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Small Business Relief under the CARES Act

Overview of the SBA Paycheck Protection Program

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Paycheck Protection Program

Below is a detailed description of the original Paycheck Protection Program (PPP) established under the CARES Act and an overview of the "second draw" PPP program (SDPPP) created at the end of 2020 in the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act ("Economic Aid Act"). The programs are designed to encourage employers to maintain payroll and to help small businesses cover their expenses (e.g., payroll, mortgage, rent, utilities, etc.) during the COVID-19 crisis. **Both the original PPP and the SDPPP have been authorized through June 30, 2021, but SBA will only accept and process loan applications submitted by lenders before June 1, 2021.**

The Economic Aid Act, signed into law on December 27, 2020, made several notable changes to the PPP. All of these changes apply retroactively to March 27, 2020, when the original program was established, unless the loan has already been forgiven. As reflected in the discussion below, the Economic Aid Act:

- Allows borrowers to select their own "forgiveness period" ending any time between 8 and 24 weeks after loan origination;
- Still requires borrowers to spend at least 60% of loan dollars on payroll costs to be eligible for full forgiveness, but expands the list of allowable and forgivable expenses to include: certain operations expenditures (i.e., software and cloud computing services needed to run the business); costs for uninsured property damage caused by public disturbances in 2020; supplier costs; and worker protection expenditures (e.g., personal protective equipment (PPE), space adaptation measures, etc.);
- Clarifies that businesses not in operation on February 15, 2020, and publicly traded companies are not eligible for PPP or SDPPP loans;
- Extends PPP eligibility to: housing cooperatives, certain news organizations with multiple locations/affiliates, and 501(c)(6) organizations that satisfy various lobbying restrictions (the American Rescue Plan Act enacted on March 11, 2021 further expanded this list to include other 501(c)s, except (c)(4)s);
- No longer requires reductions in PPP forgiveness amounts for EIDL advances;
- Makes PPP and SDPPP borrowers eligible (retroactively to the CARES Act) for the Employee Retention Tax Credit (ERTC), but borrowers may not use the same paid wages to get both PPP forgiveness and the ERTC (borrowers elect PPP forgiveness or ERTC); and
- Reverses previous IRS guidance and stipulates that forgiven business expenses paid for with PPP dollars <u>are</u> deductible and forgiven amounts will not be included in gross income.

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The Small Business Administration (SBA) has issued final loan and forgiveness applications, multiple interim final rules, and FAQ guidance to implement the PPP and SDPPP (collectively, the "rules"). These rules generally supersede any conflicting SBA loan program requirements contained in SBA Business Loan regulations (13 CFR 120.10, et seq.) until the PPP and SDPPP programs expire.

Because SBA is issuing new rules and guidance on a rolling basis, borrowers may rely on the rules and guidance in place at the time of the loan and/or forgiveness application and do not need to take any further action based on subsequent SBA releases.

The Original PPP

How long will these loans be available?

Loans are made to eligible borrowers on a first-come basis until program funds are exhausted or until the program expires, whichever is sooner. The PPP Extension Act of 2021 authorized the program through June 30, 2021, but directs SBA to only process first and second draw loan applications submitted by lenders **before June 1, 2021**.

What are some of the main benefits of a paycheck protection loan (PPL)?

- Loan amounts up to $10 million per eligible entity;
- Principal, interest, and fee payments are automatically deferred until loan forgiveness amounts are remitted or until 10 months after the forgiveness period expires for borrowers who do not apply for forgiveness by then;
- Full loan amount forgiveness for employers that maintain or restore pre-crisis payroll;
- 100% federally guaranteed;
- No recourse against individuals, shareholders, members, or partners of loan recipients for non-payment, unless s/he uses loan dollars for impermissible purposes;
- No collateral or personal guarantee requirements, or SBA fees;
- Loan maturities of two years (pre-June 5 loans) and five years (loans approved June 5 or later, and pre-June 5 loans that are renegotiated by the borrower and bank), but there is no penalty for prepayment; and
- Fixed interest rate of 1% calculated on a non-compounding, non-adjustable basis.

Who is eligible?

Any "small business concern" –

- As defined in current SBA rules based on employee-based or revenue-based size standards for the entity's primary industry (see www.sba.gov/size); or
- That meets both tests in the SBA's alternative size standard as of March 27, 2020:

- ➢ Maximum tangible net worth of the business is not more than $15 million, and
- ➢ Average net income after federal income taxes (excluding any carry-over losses) of the business for the two fiscal years before the date of PPL application is not more than $5 million.

Additionally, entities (including sole proprietors, independent contractors, and self-employed individuals) that were operating and paying workers on February 15, 2020 (or, for seasonal businesses, operated for any eight-week period between May 1, 2019 and September 15, 2019), and:

- Have 500 or fewer employees; or
- Satisfy the "small" SBA employee-based size standard for the entity's primary industry, if applicable.

Eligible entities include:

- For-profit businesses
- 501(c)(3) nonprofits
- 501(c)(12) electric and telephone cooperatives
- 501(c)(19) veterans organizations
- Tribal business concerns described in section 31(b)(2)(C) of the Small Business Act
- Housing cooperatives defined in section 216(b) of the Internal Revenue Code that employ 300 or fewer employees (other size measures do not apply)
- Agricultural enterprises described in section 18(b) of the Small Business Act
- 501(c)(6) organizations that employ 300 or fewer employees (other size measures do not apply) for which lobbying receipts and activities do not exceed 15% of overall totals and that did not spend more than $1 million on lobbying activities in the tax year prior to February 15, 2020 ("lobbying activities" are defined under the Lobbying Disclosure Act of 1995, 2 U.S.C. 1602)
- Certain FCC license holders, newspapers, broadcasters, colleges and universities with public broadcasting stations, and publicly traded news organizations that employ 500 or fewer employees per location (with special requirements for some that loan dollars be spent on local or emergency content)
- Other nonprofit organizations: 501(c) organizations (except (c)(3), (4), (6) or (19)s) that, if they were for-profit business concerns, would not be ineligible entities for SBA business loans (other than religious 501(c)s, which are eligible); that employ 300 or fewer employees (other size measures do not apply); and that satisfy the same lobbying restrictions applicable to 506(c)(6)s

Special Rules for Applicants with Self-Employment Income

Regarding individuals with self-employment income (e.g., independent contractors and sole proprietors), the rules clarify that you are eligible to apply for your own PPL if:

- You were in operation on February 15, 2020;
- Your principal place of residence is the US; and

- You filed or will file a Form 1040 Schedule C for 2019.

