding whether payroll costs must be calculated on an after-tax basis. The FAQ clarifies that payroll costs are calculated on a gross basis without regard to federal taxes imposed on or withheld from employee wages. Instead, only employer-side federal payroll taxes are excluded from payroll costs.
- ***Documentation Provided by Third Party Payroll Providers*** - In circumstances where a professional employer organization or other payroll provider used by a borrower is required to report wages under the provider's EIN, payroll documentation provided by the payroll provider that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower's employees will be deemed acceptable PPP Loan payroll documentation. Relevant information from a Schedule R (Form 941), attached to the payroll provider's Form 941 should be used if it is available; otherwise, the borrower should obtain a statement from the payroll provider documenting the amount of wages and payroll taxes. The FAQ also confirms that employees of the borrower will not be considered employees of the payroll provider.

- **Measurement Period for Determining Payroll and Number of Employees** - Borrowers may choose to calculate their payroll costs using data from either (a) the previous 12 months or (b) calendar year 2019. This represents a departure from the CARES Act, which provides that the maximum loan amount for a borrower will be equal to the average payroll costs for the 12 months prior to the date of application. The FAQ also provides that Borrowers may use their average employment over the same time periods to determine their number of employees for purposes of applying an employee-based size standard. Alternatively, borrowers may elect to use SBA's usual calculation: the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months).
- **SBA's Existing Affiliation Rules Apply** - The FAQ clarifies that borrowers must apply SBA's existing affiliation rules, as set forth in 13 C.F.R. section 121.301(f), and the affiliation rules in SBA's Interim Final Rule on Affiliation adopted on April 3. In addition, SBA's existing affiliation exclusions, including the exclusions in 13 C.F.R. section 121.103(b)(2), also apply to PPP Loans.
- **Minority Shareholders Can Relinquish Rights to Avoid Affiliation** - Under the SBA's existing affiliation rules, a minority shareholder will be deemed to control a borrower if the minority shareholder has the ability to prevent a quorum or otherwise block action by the board of directors or shareholders. The FAQ provides that if a minority shareholder irrevocably waives or relinquishes such rights, the minority shareholder will no longer be deemed an affiliate of the business (assuming that there is no other relationship that would trigger the affiliation rules).
- **Small Business Concerns** - The FAQ clarifies that small businesses can qualify for a PPP Loan even if they have more than 500 employees, as long as they satisfy the existing definition of a "small business concern" (SBC) under section 3 of the Small Business Act. A business can qualify as an SBC if it meets certain applicable industry size standard or annual receipts thresholds, which are set forth [here](#). Additionally, a business can qualify for a PPP Loan as an SBC if it met both tests in SBA's "alternative size standard" as of March 27, 2020: (1) the maximum tangible net worth of the business is not more than \$15 million; and (2) 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.
- **Eight-Week Forgiveness Period** - The FAQ clarifies that the 8-week period for determining payroll costs and other costs eligible for forgiveness will be measured from the date on which the lender makes the first disbursement of the PPP Loan to the borrower.

The FAQ contains additional clarifications that are not described here. The full text of the FAQ can be found [here](#). For additional background on SBA's guidance with respect to PPP Loans, please see our Client Alert on SBA Updates to PPP Loans [here](#). For additional background on small business loans available under the CARES Act, including PPP Loans, please see our Client Alert on Small Business Loans under the CARES Act, available [here](#). Due to the recent adoption of the CARES Act, interpretation of some of its provisions is uncertain, and it is subject to additional clarification and interpretation by Treasury, IRS, SBA and other federal regulatory agencies.

If you need more information, or if you are considering relying on this relief, please contact one of the attorneys in the Corporate Group at Shartsis Friese LLP: P. Rupert Russell, Anthony J. Caldwell, Michael B. Dell, Jeffrey L. Braker, David Suozzi, Elizabeth Sparrowe Marcil, Sergio A. Broholm or Maribeth T. Charvet.