

**Crowell & Moring:**

**Response to Associated General Contractors of America**

**Question About the Treasury Department's New Guidance on the Paycheck Protection Program**

*April 7, 2020*

**Question**

If a construction company meets the following criteria, may that company rely on the new guidance that the Treasury Department posted on its web site on April 6, 2020 (available [here](#)) to certify that the company is eligible to receive a loan under the current rules “that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program,” per the loan application form that the Small Business Administration promulgated to support that program (SBA Form 2483) as of this date:

1. the company does not meet the small business size standard that the Small Business Administration has establish for such a company, but
2. the company has fewer than 500 employees; and
3. in fact, all of the information that the company provides to the lending institution in conjunction with its application form and all supporting documents are true and accurate; and
4. in fact, the company is otherwise eligible for a federal loan pursuant to the Paycheck Protection Program?

**Short Response**

What follows is Crowell & Moring’s current analysis based on current information. Please note that (1) this general perspective should not be considered legal advice, (2) the situation and government guidance is rapidly evolving, and (3) individual circumstances may vary and additional considerations may bear on this analysis which is complex.

In short: Yes, for the reasons discussed in this document. On April 6, 2020, Treasury posted an FAQ that directly answers the question and on which construction companies can reasonably rely, to the extent provided here and in that document. The document states that:

3. **Question:** Does my business have to qualify as a small business concern (as defined in section 3 of the Small Business Act, 15 U.S.C. 632) in order to participate in the PPP?

**Answer:** No. In addition to small business concerns, a business is eligible for a PPP loan if the business has 500 or fewer employees whose principal place of residence is in the United States, or the business meets the SBA employee-based size standards for the industry in which it operates (if applicable). 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.

We view successful enforcement actions under the civil False Claims Act (“FCA”) as unlikely in this scenario, given the fact pattern described. The government’s FAQ and other guidance documents would cut against the government’s own arguments in the context of an action under the FCA. Indeed, applicants can cite to the government’s own interpretive guidance when applying and making certifications. Applicants should consider noting on the face of any application that they are relying on the government’s own FAQ documentation in support of their eligibility and certification. Details follow.

#### **Detailed Response**

The core definition of an eligible business applicant under the Paycheck Protection Program has been evolving since the legislation took effect on March 27, 2020, with the clearest explanation of eligibility coming on April 6, 2020.

#### *CARES Act*

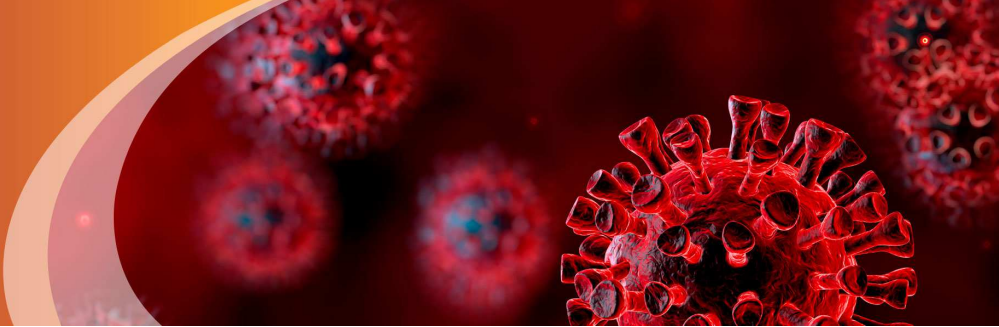
Section 1102 of the CARES Act contains the following original definition of eligible PPP applicants:

(D) INCREASED ELIGIBILITY FOR CERTAIN SMALL BUSINESSES AND ORGANIZATIONS.—

(i) IN GENERAL.—During the covered period, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) shall be eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of—

(I) 500 employees; or

(II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates.



### First Interim Final Rule

Nevertheless, in the first “interim final rule” that the SBA released the day before the application period opened on April 3, 2020, the SBA set forth a different standard for eligibility:

#### **2. What Do Borrowers Need to Know and Do?**

##### *a. Am I eligible?*

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry, and:

##### i. You are:

- A. A small business concern as defined in section 3 of the Small Business Act (15 USC 632), and subject to SBA’s affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act;
- B. A tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business; and

##### ii. You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

This description of the eligibility for the new program is inconsistent with the plain language of the CARES Act and caused a lot of confusion.

