

# **SBA PUBLISHES PPP LOAN FORGIVENESS APPLICATION**

On Friday, the SBA published its Paycheck Protection Program Loan Forgiveness Application, which includes instructions for completing the application. The application can be found [here](#). Of note, the application contains further information with respect to the timing of paying and incurring payroll costs as that relates to calculating the amount eligible for forgiveness. Additionally, the application provides certain borrowers (those with biweekly or more frequent payroll periods) flexibility in terms of when the eight-week “covered period” begins.

O’Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the authors of this article, attorneys Jason Scoby and Pete Faust.

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## **SBA ISSUES FURTHER GUIDANCE ON PPP LOAN REPAYMENT SAFE HARBOR; ALL LOANS UNDER \$2 MILLION DEEMED TO HAVE BEEN RECEIVED IN GOOD FAITH**

This morning, the SBA issued much anticipated additional guidance with respect to the Paycheck Protection Program’s repayment safe harbor. The new guidance provides significant clarity with respect to how the SBA will evaluate whether a borrower made the following certification in good faith when submitting its loan application:

“Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

With the new guidance, the SBA makes clear that all borrowers receiving a loan of less than \$2 million will be deemed to have made the certification in good faith. Loans to borrowers and their affiliates will be combined for purposes of calculating this \$2 million threshold.

Moreover, borrowers (including their affiliates) receiving more than \$2 million will still have the opportunity to demonstrate that they made the certification in good faith, and if the SBA determines that they are not able to do so, the SBA will then permit those borrowers to repay

the loan without any further penalties.

The SBA's FAQ #46 states in full:

**46. Question:** How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

**Answer:** When submitting a PPP application, all borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

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# SBA EXTENDS SAFE HARBOR FOR REPAYING PPP LOANS TO MAY 14, PROMISES MORE GUIDANCE ON CERTIFICATION ISSUE

The Small Business Administration has given borrowers another week to decide whether to repay loans under the Paycheck Protection Program without the risk of penalties.

On Tuesday night, the SBA extended the safe harbor for repaying PPP loans from May 7 to May 14. In addition, the SBA indicated that it would provide before May 14 more guidance for the certification question that has caused much consternation for some PPP borrowers.

Applicants for PPP loans certified that, given current economic uncertainty, the loan was necessary to support the ongoing operations of the applicant. The CARES Act waived for PPP loans the requirement that borrowers be unable to obtain credit elsewhere; however, subsequent guidance from the SBA in its series of Frequently Asked Questions left some borrowers confused about the certification. In FAQ #31 and #37, the SBA indicated that the PPP certification must be made in good faith after taking into account the applicant's business activity and access to other sources of capital, causing complaints from some borrowers that the SBA may be retroactively changing the rules for PPP loans.

The SBA's FAQ #43, which was issued Tuesday night, is below:

**43. Question:** FAQ #31 reminded borrowers to review carefully the required certification on the Borrower Application Form that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA guidance and regulations provide that any borrower who applied for a PPP loan prior to April 24, 2020 and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith. Is it possible for a borrower to obtain an extension of the May 7, 2020 repayment date?

**Answer:** SBA is extending the repayment date for this safe harbor to May 14, 2020. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor. SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.

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Scoby.

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## ATTORNEYS PETE FAUST AND JASON SCOBY RECENTLY QUOTED IN THE BUSINESS JOURNAL

Attorneys Pete Faust and Jason Scoby were recently quoted in the *Business Journal* in an article about advising their clients on the Economic Injury Disaster Loan (EIDL) program and the Paycheck Protection Program (PPP). The *Business Journal* article, addressed how funds should be applied and documented, and the options available to those who did not receive funds in the initial round. O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the PPP and EIDL programs, please speak to your regular OCHDL contact.

The full article titled "Top tips for Milwaukee-area businesses that received PPP funds, and businesses that didn't" was published on April 23, 2020 in the *Business Journal*.

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## BUSINESSES SHOULD NOT OVERLOOK ECONOMIC INJURY DISASTER LOANS

Although not getting as much attention as forgivable Paycheck Protection Program loans, Economic Injury Disaster loans are a viable alternative or complementary emergency loan for businesses — especially businesses that do not have many employees, such as real-estate holding companies.

The CARES Act provide an opportunity for borrowers by waiving certain requirements that otherwise renders many businesses ineligible to receive EID loans. Under the CARES Act, a business that does not meet the Small Business Administration's small business criteria can still qualify for EID loans if the business has no more than 500 employees. The CARES Act also waives for EID loans the SBA's requirement that an applicant demonstrate that it is unable to obtain credit elsewhere, often a significant hurdle for potential borrowers.

Other terms of EID loans include:

**Loan Amount:** Up to \$2 million, as determined by the SBA based on COVID-19 impact on

and creditworthiness of applicant.

