



Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

March 30, 2020

FORGIVABLE SMALL BUSINESS ADMINISTRATION LOANS TO NONPROFITS

The Keeping American Workers Paid and Employed Act (“the Act”)¹ authorizes \$349 billion in Small Business Administration (“SBA”) loans to certain businesses and nonprofit organizations, including religious nonprofits. The principal amount of each loan is 100% forgivable if certain conditions are met. Those conditions include retaining employees on the payroll during the period February 15 through June 30, 2020. The availability of forgivable loans is intended to provide an incentive for employers, including nonprofits, to keep their employees on the payroll during the current coronavirus crisis rather than laying them off.

This memo provides information about the Act based on its text and without the benefit of yet-to-be-published SBA guidance.²

1. Certain Key Terms

The term “*covered period*” means “the period beginning on February 15, 2020 and ending on June 30, 2020” (p. 6). The term has a different meaning in the loan forgiveness provisions of the Act, where it is defined as “the 8-week period beginning on the date of the origination of a covered loan” (p 17).

¹ Title I of the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”). The CARES Act was passed by Congress, and signed into law by the President, on March 27, 2018. Unless otherwise noted, all page citations in this memo are to the text of the CARES Act as reproduced at <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

² Such guidance is anticipated and, in fact, required by the Act. The Act requires the SBA, no later than 15 days after enactment of the Act, to issue regulations to carry out the Act “without regard to the notice requirements” of 5 U.S.C. § 553(b) (p. 32). The Act also requires the SBA, no later than 30 days after enactment of the Act, to issue “guidance to lenders” on the loan deferment process (p. 12). See p. 12 (allowing lenders to provide “complete payment deferment relief for impacted borrowers with covered loans for a period of not less than 6 months, including payment of principal, interest, and fees, and not more than 1 year”). We will provide further information once the SBA issues its regulations. In the meantime, we are advocating for regulatory and other agency guidance that will ensure the inclusion of more dioceses and other Catholic institutions in this program.

The term “covered loan” means a loan made under this section of the Act “during the covered period” (p. 6).

2. Eligibility of Nonprofits

During the covered period, a nonprofit organization³ “shall be eligible to receive a covered loan” if it “employs not more than the greater of ... 500 employees”⁴ or “if applicable, the size standard in number of employees established by the [SBA] for the industry in which the ... nonprofit organization ... operates” (p. 8). In its Small Business Owner’s Guide to the CARES Act (“Guide”), the U.S. Senate Committee on Small Business Entrepreneurship notes that, in general, nonprofits are eligible for the loans if they have 500 employees or fewer, “as most nonprofit SBA size standards are based on revenue, not employee number.”⁵ Guide, p. 2.

3. Identifying the Nonprofit “Organization”

Determining the identity of the nonprofit “organization” for purposes of determining whether it exceeds the 500-employee cap is, in our opinion, a question for which the Act gives no simple or immediate answer.

By way of background, in considering whether a business entity is “small” enough to qualify for a small business loan, the SBA ordinarily counts the employees of that entity and its affiliated organizations. See 13 C.F.R. § 121.103 (setting out the affiliation rules); see SBA, *Small Business Compliance Guide: Size and Affiliation* (March 2014) (describing the rules), available at https://www.sba.gov/sites/default/files/affiliation_ver_03.pdf. Whether an organization is “affiliated” with another in turn depends in large part on the degree to which either organization controls or has the power to control the other, or whether a third party controls or has the power to control both. 13 C.F.R. § 121.103(a). The SBA considers a number of factors in determining this question, which ultimately turns on a “totality of the circumstances” test. *Id.* It is difficult to predict how the SBA will apply these rules to nonprofit organizations because the rules were written for, and designed to apply to, for-profits. To complicate matters further, the Act *waives* the affiliation rules for *some* small business concerns (pp. 8-9),⁶ and then states

³ Defined as “an organization ... described in section 501(c)(3) of the Internal Revenue Code ... that is exempt from taxation under section 501(a)” of the Code (p. 6).

⁴ For purposes of determining whether a nonprofit organization employs not more than 500 employees, “the term ‘employee’ includes individuals employed on a full-time, part-time, or other basis” (p. 9).

⁵ The Guide is available at https://www.sbc.senate.gov/public/_cache/files/9/7/97ac840c-28b7-4e49-b872-d30a995d8dae/F2CF1DD78E6D6C8C3BF58C6D1DDB2B.small-business-owner-s-guide-to-the-cares-act-final-.pdf. Organizations should consult the SBA’s Table of Small Business Size Standards, available at https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019.pdf.

⁶ Specifically, the affiliation rules are waived for a covered loan for (a) any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72, (b) any business concern

that those rules apply to nonprofit organizations “in the *same* manner as with respect to a small business concern” (p. 9, emphasis added). But the availability of a waiver of the affiliation rules for small business concerns seems to depend on criteria that are inapplicable to nonprofits. See n.6 *supra*.