Notably, partners in partnerships may not submit separate PPL applications as self-employed individuals. Instead, self-employment income of general active partners may be reported as payroll costs (up to the $100,000 limit discussed below) on the partnership's consolidated application.

Special Rules for Faith-Based Organizations

The rules also contain special eligibility provisions for faith-based organizations. Such entities are eligible if they:

- Have not more than 500 employees; and
- Pay federal payroll taxes using their own IRS employer identification number (EIN) or are eligible for the federal tax deduction for gross income derived from any unrelated trade or business regularly carried out by a parish, church, etc. (see 26 U.S.C. 512(b)(12)).

Ineligible Entities

The rules explicitly exclude "household employers" of nannies, housekeepers, etc. from eligibility. The rules also exclude from this program entities that already are ineligible for SBA Business Loans under 13 CFR 120.110, except eligible entities listed above, legal gaming businesses, and hospitals that receive less than 50% of their funding, excluding Medicaid, from state and local governments. We encourage you to check the full list, but examples of ineligible entities include:

- Financial businesses primarily engaged in the business of lending;
- Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved by the loan proceeds;
- Life insurance companies;
- Businesses located in a foreign country;
- Private membership clubs and businesses;
- Speculative businesses (e.g., hedge funds and private equity firms, per SBA guidance); and
- Businesses primarily engaged in political or lobbying activities.

Moreover, as noted above, the Economic Aid Act clarified that publicly traded companies are ineligible. The law formalizes part of SBA's approach in previous FAQ guidance that created a presumption that publicly-traded companies with access to capital markets and "businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations" were not eligible for PPLs because they likely could not satisfy the good-faith "need certification" required under the CARES Act. SBA has not provided details on how it evaluates the "adequacy" of liquidity available to these potential borrowers.

Change in Ownership of Entities With PPLs

Effective October 2, 2020, SBA issued rules for changes in ownership of PPP borrowers. Notably, certain changes in ownership must be approved by the SBA. Further, the original PPP borrower remains responsible for performance of all loan obligations and all PPP certifications and requirements. No restrictions on changes in ownership apply, however, if prior to the closing date of the sale/transfer, the borrower has already repaid the PPL in full or has completed the forgiveness process and either received full forgiveness or repaid any unforgiven balance. More details on these rules and processes can be found here: https://www.sba.gov/sites/default/files/2020-10/5000-20057-508.pdf.

How do I count my employees to figure out if I'm eligible?

General Rules

Borrowers should use average employment numbers over the same period used for calculating monthly average payroll costs (discussed below) or they may use the average number of employees per pay period in the last 12 calendar months (or for the months the business has been operating, if fewer than 12 months).

All entities count full-time, part-time, and "other basis" employees (e.g., employees from temp agencies or professional employer organizations) **of the entity and of all of the entity's domestic and foreign affiliates**, unless an affiliation rule exception applies to your business or organization. The SBA has clarified that it is the borrower's responsibility to determine which, if any, entities are its affiliates. Lenders may rely on borrowers' certifications regarding overall headcount of employees.

Due to some confusion arising out of early SBA guidance, SBA is using its enforcement discretion to not find any borrower that applied for a PPL before May 5, 2020 ineligible because the borrower failed to include non-US employees in its employee headcount.

Affiliation Rules

The SBA has issued special guidance on affiliation rules applicable to the PPL program. Generally, entities are affiliates when one controls or has the power to control the other, or a third party or parties has the power to control both.

The guidance sets forth four tests/circumstances that will establish affiliations for PPL applicants:

- **Equity Ownership** – if an individual, concern, or entity owns or has the power to control more than 50% of the applicant's voting equity; absent such over 50% ownership, SBA will consider the CEO, Board of Directors, or similar body in "control" of the applicant; it also will consider a minority shareholder that has the authority to block Board or other shareholder action to be in "control."
- **Common Management –** when the CEO or President (or similar manager) of the applicant also controls the management of one or more other concern; or where an individual, concern or entity controls the Board/management of the applicant and the Board/management of one or more other concerns; or when a single individual, concern, or entity controls the applicant through a management agreement.
- **Identity of Interest –** when close relatives (spouse, parent, child, or sibling – or the spouse of any such person) have identical or substantially identical business or economic interests (e.g., they operate concerns in the same or similar industry in the same geographic area; but note, applicants may rebut a finding of affiliation under this test and show the businesses are separate.
- **Stock options, convertible securities, and agreements to merge –** generally will be considered to have present effect on the power to control a concern and are treated as though rights granted have been exercised. But no present effect will be given for:

- Agreements to open or continue negotiations toward a possible merger or sale at a future date (don't count as agreements in principal);
- Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect; or
- Individuals', concerns', or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.

Special Counting Rules and Affiliation Waivers for Certain Businesses

Under the CARES Act, there are special employee counting rules for "business concerns" with **NAICS industry codes starting with 72** (generally, "accommodations and food services"). Specifically:

- You are eligible for a PPL if you have 500 or fewer employees per location; and
- SBA affiliation rules are waived for these applicants (meaning only the employee count of the applicant entity, not the entity's affiliates, is considered).