### Second Interim Final Rule

The next night, after the application period had already opened for businesses, SBA released a second “interim final rule.” This second rule described the eligibility requirements differently than first rule:

An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), **or** (1) has 500 or fewer employees whose principal place of residence is in the United States or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, and (2) is a tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code

(IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business concern.

(Emphasis added.)

*SBA Memorandum*

On April 4, 2020, the SBA then issued an internal memorandum from the Associate General Counsel for Procurement Law to the Associate Administrator for Capital Access, in which the SBA set forth an even more comprehensive set of size standards against which to measure PPP eligibility:

1. The industry-specific list of size standards at 13 CFR § 121.201.
2. The alternative size standard in section 3(a)(S), where a business is eligible for an SBA loan if the maximum tangible net worth of the business is not more than \$15 million; and the average net income after Federal income taxes (excluding any carry-over losses) of the business for the 2 full fiscal years before the date of the application is not more than \$5 million.
3. As supplemented by the CARES Act, a 500-employee size standard that applies to all applicants.

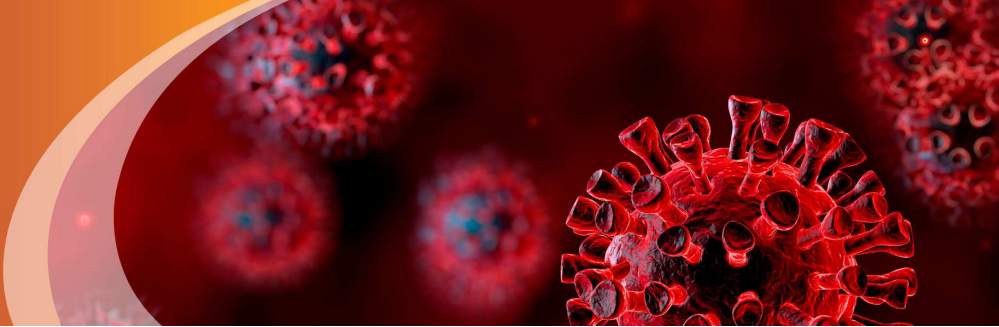
That memo also says:

Because the CARES Act supplements SBA's size standards, lenders still may determine the size of a business using the SBA's industry-specific size standards or the alternative size standard expressed in tangible net worth and average net income.

....

The CARES Act adds a 500-employee size standard for the Paycheck Protection Program. An applicant may use the 500-employee size standard **regardless of whether the applicant qualifies as a small business under SBA's two existing size standards.** See 15 USC § 636(a)(36)(D)(i) (providing for eligibility "in addition to small business concerns" to "any business concern" that meets the 500-employee size standard).

(Emphasis added.) While the memorandum has been circulating widely, SBA and Treasury do not appear to have posted it to either of their websites.



[SBA Form 2483](#)

Throughout this time period, the SBA Form 2483 has required applicants to certify to the following confusing statement of eligibility:

The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.

The form also requires applicants to make this certification under the threat of fines and imprisonment:

I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

[April 6 FAQ Document](#)

Only on April 6, 2020 did Treasury post an updated FAQ on its Treasury Cares website that directly answers the question of whether an applicant must qualify as a small business and fall under the 500 employee standard:

**3. Question:** Does my business have to qualify as a small business concern (as defined in section 3 of the Small Business Act, 15 U.S.C. 632) in order to participate in the PPP?

**Answer:** No. In addition to small business concerns, a business is eligible for a PPP loan if the business has 500 or fewer employees whose principal place of residence is in the United States, or the business meets the SBA employee-based size standards for the industry in which it operates (if applicable). 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.

Turning to the topic of affiliation, SBA and Treasury appear to recognize that the current certification required of applicants on the SBA Form 2483 is too narrowly crafted as the FAQ provides a much more expansive idea of what an applicant is certifying to:

5. **Question:** Are borrowers required to apply SBA's affiliation rules under 13 C.F.R. 121.301(f)?