**Payment Terms:** Loan term of up to 30 years. Interest rate of 3.75% for businesses and 2.75% for non-profits. Unlike PPP loans, EID loans cannot be forgiven, with the exception of the \$10,000 emergency advance described below. Payments deferred for 12 months after disbursement.

**\$10,000 Advance:** Applicants are eligible to receive an emergency advance of up to \$10,000 by submitting an application. If application is denied, the advance is forgiven (though the forgivable advance reduces the amount of any PPP loan that can be forgiven).

**Use of Proceeds:** EID loans are working capital loans and may be used for fixed debts, payroll, accounts payable, and other expenses that cannot be paid because of COVID-19's impact.

**Personal Guaranty:** Required of owners with 20% or more of equity, except for EID loans of \$200,000 or less.

**Collateral :** Loans of more than \$25,000 require borrowers to pledge available collateral, but lack of available collateral will not cause an application to be rejected.

**Underwriting:** Based on SBA review of credit score.

**Affiliation Rules:** EID loans are subject to the SBA's affiliation rules, which are discussed [here](#).

**Other Loans:** PPP loan applicants may also apply for EID loans, but the loans are not supposed to be used for the same purpose.

**Dates:** Application deadline is December 21, 2020. The SBA initially indicated that the \$10,000 advances would be made within three days after submission of application and certification but the SBA now indicates that the advances will be paid "within days" of a final submission of an application. Loan approval is expected within 21-30 days after complete application submitted. Funding of loan will be within four days after approval.

**Application Process:** Borrowers apply directly to the SBA, not banks, for EID loans. The application can be found [here](#).

A borrower will likely need permission from any existing lender to obtain an EID loan because loan agreements typically restrict a borrower's ability to incur additional indebtedness and or grant additional security interests or mortgages.

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## **LOAN FRUSTRATION CONTINUES FOR PE AND VC COMPANIES**

Many companies controlled by private-equity firms and venture-capital firms still have not received clearance to apply for emergency loans through the Small Business Administration.

Despite bi-partisan support and lobbying efforts by PE and VC firms late last week, there has been no waiver of the Small Business Administration's affiliation rules, which jeopardizes the ability of companies controlled by PE and VC firms to apply for Paycheck Protection Program loans and other SBA Section 7(a) business loans, including Economic Injury Disaster loans. We previously wrote about these efforts [here](#).

The SBA issued guidelines late Friday excluding faith-based and non-profit organizations from the affiliation rules for PPP loans, but leaving intact the affiliation rules for PE and VC companies. Even if a waiver is eventually issued, it may be too little, too late for PE and VC companies because some SBA-authorized lenders have been accepting PPP loan applications since Friday and have already approved PPP loans.

### **SBA Affiliation Rules**

Under the SBA's affiliation rules, the employees of portfolio companies controlled by a PE or VC firm are combined for purposes of determining whether each company has no more than 500 employees. Companies with more than 500 employees are ineligible for PPP and EID loans, with some limited exceptions. The SBA affiliation rules also do not apply to companies with North American Industry Classification System codes beginning with 72 (the hospitality industry).

It is important to note, though, that being owned by a PE or VC firm does not automatically make a company ineligible for a PPP or EID loan. First, the companies must actually be controlled by the PE or VC firm. Accordingly, mere ownership of less than 50% of the voting interests by a PE or VC firm, without additional rights allowing the PE or VC firm to control the company, would not prevent the company from applying for a loan. Second, a PE or VC firm must actually have more than 500 across its controlled companies.

### **Control by a PE or VC Firm**

The first issue is whether the PE or VC firm controls the company. The SBA clarified Friday night that the applicable affiliation rules are under [13 CFR 121.301](#). These affiliation rules are not as strict as the affiliation rules under 13 CFR 121.103.

Under 13 CFR 121.301(f), a PE or VC firm may exert control over a company in several ways, including: (i) owning more than 50% of the voting stock or other voting equity interest of the company, (ii) controlling a majority of the board of directors or managers, or (iii) having veto rights or other protective rights allowing the PE or VC firm to block action by the board or owners of the company.

### **Combination of Employees**

The CARES Act relaxed the eligibility requirements of prospective borrowers by allowing companies with no more than 500 employees to apply for PPP and EID loans, even if they would not have previously satisfied the SBA's size limitations, based, for example, on annual revenues. The SBA, however, combines the employees of all affiliates in determining eligibility. Each part-time employee is counted as one employee

A company controlled by a PE or VC firm is still eligible for a loan if the combined employees of that company and any other companies controlled by the PE or VC firm are not more than 500.

For example, if a PE firm controls five portfolio companies, and each portfolio company has 75 employees, all of the portfolio companies are eligible for a PPP or EID loan because the combined number of 375 employees does not exceed the SBA's 500-employee limit.