SBA affiliation rules also are <u>waived</u> for "business concerns" that:

- Operate as a **franchise under an SBA franchise identifier code** (list available on the SBA website); or
- Receive financial assistance from Small Business Investment Act licensees.

To allow more businesses to take advantage of the franchise waiver, SBA has indicated that it will allow franchisors to apply for identifier codes for purposes of PPLs under a more relaxed process than would normally apply (but those codes will not extend beyond the PPL program).

There also is an affiliation rule waiver for **faith-based organizations**. Under SBA guidance, the normal affiliation rules do not apply to "the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization, or entity that is based on a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion." SBA will permit these applicants to make a good-faith determination about whether and to what extent the affiliation rule waiver applies to them and will not require lenders to assess the reasonableness of the applicant's determination.

The Economic Aid Act also waives the affiliation rules for **news organizations majority-owned or controlled by businesses concerns with NAICS codes beginning with 511110 or 5151**, as long as the organization has no more than 500 employees per physical location (or the applicable SBA size standard for number of employees), and **nonprofit broadcasting organizations with NAICS codes beginning with 5151.**

The American Rescue Plan waives the affiliation rules for **Internet-only news publishers** with a NAICS code of 519130 (that are majority-owned or controlled by an organization with the same code) that were not eligible for PPLs prior to March 11, 2021, if: the organization has 500 or fewer employees *or* satisfies the SBA size standard for that NAICS code *per location;* and the organization certifies in good faith that PPL proceeds will be used to support local or regional news operations.

Additionally, the general exceptions to the SBA's affiliation rules (*see* 13 CFR 121.103(b)) still apply for purposes of the PPL program.

Finally – and separate from the blanket affiliation rule waivers above – for employee counting purposes, the American Rescue Plan makes **501(c)(3) organizations with 500 or fewer employees *per location*** eligible for PPLs; and **other eligible nonprofits (except (c)(3)s and (19)s) are eligible if they employ not more than 300 employees *per location***.

A Few More Things to Consider on Counting

It is worth evaluating PPL eligibility from the perspective of each separately organized business concern. "Business concerns" under the SBA are for-profit business entities with US locations that have primary operations in the US or make a significant economic contribution in the US (e.g., by paying taxes). Business concerns may be organized as sole proprietorships, partnerships, LLCs, corporations, associations, trusts, cooperatives, or joint ventures with under 50% foreign business participation.

If a business concern operates under multiple NAICS industry codes (perhaps one of which begins with 72), the SBA will look at the code of your "primary industry" based on average receipts, employees, costs of doing business, etc.

How do I apply for a loan?

The rules clarify that entities may not apply for or receive more than one PPL (but the Economic Aid Act does allow borrowers who returned all or some PPL dollars or who did not receive the maximum loan amount for various reasons, including later rule changes, to apply for the remaining amount).

PPLs are available through private banks, credit unions, and other lending institutions that are authorized and elect to participate in the program. The Treasury Department has posted a link on its website to help you locate an eligible participating lender.

What is Required for the Loan Application?

Standard application forms are available at https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses. They are significantly streamlined compared to normal SBA 7(a) Business Loan applications. By design, banks' underwriting obligations for PPLs are very limited (essentially, verifying that documentation is submitted, payroll averages are substantiated, etc.) and they may rely on borrowers' documentation and certifications to determine eligibility and loan amounts.

The application generally requires:

- Basic business identification information;
- Payroll calculations and employee counts;
- A list of all owners of the applicant with 20% or greater ownership stake; and
- The good-faith certifications described below.

The only blanket "borrower requirements" imposed by the CARES Act for PPLs are certain good-faith certifications. An authorized business representative must certify, among other things, that:

- The entity is eligible for a PPL.

- “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant” (the “need certification”).
- Funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments.
- You will provide your lender with documentation necessary to establish your forgiveness amount (e.g., payroll numbers, proof of dollars spent on forgiveness-eligible expenses, etc.).
- Loan forgiveness will be based on the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, but not more than 40% of the forgiven amount may be for non-payroll costs (discussed further below).
- Everything you submit to the lender is true and accurate. Knowingly making a false statement to get a loan under this program is punishable by law.
- You acknowledge that the lender will calculate your loan amount using the tax documents you submitted.

The rules clarify that e-signatures and e-consents are permitted. As reflected on the loan application, certain felony convictions of borrowers’ owners and bankruptcy will impact eligibility for a PPL.

Additional Notes on the “Need Certification” and Related Safe Harbors

Multiple pieces of SBA guidance on the need certification released in late April and May created confusion and concern for PPL recipients, particularly those who received their loans early in the program. The SBA has therefore created multiple safe harbors related to this certification.

First, any borrower who received a PPL and repaid the loan in full by May 18, 2020 will be deemed by SBA to have made the need certification in good faith.

Second, SBA guidance issued on May 13, 2020 creates a bright-line safe harbor going forward:

“Any borrower that, together with its affiliates, received a [PPL] 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.”

The rules do not specify whether affiliates’ loan amounts will be considered for purposes of this safe harbor for businesses that have an affiliation rule waiver (e.g., restaurants, churches, etc.), but forgiveness application instructions suggest that affiliates’ loan amounts will not be counted if a borrower has such a waiver.

SBA has made clear that it will specially review compliance with the PPL program rules and requirements, including the good-faith need certification, for borrowers with loans above $2 million. To help facilitate this additional oversight policy, SBA has released “Loan Necessity Questionnaires” for for-profit borrowers and non-profit borrowers who, together with their affiliates, received PPL loans with an original principal amount of $2 million or more.

