

ARTICLE

Religious freedom and the SBA Paycheck Protection Program

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April 04, 2020

This week, as the Small Business Administration (SBA) launched the \$350 billion Paycheck Protection Program (PPP) to aid small businesses, nonprofits, and houses of worship, a few lingering questions remained in terms of how the SBA's normal requirements for its loans would apply to faith-based nonprofits and houses of worship. The administration resolved those questions through the release of two interim final rules and a frequently asked questions document for faith-based organizations. These rules and guidance provide clear answers for

faith-based organizations deciding whether to move forward with an SBA 7(a) loan during this time of crisis. Here is a summary of the key parts of these documents, which are linked at the bottom of this article.

Faith-based organizations and houses of worship don't surrender their rights by participating in the PPP.

Faith-based organizations and houses of worship will retain all constitutional and statutory religious freedom rights as they participate in the PPP. Indeed, as discussed further below, several program requirements are modified or waived for faith-based organizations in light of the religious freedom rights that they possess. According to the SBA guidance: Simply put, a faith-based organization that receives a loan will retain its independence, autonomy, right of expression, religious character, and authority over its governance, and no faith-based organization will be excluded from receiving funding because leadership with, membership in, or employment by that organization is limited to persons who share its religious faith and practice. Further, in the initial rules for the PPP, the Small Business Administration made clear, “All loans guaranteed by the SBA pursuant to the CARES Act will be made consistent with constitutional, statutory, and regulatory protections for religious liberty, including the First Amendment to the Constitution, the Religious Freedom Restoration Act,” and other regulatory and statutory protections for faith-based organizations.

Faith-based organizations retain their rights to hire leaders and staff consistent with their religious beliefs.

Current SBA regulations and the new guidance released this week make clear that faith-based organizations, including churches, may continue to hire pastors, leaders, and staff that share their religious beliefs. No new requirements on hiring will apply if the organization participates in the PPP. The guidance states, “SBA regulations also make clear that these nondiscrimination requirements do not limit a faith-based entity’s autonomy with respect to membership or employment decisions connected to its religious exercise.”

Churches will not be required to change membership requirements or religious practices.

Although participating in the PPP program does come with some new nondiscrimination requirements, discussed further below, the SBA guidance makes clear that churches will not be required to make changes to its religious practices, including membership, Bible studies, weddings, funerals, and so on. As discussed above, churches retain their religious freedom rights even while participating in the program.

Faith-based organizations will be required to offer social services to the public without discrimination, but most organizations already do.

While participating in the program, faith-based organizations will be required to offer goods, services, and accommodations to the general public without discriminating on the basis of race, color, religion, sex, handicap, age, or national origin. It is worth noting, however, that on principle, nearly every faith-based organization or church is already doing so. Consider the example of a soup kitchen or thrift store: these services are already open to all and not for the sake

of complying with a nondiscrimination law, but for the sake of the gospel. The guidance clarifies that these new requirements do not apply to a church's ability to care for its own members. The guidance states, "SBA's regulations do not apply to limit a faith-based organization's ability to distribute food or clothing exclusively to its own members or co-religionists." Further, the guidance clarifies that these new requirements are not permanent, "once the loan is paid or forgiven, those nondiscrimination obligations will no longer apply." To see the SBA's full guidance of this issue, [see question 5 in the SBA's new FAQ document \(https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf\)](https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf).

Faith-based organizations are generally exempt from the SBA's affiliation rules.

In order to qualify for the PPP, the organization must have fewer than 500 employees. In addition, the SBA has a complex set of affiliation rules that have raised some questions about whether a group of churches or an entire denomination should be counted as a single organization for the purposes of the 500-employee limit. The SBA's guidance clarifies, "If the connection between your organization and another entity that would constitute an affiliation is based on a religious teaching or belief or is otherwise a part of the exercise of religion, your organization qualifies for an exemption from the affiliation rules." For further information about the exemption for affiliation requirements, [see questions 6, 7, and 8 in the SBA's FAQ document \(https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf\)](https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf).

Churches can participate even if they have not received their own tax exemption letter from the IRS.

Guidance from the SBA clarifies that churches are eligible to participate even if they have not received their own tax exemption letter from the IRS. This applies to churches and integrated auxiliaries that are operating under another organization or convention's tax exempt status as well as churches that meet the statutory definition of a church but have not applied for tax exempt status. The guidance provides: Churches (including temples, mosques, synagogues, and other houses of worship), integrated auxiliaries of churches, and conventions or associations of churches qualify for PPP and EIDL loans as long as they meet the requirements of Section 501(c)(3) of the Internal Revenue Code, and all other PPP and EIDL requirements. Such organizations are not required to apply to the IRS to receive tax-exempt status. See 26 U.S.C. § 508(c)(1)(A).

Conclusion

Thankfully, the SBA's new guidance provides the answers to the questions that churches and nonprofit organizations have been asking this week with respect to religious freedom and eligibility for the SBA's Paycheck Protection Program. To go deeper, the documents discussed above may be found here:

- [SBA Frequently Asked Questions for Faith-Based Organizations in the Paycheck Protection Program and the Economic Injury Disaster Loan Program \(https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf\)](https://www.sba.gov/sites/default/files/2020-04/SBA%20Faith-Based%20FAQ%20Final.pdf)

- [Summary of Affiliation Rules in the SBA Paycheck Protection Program](https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20.pdf)
(<https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20.pdf>)
 - [Interim Final Rule for SBA Paycheck Protection Program](https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf)
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 - [Explainer: How your church can receive a forgivable COVID-19 loan](https://erlc.com/resource-library/articles/explainer-how-your-church-can-receive-a-forgivable-covid-19-loan)
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