

Farmer and Rancher PPP Eligibility: Interim Final Rule for Ag Loans

There has been some question about the eligibility of farmers for PPP loans. Two matters have acted to resolve this question: (i) the enactment of the Paycheck Protection Program and Health Care Enhancement Act; and (ii) recent guidance from SBA. This memorandum addresses the eligibility of farmers for PPP loans.

Are Farmers Eligible for PPP Loans?

Yes. Section 101 of the Paycheck Protection Program and Health Care Enhancement Act adds in a subsection addressing eligible entities for PPP loans. Section 101 provides that: "agricultural enterprise[s] (as defined in section 18(b) of the Small Business Act (15 U.S.C. 647(b)) with not more than 500 employees" are eligible for PPP loans. "Agricultural enterprises" are "small business concerns engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural-related industries."

Likewise, SBA recently updated its PPP FAQ, to provide the following:

- **Question 34:** Are agricultural producers, farmers, and ranchers eligible for PPP loans?
- **Answer:** Yes. Agricultural producers, farmers, and ranchers 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.

Additionally, agricultural producers, farmers, and ranchers can qualify for PPP loans as a small business concern if their business meets SBA's "alternative size standard." The "alternative size standard" is currently: (1) maximum 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.

The next section of this memorandum will address the criteria for eligibility. Note that the "affiliation" rules will still apply.

What are the Eligibility Standards for Farmers and Ranchers Seeking PPP Loans?

The analysis of whether an for-profit applicant is eligible for a PPP loan begins with the question of whether the applicant have less than 500 employees. If it has less than 500 employees, then in general it will be eligible (subject to the rules regarding ineligible businesses).

If the applicant has more than 500 employees, it still can qualify as what the CARES Act calls a "business concern" if it meets the applicable NAICS threshold *expressed in terms of employees*. For nearly all industries under NAICS Sector 11 "Agriculture, Forestry, Fishing, and Hunting" the size standard is expressed as a revenue threshold of \$1 million (with limited examples such

as Cattle Feedlots, which \$8 million). Normally, that would mean that if a for-profit firm had more than 500 employees, it would not qualify as a "business concern" because that firm's applicable threshold is expressed in revenue rather than in employees. SBA's guidance seems to suggest that a farming operation that had more than 500 employees could still qualify as a "business concern" if it had less than \$1 million in receipts (*See* discussion below with reference to calculating receipts).

Whether SBA's guidance contains a misstatement of the applicable rules is of no moment. Even if an applicant cannot qualify as a "business concern", it can still qualify as a "small business concern". A small business concern must be independently owned and operated and must not dominate the field of operations in which it is operating. A small business concern must likewise meet the eligibility threshold contained in SBA's regulations. For most farm and ranching operations, that means it must have \$1 million or less in receipts.

For purposes of calculating the annual receipts, the SBA has established the following methodology: calculate the total receipts of the business over its most recently completed three (3) fiscal years divided by 3. 13 CFR § 121.104(a)(4).

Alternatively, a firm may be a "small business concern" if it meets *both* of the prongs of the SBA's "alternative size standards". Question 34, reproduced above essentially restates the rule which is:

- (1) 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.

See 15 U.S.C. Sec. 632(a)(5)(B).

PPP Loan Calculation: Interim Final Rule date 04/24/2020

Self-employed farmers (i.e., those who report their net farm profit on IRS Form 1040 Schedule 1 and Schedule F) should use IRS Form 1040 Schedule F in lieu of Schedule C, and Schedule F line 34 net farm profit should be used to determine their loan amount in place of Schedule C line 31 net profit. The calculation is otherwise the same as for Schedule C filers above. The 2019 IRS Form 1040 Schedule 1 and Schedule F must be included with the loan application.

Are Agricultural Cooperatives Eligible?

Yes. SBA has clarified that, other eligibility requirements are met, small agricultural cooperatives and other cooperatives may receive PPP loans. A lender would certainly want to scrutinize: (i) the form of entity of an agricultural cooperative takes, and (ii) affiliation rules.

In particular, a lender should bear in mind that if the cooperative is not organized for profit, that there may be a problem. Only 501(c)(3) tax exempt organizations (including churches, synagogues, and mosques that are not technically organized as 501(c)(3) organizations, but operate in accordance with the provisions of IRC Sec. 501(c)(3)) are tax-exempt organizations

that are eligible. A lender would want to carefully scrutinize the form of an agricultural cooperative to ensure it is in fact otherwise eligible.

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