While SBA acknowledges that these borrowers may be able to show, based on their individual circumstances, that the need certification was made in good faith, it has – as noted above – indicated that publicly-traded companies with access to capital markets (now explicitly ineligible for PPLs and SDPPLs after December 27, 2020 under the Economic Aid Act) and some PE-backed or privately-owned businesses are unlikely to be able to make this showing. The for-profit Lender Necessity Questionnaire requests information on, among other things: 2020 gross revenue compared to 2019, government-ordered and/or voluntary changes in business operations, non-COVID related capital improvement projects, dividend or other capital distributions, prepayment of any debt, employee compensation above $250,000 (annualized), securities listings on national exchanges, and ownership by private equity firms, venture capital firms or hedge funds.

If SBA determines that a borrower lacked a good-faith basis for making the need certification, it will seek repayment of the balance of the loan and will inform the borrower's lender that the borrower is not eligible for forgiveness. Notably, such a finding by SBA will not impact SBA's guarantee of the loan. If the borrower repays the loan (required timing of repayment is unclear), SBA will not pursue further penalties against the borrower based on its finding of an improper need certification.

What Other Documentation Do I Need to Submit with My Application?

Ultimately, for applicants not applying as individuals with self-employment income, this will be up to your lender and we understand that there are some significant variations between banks. At a minimum, however, all applicants will need to supply some payroll documentation along with the application form.

SBA FAQs provide examples of what may suffice for payroll documentation, including: payroll reports from recognized third-party processors; an employer's quarterly federal tax returns; or, for employers who contract with payroll providers or PEOs for payroll, relevant information from Schedule R (Form 941), Allocation Schedules for Aggregate Form 941 filers, and the like.

SBA also has published detailed guidance on what documentation should be provided by some types of entities (e.g., self-employed borrowers, partners, farmers, etc.) to substantiate payroll: https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses.

SBA has clarified that most borrowers may calculate average monthly payroll costs based on data from the previous 12 months or from calendar year 2019 (seasonal businesses may use data from February 15, 2019 or March 1, 2019 until June 30, 2019, or any consecutive 12-week period between February 15, 2019 and February 15, 2020; and new businesses not operating between February 15, 2019 and June 30, 2019 may use data from January 1, 2020 through February 29, 2020). Also, SBA rules released in January 2021 will allow 2021 borrowers to use calendar year 2020 as their average payroll base period.

Borrowers Beware!

A general caution on the application and documentation process – borrowers beware. It is the borrower's obligation to verify eligibility and loan amounts, and to make the certifications above on some good-faith basis. Lenders are held harmless if they rely on borrower representations and documentation.

As noted above, loans in excess of $2 million will receive additional scrutiny from the SBA. Additionally, the Justice Department already is investigating some PPL borrowers for possible fraudulent activity and the SEC has started questioning borrowers within its purview.

Borrowers who improperly claim eligibility, make misrepresentations, or certify without a good-faith basis to any of the items above could face: loan default (per some lender contracts we have reviewed), SBA audits, federal civil and/or criminal penalties, and Congressional oversight actions.

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What if I already got an SBA loan for economic injury due to the COVID-19 emergency?

Under the CARES Act, SBA economic injury disaster loans (EIDLs) made under the SBA's Disaster Loan Program between January 31, 2020 and April 3, 2020 may be refinanced as PPLs. Implementing guidance from the SBA clarifies:

PPLs **must** be used to refinance the full amount of an EIDL when the PPL borrower –

- Received EIDL funds from January 31,2020 through April 3, 2020; and
- Used the EIDL funds to pay payroll costs.

PPLs may be refinanced – but are not required to be – when the PPL borrower –

- Received EIDL funds from January 31,2020 through April 3, 2020; and
- Used the EIDL funds for purposes other than payroll costs.

The amount to be refinanced does not include any EIDL advance taken by the borrower.

What is my maximum loan amount and how can I spend it?

Calculating Maximum Laon Amounts

Under the rules, loan amounts are, up to $10 million:

- 250% of average monthly "payroll costs" (defined below) paid by the applicant during calendar year 2019 or 2020 (or one of the alternate look-back periods for seasonal or new businesses noted above), plus
- Any outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance as a PPL, less any amounts you took as an advance on such EIDL.

Pursuant to SBA guidance, for any loans not fully disbursed by April 30, 2020, a single corporate group may not receive more than $20 million in PPLs (this applies to groups that have affiliation rule waivers). Businesses are considered part of a single group if they are majority-owned, directly or indirectly, by a common parent. Borrowers are obligated to notify their lenders if they have applied for loans above this amount and must withdraw or cancel their applications accordingly.

Payroll costs are calculated on a gross pay basis without regard to federal taxes imposed or withheld (e.g., employee and employer shares of FICA taxes, income taxes withheld from employees). But gross pay/payroll costs do not include the employer's share of payroll taxes.

There are special calculation rules for individual applicants with self-employment income. If you are such an individual and you have no other employees, your maximum loan amount is (again, up to $10 million):

- 250% of your net profit amount from Form 1040 Schedule C line 31 (capped at $100,000 annualized) divided by 12; plus
- Any outstanding amounts from an EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance as a PPL, less any amounts you took as an advance on such EIDL.

Note that if your net profit amount is zero or negative, you do not qualify for a PPL.

If you are self-employed (including independent contractors and sole proprietors, but not partners in partnerships) and you do have other employees, your maximum loan amount is the outstanding amount on any refinanced EIDL (less any advances taken on the EIDL), plus 250% of the monthly average of:

- Net profit amount from Form 1040 Schedule C line 31 capped at $100,000 annualized; plus
- 2019 gross wages and tips paid to employees whose principal place of residence is in the US (capped at $100,000 annualized for any individual employee) computed using 2019 Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter, plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips (e.g., FSA contributions/deductions, transit or parking benefits); plus
- 2019 employer contributions for group health, life, disability, vision, and dental insurance (from Form 1040 Schedule C line 14), retirement contributions (Form 1040 Schedule C line 19), and 2019 state and local payroll taxes (including state unemployment insurance taxes).

