

Trump Signs \$484 Billion Relief Bill to Aid Small Businesses

Article

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Today, April 24, President Trump signed into law the Paycheck Protection Program and Health Care Enhancement Act (the “Act”). The House and Senate passed the Act on April 21 and April 23, respectively. The Act allocates an additional \$484 billion to replenish the Paycheck Protection Program (“PPP”) and to provide funds for hospitals and coronavirus testing.

The \$484 billion will be allocated as follows:

- \$310 billion to increase PPP funding
- \$60 billion to increase Economic Injury Disaster Loan (“EIDL”) funding (\$10 billion of which is allocated specifically to Emergency EIDL grants)
- \$75 billion directed to hospital funding
- \$25 billion directed to new coronavirus testing programs

The aforementioned funding is in addition to the \$2.3 trillion included in the CARES Act, which allocated nearly \$350 billion to the PPP. Initial funding for the PPP, which began accepting applications on April 3, was entirely depleted along with EIDL funds by April 16.

President Trump tweeted that upon the signing the bill, the administration’s focus will shift toward the “phase four” coronavirus bill, which is likely to include more help for local and state governments, as well as additional tax incentives for businesses and further payroll tax cuts.

In addition to the expansion of funding for the PPP, a new SBA FAQ was published on Thursday, April 23, in consultation with the Department of the Treasury. While we will not repeat all of the FAQs here, there are a few that we wish to highlight.

1. FAQ 16 provides that, under the Act, payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee’s and employer’s share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees.

As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax. For example, an employee who earned \$4,000 per month in gross wages, from which \$500 in federal taxes was withheld, would count as \$4,000 in payroll costs. The employee would receive \$3,500, and \$500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the \$4,000 in wages are excluded from payroll costs under the statute.

2. FAQ 17 provides that borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application and need not take any action based on the updated guidance in these FAQs. However, borrowers whose previously submitted loan applications have not yet been processed may revise their applications based on clarifications reflected in these FAQs. It is also not clear how, if at all, this particular FAQ is to be interpreted in light of FAQ 31 which we address below.
3. FAQ 20 provides that the eight-week period for calculation of the amount of forgiveness of a PPP loan begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.
4. FAQ 23 provides that if a franchise brand is listed on the SBA Franchise Directory, each of its franchisees that meets the applicable size standard can apply for a PPP loan. (The franchisor does not apply on behalf of its franchisees.) The \$10 million cap on PPP loans is a limit per franchisee entity, and each franchisee is limited to one PPP loan.

Franchise brands that have been denied listing on the Directory because of affiliation between franchisor and franchisee may request listing to receive PPP loans. SBA will not apply affiliation rules to a franchise brand requesting listing on the Directory to participate in the PPP, but SBA will confirm that the brand is otherwise eligible for listing on the Directory.

5. FAQ 24 provides that under the CARES Act, any single business entity that is assigned a NAICS code beginning with 72 (including hotels and restaurants) and that employs not more than 500 employees per physical location is eligible to receive a PPP loan, and that the \$10 million maximum loan amount limitation applies to each eligible business entity, because individual business entities cannot apply for more than one loan. There are specific examples provided that any company falling under NAICS code 72 should review in connection with an application.
6. FAQ 29 provides clarification that lenders may use scanned copies of documents or E-signatures or E-consents permitted by the E-sign Act, but also notes that this guidance does not supersede signature requirements imposed by other applicable law, including by the lender's primary federal regulator.
7. FAQ 31 reiterates that borrowers are required to make a good faith certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." In looking at whether the loan is "necessary," the SBA suggests borrowers take into account their current business activity and their ability to access other sources of liquidity sufficient to support ongoing operations in a manner that is not "significantly detrimental" to the business.

Despite the use of qualifiers such as "necessary" and "significantly detrimental," the FAQ provided no actual metrics (i.e. a certain percentage decrease in revenue as compared to the same period in the previous year) for potential borrowers to analyze. However, the guidance does state that, "it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification." The guidance goes on to say that companies who repay the funds in full by May 7 will be considered to have made their request "in good faith."

This latest request for publicly traded companies to return PPP funds comes in the wake of significant public criticism of large companies who received loans from the program while many small businesses were unable to get a loan before initial PPP funding was entirely depleted. Treasury Secretary Steven Mnuchin stated on Tuesday that "there are severe consequences for people who don't attest properly to this certification. And again, we want to make sure this money is available to small businesses that need it, people who have invested their entire life savings."

The PPP waived affiliation requirements for companies operating under NAICS code 72 (Accommodation and Food Services) – this allowed restaurant chains to apply for funding provided there were fewer than 500 employees *per location*. Initial guidance provided no indication that public companies would not qualify for this waiver. Several large restaurant chains such as Shake Shack (which received a \$10 million PPP loan), and Ruth's Chris Steak Houses have already repaid their loans. These companies pointed to the convoluted and unclear eligibility guidelines that on their face allowed such companies to apply.

While the new guidance makes it clear that public companies who have received PPP loans by utilizing the affiliation waiver should revisit their application and determine whether they can in "good faith" establish a basis for necessity, we also encourage every other company which has applied to revisit their application and evaluate the necessity of the PPP loan in light of this new guidance.