

## New Developments on PPP Lending

### Coronavirus Advisory Alert

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On April 16, 2020, the Small Business Administration (SBA), less than two weeks after the activation of its Paycheck Protection Program (PPP), announced that funds for PPP loans had been completely depleted. An additional \$310 billion is expected to be authorized by pending legislation by the end of this week. Late last week, the SBA released a further revised Frequently Asked Questions (FAQ) guide, which expanded on previously published FAQs regarding PPP regulations. The major takeaways of that FAQ are provided below.

#### Franchises

The April 17 FAQ provides that where a franchise is listed in the SBA's Franchise Directory, the \$10 million cap on PPP loans "is a limit **per franchisee entity** and each franchisee is limited to one PPP loan" (emphasis added). This guidance is particularly confusing in the case where a franchisee establishes a separate legal entity for each franchise location. In such case, it would appear that the SBA would look through all of the separate legal entities and permit a single loan for the parent franchisee entity. That franchisees would be treated in this manner, which is in opposition to the treatment afforded hospitality, food services, and other North American Industry Classification System (NAICS) businesses, is somewhat surprising. The SBA Franchise Directory can be downloaded from this [link](#). However, we would advise any franchisee classified as a NAICS 72 businesses to utilize that exception from the SBA affiliation rules to enable each separate legal entity conducting franchisee business to qualify for its own PPP loan in an amount not to exceed \$10 million, as clarified in this FAQ.

#### Hospitality and Food Services

The FAQ further clarified that any business assigned NAICS code number 72 and employing a maximum of 500 employees per location would be eligible for a PPP loan. However, unlike the apparent limitation on franchisees, if a parent company operates each hotel or restaurant location through a separate legal entity, each separate entity can obtain its own PPP loan of up to \$10 million – even if the parent operates other businesses in industries other than NAICS 72 and thereby exceeds the 500 employee test on a consolidated basis – even if all employees of its hotel or restaurant business are excluded from the count. Below are examples provided by the FAQ to illustrate principles concerning affiliation for hospitality and food service businesses.

**Example 1:** Company X directly owns multiple restaurants and has no affiliates.

- Company X may apply for a PPP loan if it employs 500 or fewer employees per location (including at its headquarters), even if the total number of employees across all locations exceeds 500.

**Example 2:** Company X wholly owns Company Y and Company Z (as a result, Companies X, Y, and Z are all affiliates). Company Y and Company Z each own a restaurant with a maximum of 500 employees.

- Company Y and Company Z can each apply for a PPP loan because each has a maximum of 500 employees. The affiliation rules do not apply, because Company Y and Company Z are each in the food services industry (NAICS code 72).

**Example 3:** Company X wholly owns Company Y and Company Z (as a result, Companies X, Y, and Z are all affiliates). Company Y owns a restaurant with 400 employees. Company Z is a construction company with 400 employees.

- Company Y is eligible for a PPP loan because it has 500 or fewer employees. The affiliation rules do not apply to Company Y, because it has 500 or fewer employees and it is in the food services industry (NAICS code 72).
- The waiver of affiliation rules does not apply to Company Z, because Company Z is in the construction industry. Under SBA affiliation rules, 13 CFR 121.301(f)(1) and (3), Company Y and Company Z are affiliates of one another because they are under the common control of Company X. This means that the size of Company Z is determined by adding its employees to those of Company X and Company Y. Therefore, Company Z is deemed to have more than 500 employees, together with its affiliates.

### **Reconciling Bank Secrecy Act Requirements**

When a borrower applies for a PPP loan, the lender must verify certain information concerning any individual or entity that has a 20% or greater ownership stake in that borrower. Such information includes name, address, tax identification number, and other items. Under the Bank Secrecy Act (BSA), lenders are obliged to collect this information only from owners that have at least a 25% stake in an applicant. The April 17 FAQ now makes it clear that lenders do not need to acquire this information from 20% owners where the applicant is an existing customer. However, where the applicant is a *new* customer, lenders collecting information on 20% owners of the applicant will be deemed in compliance with BSA requirements.

### **Submitting PPP Loan Applications Through E-Tran**

The April 17 FAQ notes that lenders must collect the information and certifications found in the Borrower Application Form (Form 2483) and must review and confirm the payroll documentation provided by the borrower prior to submitting the PPP application through the SBA's E-Tran system. Lenders that did not take these steps and submitted applications on E-Tran before April 14 do not have to withdraw those applications but must fulfill their responsibilities regarding these applications by the date of loan closing.

### **Selling PPP Loans on the Secondary Market**

Lenders may sell PPP loans on the secondary market at any time after the loan is fully disbursed. A secondary market sale does not require approval from the SBA and can be done at a premium or discount to par value.