Separate specific loan calculation (and documentation) rules apply for self-employed farmers and ranchers, partnerships, nonprofits, religious institutions, veterans organizations, tribal businesses, and entities not in operation between Feb. 15, 2019 and June 30, 2019 (see SBA guidance for details: https://home.treasury.gov/system/files/136/PPP--How-to-Calculate-Maximum-Loan-Amounts-for-First-Draw-PPP-Loans-and-What-Documentation-to-Provide-By-Business-Type.pdf).

Allowable Uses for Loan Proceeds

By rule, **at least 60% of PPL proceeds must be used for "payroll costs"** (this requirement is separate from and in addition to the forgiveness eligibility requirements discussed below).

Payroll costs, as defined in the rules:

Include (paid by the employer on a gross basis):

- individual employee cash compensation paid to employees whose principal place of residence is in the US (includes salary, wages, commissions, cash tips, hazard pay, bonuses, or similar) up to annualized compensation of $100,000 (this cap applies only to cash compensation, not the other payroll items below);
- paid leave;
- severance payments;
- payments for group benefits (including health, vision, dental, life, and disability benefits), including insurance premiums and contributions to self-insured plans;
- retirement benefits (e.g., employer contributions to retirement or pension plans);
- state and local payroll taxes; and
- "owner compensation replacement" for self-employed, independent contractor and sole proprietor applicants only: based on net profits on 2019 Form 1040 Schedule C up to annualized compensation of $100,000 (note: other employers may not include these individuals in their "payroll cost" calculation);

Exclude:

- excess individual cash compensation above the $100,000 annualized threshold;
- federal employer-side taxes (e.g., employer's share of federal payroll taxes);
- compensation to employees whose principal place of residence is not the US; and
- sick and family leave wages for which credit is allowed under the Families First Coronavirus Relief Act (for both employees and owners).

The rules clarify that independent contractors and sole proprietors do not count as "employees" for purposes of calculating "payroll costs" because they may apply for their own loans under the program.

Other allowable uses for PPL dollars beyond payroll costs – which, again, may only account for 40% of overall loan dollars spent, per SBA rules – include:

- Group health care benefits during periods of paid sick, medical, or family leave;
- Business insurance premiums;
- Payments of interest on mortgage obligations;
- Rent (including rent under a lease agreement);
- Utilities;
- Interest on any other debt obligations incurred before February 15, 2020;
- "Covered operations expenditures" defined as: payment for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses;
- "Covered property damage costs" defined as: costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation;
- "Covered supplier costs" defined as: expenditures made by an entity to a supplier of goods for the supply of goods that—(A) are essential to the operations of the entity at the time at which the expenditure is made; and (B) is made pursuant to a contract, order, or purchase order—(i) in effect at any time before the covered period with respect to the applicable covered loan; or (ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan;
- "Covered worker protection expenditures" defined as "an operating or a capital expenditure to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending [when the COVID-19 national emergency is over] related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19 (e.g., air filtration systems, physical barriers,

drive-through windows, expansion of outdoor or indoor business space, and personal protective equipment; does not include residential real property or intangible property);

- Any uses already permitted for SBA Business Loans (e.g., inventory, supplies, building or land purchases, construction, site improvements, etc.); and/or
- Refinancing an SBA EIDL loan made between January 1, 2020 and April 3, 2020.

Note that these expenditures are all permitted under the PPL program, but not all of them are eligible for loan forgiveness (see discussion below). So, for example, you could use the loan dollars to pay inventory expenses, but that portion of the loan will not be forgiven.

No PPL or SDPPL funds may be used for lobbying activities, lobbying expenditures related to state or local elections, or expenditures designed to influence federal or state legislation, regulations, or administrative actions/orders.

A word of caution – we have seen a variety of "use" requirements in loan documents from different banks, not all of which comport with the CARES Act or SBA rules. We therefore advise borrowers to carefully review their loan documents for any contractual limits/requirements on how and/or when loan dollars must be spent to avoid default or other penalties.

Additional Clarifications & Limitations for Individual Borrowers with Self-Employment Income

The "allowable uses" rules described above generally apply to individual borrowers with self-employment income, but SBA rules make some additional and notable clarifications for these borrowers:

- You may use loan dollars for owner compensation replacement (as calculated above based on 2019 net profits and capped at $100,000 annualized);
- "Payroll costs" follow the definition above for any employees you have (but you do not count <u>owner</u> benefits in "payroll costs");
- Mortgage interest, rent, and utility payments must be <u>business</u> obligations/expenses, <u>and</u> you must have claimed or be entitled to claim a deduction for these expenses on your 2019 Form 1040 Schedule C for them to be permissible uses during the eight-week period following disbursement of your loan (this is to ensure loans are used for maintaining existing operations and not for business expansion); and
- The general "allowable use" categories for group health benefits and insurance premiums do <u>not</u> apply for these borrowers (but note employer payments for employees' benefits, including health premiums, are includable/allowable under "payroll costs").

How much of my loan will be forgiven?

Your full loan amount may be forgiven, subject to the rules and penalties discussed below. The Economic Aid Act reversed prior IRS guidance and clarified that business expense amounts that ultimately are forgiven <u>**are**</u> deductible and not included in gross income.

SBA continues to publish additional rules and guidance to implement the forgiveness provisions in the program. Notably, loan forgiveness assessments will be based on rules/guidance in place <u>on the date of your forgiveness application</u>, so it is important to stay apprised of any regulatory developments.