**Answer:** Yes. Borrowers must apply the affiliation rules set forth in SBA's Interim Final Rule on Affiliation. A borrower **must certify on the Borrower Application Form that the borrower is eligible to receive a PPP loan, and that certification means that the borrower is a small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632), meets the applicable SBA employee-based or revenue-based size standard, or meets the tests in SBA's alternative size standard**, after applying the affiliation rules, if applicable. SBA's existing affiliation exclusions apply to the PPP, including, for example the exclusions under 13 CFR 121.103(b)(2).

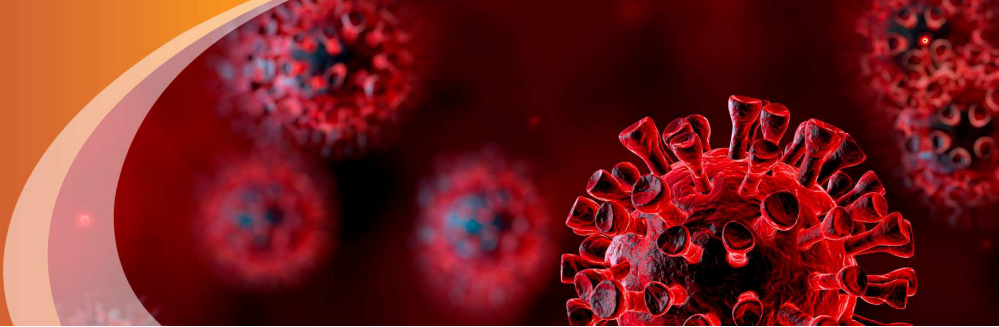
(Emphasis added.) But the FAQ recognizes its own limitations—it expressly states that it “does not carry the force and effect of law independent of the statute and regulations on which it is based.” Nevertheless the FAQ advises:

Borrowers and lenders may rely on the guidance provided in this document as SBA's interpretation of the CARES Act and of the Paycheck Protection Program Interim Final Rule (“PPP Interim Final Rule”) (link). The U.S. government will not challenge lender PPP actions that conform to this guidance, and to the PPP Interim Final Rule and any subsequent rulemaking in effect at the time.

Also, in apparent recognition of the choppy way in which the PPP has been rolled out, the FAQ indicates that an application is governed by the laws, rules, and *guidance* available at the time of the application:

17. **Question:** I filed or approved a loan application based on the version of the PPP Interim Final Rule published on April 2, 2020. Do I need to take any action based on the updated guidance in these FAQs?

**Answer:** No. Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application. However, borrowers whose previously submitted loan applications have not yet been processed may revise their applications based on clarifications reflected in these FAQs.



**Enforcement Risk**

We view successful enforcement actions under the civil False Claims Act (“FCA”) as unlikely in this scenario. For example, for the government to use its principal anti-fraud statute, the FCA, the government would need to prove that an applicant made a false statement, with knowledge that the statement was false, and that statement was material to the government’s decision to provide funding. The government’s FAQs and other guidance documents would cut against the government’s own arguments in the context of an action under the FCA. Indeed, applicants can cite to the government’s own interpretive guidance when applying and making certifications. Applicants might further bolster their position by noting on the face of application that they are relying on the government’s own FAQ documentation in support of their eligibility and certification. That contemporaneous evidence of the company’s reliance on government interpretations may be highly useful in further minimizing risk of a successful fraud action by the government.

\* \* \*

**Contacts**



Amy O’Sullivan, Partner  
[aosullian@crowell.com](mailto:aosullian@crowell.com)  
202.624.2563



Olivia Lynch  
[olynch@crowell.com](mailto:olynch@crowell.com)  
202.624.2654



Mana Lombardo  
[melombardo@crowell.com](mailto:melombardo@crowell.com)  
213.443.5563



David Robbins  
[drobbins@crowell.com](mailto:d Robbins@crowell.com)  
202.624.2627



Peter Eyre  
[peyre@crowell.com](mailto:peyre@crowell.com)  
202.624.2807



Jeff Selman  
[jselman@crowell.com](mailto:jselman@crowell.com)  
415.365.7442

Please visit our [COVID Resource Center](#) for additional information.