

# The SBA Is Accepting New CARES Act Applications; Can Businesses Apply For More Than One Loan?



**Margaret Johnston**  
mjohnston@mwlaw.com  
(501) 688.8870



**Craig Cockrell**  
ccockrell@mwlaw.com  
(479) 464.5683

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The President signed the Paycheck Protection Program and Health Care Enhancement Act into law on April 24, 2020, injecting an additional \$484 billion in aid to supplement the SBA business loan programs created under the CARES Act. In particular, the new Act dedicated the following SBA funds:

- An additional \$310 billion for the currently-depleted [Paycheck Protection Program \(PPP\)](#), of which \$60 billion is reserved for small and midsize banks, credit unions and community development finance institutions; and
- An additional \$50 billion for the SBA's COVID-19 Economic Injury Disaster Loans (EIDLs).

The SBA is accepting new applications for these loans beginning 10:30 a.m., EDT, on Monday, April 27, 2020.

With the infusion of new money into these loan programs, small businesses that have not yet applied may consider applying for a loan from one or both of these programs. However, businesses that are affiliated with other businesses (through common ownership or control) may not be approved for a separate loan, if an affiliate has already applied and the SBA imposes loan caps to the affiliated businesses as a group. This alert will address how to determine eligibility for the SBA loan programs and the total number and amount of loans available, on the basis of whether a small business loan applicant has any "affiliates" as defined under the applicable regulations.

## What is the maximum amount a borrower may apply for?

The maximum PPP loan amount available is, generally, 2.5 times the applicant's average monthly payroll costs over the last year, up to \$10 million. The maximum EIDL loan amount is \$2 million.

## How does an applicant's relationship with its affiliates affect its loan eligibility?

To be eligible for the PPP or the EIDL, an applicant needs to meet both of the following size and affiliation criteria:

1. the size of the individual applicant must not exceed the SBA's size standards according to its primary industry type; and
2. the size of the applicant combined with that of its affiliates must not be greater than the higher of either the size standard for the primary industry of the applicant alone or the size standard for the primary industry of the applicant and its affiliates together.

The same considerations that determine whether an applicant has affiliates for purposes of eligibility could also affect the total number and amount of loans sought.

**Determining whether the individual applicant meets the size criteria.** A small business can be an eligible borrower even if it has more than 500 employees, as long as it has 500 or fewer employees whose principal place of residence is in the United States, or if it satisfies the SBA employee-based size or revenue standards for the industry in which it operates.

SBA has established size standards for “small business concerns” based on the entity’s economic activity or industry under the North American Industry Classification System (NAICS). Applicants for CARES Act SBA loans can find the size standard applicable to their business type by searching the [NAICS Association’s Table of Small Business Size Standards](#). A summary of the calculation guidelines for these standards is provided below.

Finally, according to the SBA’s guidance on the PPP, if a business does not qualify by virtue of the SBA’s size standards under the NAICS, it may still qualify for the Paycheck Protection Program as a small business concern if, as of March 27, 2020, it met SBA’s two-part “alternative size standard” test:

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.

In [new FAQs issued April 26](#), the SBA noted that agricultural producers, farmers, and ranchers, including cooperatives, are eligible for PPP loans if: (i) the business has 500 or fewer employees, or (ii) the business fits within the revenue-based sized standard, which is average annual receipts of \$1 million. These applicants may also qualify under the current “alternative size standard” described above.

**Determining the applicant’s affiliates for purposes of loan caps and meeting the eligibility size criteria.** According to the SBA’s guidance, individual business entities cannot apply for more than one loan under the same program. To date, the laws and SBA’s guidance do not prevent multiple affiliates from applying for loans as separate entities so long as they and their affiliates meet the above eligibility requirements; but, in the absence of clarification otherwise, the applications of affiliates will be reviewed together and could be subjected collectively to the single loan amount caps under each program.

Businesses are considered affiliates “when one controls or has the power to control the other, or a third party or parties controls or has the power to control both.” However, there are exceptions. Some noteworthy scenarios:

- According to the SBA’s guidance, 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 fact that the applicant has a franchise or licensing relationship with another entity will not, in itself, cause that other entity to be considered an affiliate, “provided the applicant franchisee has the right to profit from its efforts and bears the risk of loss commensurate with ownership.”
- As for hotels and restaurants, the SBA has clarified that under the CARES Act, if a business entity is assigned a NAICS code beginning with 72 (including hotels and restaurants) and it employs not more than 500 employees per physical location, that single entity is eligible to receive a PPP loan and is permitted to apply for a separate PPP loan provided it uses its unique Employer Identification Number (EIN).
- A minority shareholder may be considered to control an applicant if the shareholder has the right to prevent a quorum or otherwise block action by the board of directors or shareholders; however, if that minority shareholder irrevocably waives or relinquishes such right, its ownership in the applicant will no longer cause it to be considered an affiliate.

- Finally, employees of the applicant will not be considered employees of the eligible borrower's payroll provider or Professional Employer Organization (PEO), even if the applicant may be required under state registration laws to report wage and other data on the Employer Identification Number (EIN) of the PEO or other payroll provider.

Each applicant must be sure to list its affiliates in the loan application, or it could be subject to subsequent investigation under the False Claims Act.

**Calculating the applicable size standard.** Depending on the primary industry of the applicant and its affiliates, the relevant size standard for SBA loan eligibility is based on either average annual receipts or average employment. Instructions to calculate these figures can be found in the Code of Federal Regulations at 13 CFR § 121.104 and 13 CFR § 121.106, respectively.

Generally speaking, an applicant can calculate its aggregate payroll costs using data either from the previous 12 months or from calendar year 2019. Applicants with seasonal business models should note that the PPP is designed to help businesses maintain employment in the immediate eight weeks from disbursement of the loan, and that these loans are being approved as quickly as possible, for disbursement by lenders within ten calendar days. The SBA will allow seasonal businesses to use average monthly payroll for the period between February 15, 2019, or March 1, 2019, and June 30, 2019. There is currently no guidance under the PPP loans specifically to accommodate businesses that normally expect higher activity in the second half of the year.