

Paycheck Protection Program (PPP) Size Eligibility

The Frequently Asked Questions (FAQ's) written by the SBA provide insights on the logical steps to be taken in the determination of size eligibility for the Paycheck Protection Program under the CARES Act. The FAQ's are available at <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

The first step to be taken is the determination of whether the business has more than 500 employees whose principal place of residence is in the United States, or if the business meets the SBA employee-based size standards for the industry in which it operates (based upon the NAICS code). Similarly, PPP loans are also available for qualifying tax-exempt nonprofit organizations described in section 501(c)(3) of the Internal Revenue Code (IRC), tax-exempt veterans organization described in section 501(c)(19) of the IRC, and Tribal business concerns described in section 31(b)(2)(C) of the Small Business Act that have 500 or fewer employees whose principal place of residence is in the United States, or meet the SBA employee-based size standards for the industry in which they operate.

The FAQ's clarified the following: "For purposes of loan eligibility, the CARES Act defines the term employee to include "individuals employed on a full-time, part-time, or other basis." A borrower must therefore calculate the total number of employees, including part-time employees, when determining their employee headcount for purposes of the eligibility threshold. For example, if a borrower has 200 full-time employees and 50 part-time employees each working 10 hours per week, the borrower has a total of 250 employees.

By contrast, for purposes of loan forgiveness, the CARES Act uses the standard of "fulltime equivalent employees" to determine the extent to which the loan forgiveness amount will be reduced in the event of workforce reductions."

In making the determination of the number of employees, businesses must apply the affiliation rules set forth in the SBA's Interim Final Rule on Applicable Affiliation Rules. Under SBA rules, entities may be considered affiliates based on factors including stock ownership, overlapping management, and identity of interest as set-forth in 13 CFR § 121.301. It is important to note that the SBA's affiliation rules include non-U.S. affiliates; however, we believe that requirement is superseded by the SBA's Interim Final Rule which specifically states that only "employees who principal place of residence is in the United States" are included for the purposes of PPP.

Businesses should also consider the specific exceptions to the affiliation rules provided by the SBA:

- The affiliation rules do not apply for any business assigned a NAICS code beginning with 72, any business concern operating as a franchise that is assigned a franchise identifier code by the SBA, and any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958.
- The affiliation rules do not apply to faith-based organizations.

- With respect to businesses assigned a NAICS code beginning with 72, the FAQ's further clarified that each hotel or restaurant location owned by a parent business is a separate legal business entity and each hotel or restaurant location that employs not more than 500 employees is permitted to apply for a separate PPP loan provided it uses its unique EIN.

To the extent that a business, along with its affiliates, determines it has more than 500 employees whose principal place of residence is in the United States and there is no exception to the affiliation rules available to it, the business can also consider whether it meets the Small Business Concern requirements. The FAQ's indicate that Small Business Concerns (as defined in section 3 of the Small Business Act, 15 U.S.C. 632) are not required to have 500 or fewer employees to be eligible borrowers in the PPP. A business can qualify as a Small Business Concern if it meets the SBA employee-based or revenue-based size standard corresponding to its primary industry. The size standards can be found at www.sba.gov/size.

Additionally, a business can qualify for the Paycheck Protection Program as a small business concern if it met both tests in SBA's "alternative size standard" as of March 27, 2020: (1) 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