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Finally, the PPP Flexibility Act extended deferral of all principal, interest, and fee payments on loans to the date on which forgiveness amounts are remitted by SBA to the lender (or the lender is notified by SBA that forgiveness is not allowed) or until 10 months after the end of the forgiveness period if the borrower has not applied for forgiveness by then. This statutory change overrides any loan document terms that may reference the older/original deferral period of six months.

Determining Your Maximum Possible Forgiveness Amount

The maximum possible forgiveness amount (up to the principal amount of the loan, plus interest) is the sum of the following **incurred and paid within the borrower's forgiveness/"covered" period**:

- **Payroll costs for employees** (as defined above, including owner compensation replacement for individual borrowers with self-employment income), **excluding**:
  - Payroll costs that are qualified wages taken into account in determining the Employer Retention Tax Credit (ERTC) (additional guidance on the ERTC and PPL borrowers can be found here: https://www.irs.gov/pub/irs-drop/n-21-20.pdf); and
  - For forgiveness applications submitted after March 11, 2021, COBRA premiums for which a tax credit is allowed under the American Rescue Plan Act;
- **Interest on mortgage obligations that were in place before February 15, 2020** ("prepayments" or advance payments on interest are not allowed);
- **Rent obligations under leases that were in place before February 15, 2020**;
- **Certain utility payments** (electricity, gas, water, transportation, telephone, or Internet) for services that began before February 15, 2020;

And, for PPLs on which the SBA did not remit a forgiveness payment to the lender as of December 27, 2020:

- Covered Supplier Costs (defined above);
- Covered Worker Protection Expenditures (defined above);
- Covered Property Damage Costs (defined above); and
- Covered Operations Expenditures (defined above).

Under the Economic Aid Act, **borrowers may elect their forgiveness covered period starting from the date of loan origination and ending any time between 8 and 24 weeks later**.

To receive full loan forgiveness, borrowers must spend at least 60% of PPL dollars on payroll costs. The SBA has interpreted that requirement as a proportional limit on non-payroll costs' share of the borrower's forgiveness amount, so borrowers who do not spend at least 60% on payroll still will be eligible for some forgiveness. The SBA provides the following example on how the proportional calculation will be made:

> [I]f a borrower receives a $100,000 PPP loan, and during the [forgiveness] period the borrower spends $54,000 (or 54%) of its loan on payroll costs, then because the borrower used less than 60% of its loan on payroll costs, the maximum amount of loan forgiveness the borrower may receive is $90,000 (with $54,000 in payroll costs constituting 60% of the forgiveness amount and $36,000 in nonpayroll costs constituting 40% of the forgiveness amount).

Moreover, any amounts spent outside of the forgiveness period, even for forgiveness-eligible expenses, will not be included in your forgiveness amount.

The SBA's forgiveness rules clarify that salary, wages, commissions, or similar compensation paid to furloughed employees (i.e., those not actually providing services to the business) are forgivable expenses (capped at the $100,000 annualized rate for compensation to any individual employee). Additionally, hazard pay and bonuses are eligible for forgiveness (again, up to the $100,000 annualized rate cap).

Additionally, "interest on mortgage obligations" includes interest on business mortgages on real or personal property (e.g., an auto loan). Although a permissible use of PPL dollars, interest on unsecured credit is not eligible for loan forgiveness. Mortgage interest, rent amounts, and utility payments attributable to business operations of tenants or subtenants are not forgivable (e.g., if a borrower rents a building for $10,000 per month, but subleases a portion of the building for $2,500 per month, the borrower is only eligible for forgiveness on $7,500 per month; or, if a borrower with a mortgage subleases space, the eligible mortgage interest is the percent share of the fair market value of the space not leased out to the other business(es)). And while rent/lease payments to related parties may be forgiven, mortgage interest payments to related parties are not forgivable.

The forgiveness applications and SBA rules provide some clarification on the "incurred and paid" requirement. Payroll costs generally are incurred on the day the employee's pay is earned (or for workers not working, but still on payroll, per a schedule established by the borrower) and they are paid on the date paychecks are distributed or ACH credit transactions are originated. For payroll costs incurred during the last pay period within the forgiveness period, borrowers are permitted to pay them on or before the next regular payroll date (even if that is outside of the forgiveness period) and still receive forgiveness. For non-payroll expenses (mortgage interest, rent, utilities, etc.), those may be forgiven if they are (1) paid during the forgiveness period; or (2) incurred during the forgiveness period and paid on or before the next regular billing date, even if that is outside of the forgiveness period.

Special Forgiveness Amount Calculations for Owners & Self-Employed Individuals

SBA rules provide the following detail on what "compensation" should be counted for different types of individuals:

- C-corporation owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health insurance contributions made on their behalf.
- S-corporation owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement contributions made on their behalf, but employer health insurance contributions made on their behalf cannot be separately added because those payments are already included in their employee cash compensation.
- Form 1040 Schedule C or F filers are capped by the amount of their owner compensation replacement, calculated based on 2019 net profit (as described above), and do not include retirement or health contributions.
- General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235, and do not include retirement or health contributions.

- LLC members are subject to the rules based on the LLC's tax filing status in the reference year used to determine the PPL amount.

Generally, the above forgivable amounts are prorated for the number of weeks in the covered period (with the overall $100,000 annualized cap) to determine the maximum payroll forgiveness amount; but for covered periods longer than 10 weeks (2.5 months), self-employed individuals' and owner-employees' payroll forgiveness is capped at 2.5 months' worth of 2019 (for first draw PPLs made in 2020) or 2020 (for first draw PPLs made in 2021 or SDPPLs) compensation in total across all businesses.