### **Amendment of Organizational Documents**

PE and VC firms frustrated by the lack of an SBA affiliation waiver could consider amending the organizational documents of one or more portfolio companies to waive or remove provisions that grant the PE and VC firms effective control over the company (e.g., veto powers) when the PE and VC firms do not own a majority of the voting interests of the company.

There is no guarantee that the SBA would accept an applicant's last-minute changes to its organizational documents, but to increase the chances of acceptance and to protect the applicant from claims of misleading the SBA, any amendment to the organizational documents should be: (i) fully disclosed to the SBA, (ii) effective prior to the date of application and effective through at least the term of the loan (perhaps longer), (iii) in accordance with general contract principles required for enforceable contracts, and (iv) strictly adhered to by all parties, particularly the PE and VC firms.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For

questions or further information relating to the Paycheck Protection Program and Economic Injury Disaster loans, please speak to your regular OCHDL contact, or the author of this article, attorney [Pete Faust](#).

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## COMPANIES OWNED BY PE AND VC FIRMS IN LIMBO OVER PPP LOANS

Many companies owned by private-equity firms and venture-capital firms are in jeopardy of being ineligible to apply for Paycheck Protection Program loans unless Treasury Secretary Steven Mnuchin grants a late reprieve from the Small Business Administration's affiliation rules.

Democratic and Republican lawmakers urged Mnuchin on Thursday to waive the affiliation rule and seemed hopeful that Mnuchin would provide the waiver. See [here](#) and [here](#). However, the additional guidance provided by the SBA late Thursday, on the eve of the PPP loan application date, made no mention of the waiver.

Under the SBA's affiliation rules, the employees of portfolio companies controlled by a PE or VC firm are combined for purposes of determining whether each company has no more than 500 employees. Companies with more than 500 employees are ineligible for PPP loans, with some limited exceptions.

For example, if a PE firm controls five portfolio companies, and each portfolio company has 200 employees, none of the portfolio companies or the PE firm would be eligible for a PPP loan. They would all be deemed to have 1000 employees for purposes of a PPP loan.

Under the SBA's affiliation rules, a PE or VC firm may exert control over a company in several ways, including: (i) owning more than 50% of the stock or other equity interest of the company, (ii) controlling a majority of the board of directors or managers, or (iii) having veto rights or other protective rights allowing the PE or VC firm to block action by the board or owners of the company.

The SBA affiliation rules are often viewed in the context of PE and VC firms, but the affiliation rules apply to all affiliated companies (e.g., subsidiaries), not just those owned by PE and VC firms, unless the late waiver is granted.

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## **EIGHTEEN OCHDL ATTORNEYS NAMED 2020 BEST LAWYERS IN AMERICA®**

O'Neil Cannon is pleased to announce that eighteen lawyers have been named to the 2020 Edition of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Its first international list was published in 2006 and since then has grown to provide lists in over 75 countries.

“For more than a third of the century,” says CEO Steven Naifeh, “Best Lawyers has been the gold standard of excellence in the legal profession.” President Phil Greer adds, “We are extremely proud of that record and equally proud to acknowledge the accomplishments of these exceptional legal professionals.”

Lawyers on *The Best Lawyers in America* list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and undergo an authentication process to make sure they are in current practice and in good standing.

We would like to congratulate the following attorneys named to the 2020 *Best Lawyers in America* list:

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation Bankruptcy
- Peter J. Faust – Corporate Law, Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, Real Estate Law
- Joseph E. Gumina – Litigation – Labor and Employment
- Dennis W. Hollman – Corporate Law, Trusts and Estates
- Grant C. Killoran – Litigation – Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, Product Liability Litigation – Defendants
- Gregory W. Lyons – Commercial Litigation, Litigation – Insurance
- Patrick G. McBride – Commercial Litigation

- Thomas A. Merkle – Family Law
- Chad J. Richter – Business Organizations (including LLCs and Partnerships)
- John Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation – Bankruptcy
- Steven J. Slawinski – Construction Law

Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* is based on an exhaustive peer-review survey. Over 54,000 leading attorneys cast more than 7.3 million votes on the legal abilities of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers* is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* “the most respected referral list of attorneys in practice.”

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- Peter J. Faust – Mergers and Acquisitions Law, Corporate Law
- Robert R. Gagan – Municipal Law
- John G. Gehringer – Real Estate Law, Construction Law, Commercial Litigation, Corporate Law
- Joseph E. Gumina – Litigation – Labor and Employment
- Dennis W. Hollman – Trusts and Estates, Corporate Law
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Additionally, Attorney Dean P. Laing has been named the 2019 Milwaukee Lawyer of the Year in Product Liability Litigation-Defendants.

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