In short, the text of the Act, in our view, does not offer clear guidance on this question. Given the lack of clarity, we are hoping for further guidance from the SBA to help answer this question. Such guidance is expected soon. See n.2 *supra*.⁷

4. Overall Loan Purpose and Requisite Certification

The SBA loans are intended to help the borrower, in light of current economic conditions, to retain its employees and to continue paying their salaries and wages (p. 11). The Act is also intended to prevent “double-dipping,” that is, eligibility for an SBA loan requires that the applicant not have already applied for or received an SBA loan for the same purpose and to cover the same costs (*id.*).

These objectives are reflected in the certification that a nonprofit organization must provide when it applies for an SBA loan. The applying organizations must make a good faith certification that (1) “the uncertainty of current economic conditions makes necessary the loan request to support the [organization’s] ongoing operations,” (2) funds “will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments,” (3) the organization “does not have any application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan,” (4) “during the period beginning on February 15, 2020 and ending on December 31, 2020,” the organization “has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan” (p. 11).

operating as a franchise that is assigned a franchise identifier code by the SBA, and (c) and any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act, 15 U.S.C. § 681 (pp. 8-9). This seems circular because it appears to make the *waivability* of the affiliation rules depend, in part, on an assessment of the *number* of employees, an assessment that in turn requires one to know whether or not the employees of related organizations should be counted.

⁷ Those organizations ineligible for an SBA loan by virtue of the 500-employee cap should note that under section 4003 of the CARES Act, nonprofits with between 500 and 10,000 employees are eligible for low-interest loans, with no principal or interest due for the first 6 months. These are not SBA loans, and they are not forgivable, but may be of interest to nonprofits seeking some relief. See p. 193 (specifying the inclusion of nonprofits). For more information about this program, see the last column of the chart issued by the National Council of Nonprofits, available at <https://www.councilofnonprofits.org/sites/default/files/documents/cares-act-loan-options-for-nonprofits.pdf>.

5. Amount of the Loan

In general, the maximum loan amount is the *lesser* of (a) the product obtained by multiplying 2.5 times the “average total monthly payments by the applicant for payroll costs⁸ incurred during the 1-year period before the date on which the loan is made,” or (b) \$10,000,000 (pp. 9-10). The calculation may be different for otherwise eligible organizations that were not in “business” during the period February 15, 2019 through June 30, 2019 (*id.*).

6. Allowable Uses of the Loan

During the covered period, the organization may use the covered loan for (a) payroll costs (see n.8 *supra* for the definition of payroll costs), (b) costs related to the continuation of group health benefits during period of paid sick, medical, or family leave, and insurance premiums, (c) employee salaries and similar compensation, (d) payments of interest on any mortgage obligation (which shall not include any prepayment or payment of principal on a mortgage obligation), (e) rent (including rent under a lease agreement), (f) utilities, and (g) interest on any other debt obligations that were incurred before the covered period (p. 10).

7. Loan Forgiveness

The borrower may receive loan forgiveness on a covered loan for an amount equal to the sum of the following costs incurred during the 8-week period beginning on the date of the origination of the loan: (a) payroll costs, (b) any payment of interest on any covered mortgage obligation (but not including any prepayment or payment of principal on a covered mortgage obligation), (c) any payment on any covered rent obligation, and (d) any covered utility payment (p. 18).⁹ The amount of loan forgiveness “shall not exceed the principal amount of the financing made available under the applicable covered loan” (p. 19).

However, the amount of loan forgiveness “shall be reduced” as a result of any reduction in (a) numbers of employees or (b) total salary or wages (excluding any employee whose salary

⁸ The term “payroll costs” means the sum of payments of any compensation with respect to employees that is a salary, wage, or similar compensation; payment for vacation, parental, family, medical, or sick leave; allowance for dismissal or separation; payment required for providing group health care benefits, including insurance premiums; payment of any retirement benefit; payment of State or local taxes assessed on the compensation of employees, but shall not include the compensation of any employee in excess of an annual salary of \$100,000 as prorated for the covered period, taxes imposed under chapters 21, 22, or 24 of the Internal Revenue Code during the covered period, any compensation of any employee whose principal place of residence is outside the United States, or paid sick or family and medical leave for which a credit is allowed under the recently-enacted Families First Coronavirus Response Act (p. 7).

⁹ A “covered mortgage obligation” is any indebtedness or debt instrument incurred in the ordinary course of business that is (a) a liability of the borrower, (b) is a mortgage on real or personal property, and (c) was incurred before February 15, 2020 (p. 17). A “covered rent obligation” is rent obligated under a leasing agreement in force before February 15, 2020 (*id.*). A “covered utility payment” is payment for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020 (*id.*).

during any single pay period in 2019 exceeded \$100,000 at an annualized rate of pay) (p. 19). There is an exception to the requirement to reduce the amount of loan forgiveness when the employer has eliminated the reduction in the number of its employees or their salary/wages no later than June 30, 2020 (pp. 19-20).