"Owner-employee" is not defined in the application or forgiveness rules. That term generally refers, however, to sole proprietors and some partners.

Penalties That Will Reduce Your Forgiveness Amount

Because the policy goal of the PPL program is to encourage employers to keep employees on payroll at something at least close to their normal base pay, **for loans over $50,0000 (other than borrowers who, together with their affiliates, received a PPL or SDPPL of $2 million or more)**, the maximum forgiveness amount will be reduced as follows:

- Full-time equivalent employee (FTEEs) reductions = proportionately for reductions in average FTEEs between the forgiveness period and a pre-crisis reference period (borrower may elect February 15, 2019 to June 30, 2019, or January 1, 2020 to February 29, 2020, or special look-back periods for seasonal employees); and
- Certain salary reductions = via a straight reduction for drops in any individual employee's salary/wages over 25% (compared to the employee's base salary/wages in the last completed quarter of employment by that employee prior to the covered period) for workers who did not make $100,000 on an annualized basis in any pay period in 2019.

"Full-time equivalent employee" under the rules and forgiveness application means an employee who works 40 hours or more, on average, each week. Hours for employees who work fewer than 40 hours are recorded as proportions of a single FTEE and aggregated. There are two permissible methods for calculating FTEEs (borrowers may use either one, but it must be applied consistently across all employees and relevant timeframes):

- For each employee, the average number of hours paid per week during the relevant period divided by 40 (round to nearest tenth) with a maximum of "1" for each employee; or
- Using a simplified method, assign a "1" for any employee who works 40 hours or more per week and "0.5" for employees who work fewer than 40 hours (i.e., for any part-time employee, regardless of how many hours they actually work or were paid during the relevant periods).

Safe Harbors/Exemptions from Forgiveness Amount Penalties

There are some exemptions under which borrowers' forgiveness amounts will not be reduced, even if employee counts or salaries/wages decline during the forgiveness period. The PPP Flexibility Act of 2020 includes a safe harbor from the FTEE reduction for employers who can document either:

- An inability to rehire employees who were employed on February 15 and inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020 (for PPLs made before

December 27, 2020) or by the end of the covered period (for loans made on or after December 27, 2020); or

- An inability to return to the "same level of business activity as such business was operating [] before February 15, 2020," due to compliance with certain federal COVID-19-related safety guidance or requirements (e.g., sanitation standards, social distancing, worker safety requirements, etc.) established/issued between March 1, 2020 and December 31, 2020 (for Pre-December 27 loans) or by the end of the covered period (for loans on or after December 27, 2020).

SBA has interpreted these statutory safe harbors and related documentation requirements as follows:

- Inability to rehire by December 31, 2020 or end of the covered period, as applicable – Borrowers should maintain documentation showing the written offer to rehire, a written record of the offer's rejection, and a written record of efforts to hire a similarly qualified individual.

- Inability to return to the same level of business – SBA interprets this safe harbor to include both direct and indirect compliance with federal COVID Requirements or Guidance, and because a significant amount of the reduction in business activity stemming from COVID Requirements or Guidance is the result of state and local government shutdown orders that are based in part on guidance from the three federal agencies, reductions in business levels due to state/local orders <u>will</u> count for purposes of this exemption; documentation must include copies of applicable COVID Requirements or Guidance for each business location and relevant borrower financial records.

Additionally, by rule, SBA will <u>not</u> reduce a borrower's forgiveness amount if the borrower reduces the hours of an employee, offers to restore the reduction in hours, but the employee declines the offer. This exemption applies if:

- The borrower made a good faith, written offer to restore the reduced hours of such employee;

- The offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the reduction in hours;

- The offer was rejected by such employee; and

- The borrower has maintained records documenting the offer and its rejection.

The SBA forgiveness application and rules also exclude from the FTEE reduction penalty employees who, during the forgiveness period or Alternative Payroll Covered Period, were fired for cause, voluntarily resigned, or voluntarily requested a reduction in hours (if those positions were not filled by new employees). Employers must maintain records for such employees and events.

In all of these safe harbor/exemption cases, you exclude the employee from the FTEE reduction headcount, so under the pre-crisis and forgiveness period comparison calculation, the borrower does not trigger a penalty for that particular employee.

Interplay between FTEE and Salary Reduction Penalties

The SBA's forgiveness rules clarify that the salary reduction penalty applies only to the portion of salary/wage reduction <u>not</u> attributable to a FTEE reduction. SBA provides a couple of examples of how this rule operates in an eight-week forgiveness period context –

- An employer reduces an applicable full-time employee's weekly salary from $1000 to $700 between the relevant comparison periods. The first $250 reduction is exempted from the reduction, so the forgiveness penalty would be $400 ($50 of non-exempt reduction times the eight weeks of the forgiveness period or Alternative Payroll Covered Period).

- An hourly employee worked 40 hours per week during the pre-crisis look back period, but is reduced to 20 hours during the forgiveness period. There is no change in the employee's hourly wage, so the entire salary reduction is attributable to a reduction in FTEEs and there is no separate salary/wage reduction penalty amount.

"Rehire" Relief to Negate Forgiveness Amount Penalties

There is relief from forgiveness amount penalties in certain circumstances for businesses that restore payroll to pre-crisis levels by December 31, 2020 (for loans originated before December 27, 2020) or by the end of their covered period (for PPP loans originated December 27 or later and SDPPPs). Specifically, the FTEE and salary reduction penalties described above will not apply (i.e., eligibility for your maximum forgiveness amount is restored) if the employer eliminates by December 31, 2020 or the end of the covered period, as applicable, reductions in the number of FTEEs and/or, as applicable, reductions in individuals' salaries that were made between February 15, 2020 and April 26, 2020 (the look-back period).

For post-December 27, 2020 loans, the Economic Aid Act gives SBA and the Treasury Department authority to jointly change the look-back/comparison periods for the rehire relief to further the employee retention goals of the program.

How do I apply for forgiveness?

The Forgiveness Application Process

For loans over $150,000, to receive loan forgiveness (on a first round PPL or SDPPL), you must submit either the simplified or regular forgiveness application (or "lender equivalent") to the lender servicing your loan along with required documentation (described in the forgiveness applications).

Forgiveness applications may be submitted any time before the loan maturity date if all loan proceeds for which forgiveness is requested have been exhausted (which means that the covered periods for a first draw PPL and a SDPPL may not overlap). Borrowers who do not submit a forgiveness application within 10 months of the maximum covered period (24 weeks after loan disbursement) must begin paying principal and interest on the PPL. For SDPPLs in excess of $150,000, borrowers must submit their loan forgiveness application for the First Draw PPL before or simultaneously with the SDPPL forgiveness application.

The forgiveness applications are available at https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses and include:

- The standard/full application (Form 3508);
- The EZ application (Form 3508EZ) is available for borrowers who did not cut salaries/wages by more than 25% during certain timeframes, and either: did not reduce FTEEs or average hours over certain periods (or who "trued up" FTEEs by December 31, 2020 or the end of the covered period, as applicable); or whose operations were disrupted by federal health and safety orders; and
- Form 3508S – which, under the Economic Aid Act is limited to certain certifications and attestations and has minimal documentation requirements – is available for borrowers who received loans of $150,000 or less.

For PPLs made before December 27, 2020, the Economic Aid Act requires borrowers to disclose controlling interests by certain government officials (President, Vice President, head of an executive department, or member of Congress, or the spouse of any such official). SBA has developed a reporting form (Form 3508D) for borrowers to submit to their PPP lenders with specific deadlines based on when the borrower applied/applies for forgiveness. Borrowers in which these officials have a controlling interest are excluded from eligibility for PPLs and SDPPLs after December 27, 2020.

Lender Forgiveness Determinations

Lenders have 60 days following submission of a completed application to make a forgiveness determination. As with the original loan application, lenders may rely – after receipt of a complete application and required documentation, and a good-faith review in a reasonable time – on borrowers' certifications and documentation when making forgiveness decisions. It is the borrower's obligation to properly calculate forgiveness amounts.

Lenders may approve forgiveness applications in whole or in part, deny applications, or (if instructed by the SBA) deny an application without prejudice due to a pending SBA review. Borrowers have 30 days after the lender's determination to request that the SBA review the decision.

SBA Discretionary Reviews of PPL and/or Forgiveness Eligibility

By law, SBA has 90 days after a lender's forgiveness determination to review the decision and to remit any forgiveness amount due to the lender. But SBA has broadly reserved the right to review any PPP loan of any amount before or after a lender's determination. SBA will review, among other things:

- A borrower's initial PPL eligibility, including compliance with SBA's affiliation rules, certifications and representations made on the loan application, etc.;
- Proper calculation of loan amounts and uses of loan proceeds;
- Loan forgiveness amounts to which the borrower is entitled; and
- For SDPPLs, whether the borrower satisfies the 25% revenue reduction requirement.

If SBA opts to review a PPP loan or forgiveness application, it will notify the lender and the lender must then notify the borrower within 5 business days. A lender may not approve any forgiveness application while an SBA review is ongoing. SBA may review a borrower's first draw PPL and SDPPL separately or at the same time.

If questions arise about a borrower's loan or forgiveness eligibility, the borrower will have an opportunity to respond and the lender or SBA will request additional information from the borrower. Failure to provide additional requested information will result in a determination of ineligibility for the loan and/or forgiveness.

If SBA determines that the borrower was ineligible for a PPP loan in the first place, it will notify the lender that the borrower is ineligible for forgiveness (note that an SBA determination of ineligibility for a first draw PPL may result in a related finding of ineligibility for a SDPPL). If SBA concludes that the borrower is not eligible for the forgiveness amount claimed on the forgiveness application, it will direct the lender to deny the forgiveness application in whole or in part, as appropriate. If the borrower is ineligible for forgiveness or if only a portion of the loan is forgiven, the remaining balance due on the PPL must be repaid on or before the loan maturity date.

Borrowers may appeal an SBA finding of ineligibility for a PPL and/or forgiveness amounts to the SBA Office of Hearings and Appeals (OHA). Such an appeal does not extend the deferral period for payment of unforgiven amounts on a PPL. Only certain “final SBA review decisions” are appealable:

- Ineligible for a PPP loan;
- Ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses;
- Ineligible for PPP loan forgiveness in the amount determined by the lender in its full approval or partial approval decision issued to SBA (except for the deduction of any Economic Injury Disaster Loan advance in accordance with section 1110(e)(6) of the CARES Act); and/or
- Ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA.

Note that if SBA remits a forgiveness amount that matches the lender’s forgiveness determination, the borrower may not appeal to OHA.

OHA appeals must be filed with 30 calendar days of the earlier of: borrower receipt of the final SBA loan review decision or notification by the lender of the SBA’s decision. Other formal rules and processes for OHA appeals, including requirements for the appeal petition, are set forth in 13 CFR 134.1202 – 134.1217.

The forgiveness applications require borrowers to maintain PPL documentation for six years after forgiveness or payment of the loan in full and allow SBA to access those files. SBA officials testified before Congress in March 2021 that they anticipate audit activities around the PPP programs will continue for up to 10 years – the statute of limitations for fraud – so we advise that all borrowers, regardless of forgiveness outcome, retain documents related to PPL applications and forgiveness for at least that long.

The Second Draw PPP

The Economic Aid Act authorized and appropriated funds for the SDPPP, which will accept applications until May 31, 2021. The SDPPP program follows the same basic structure of the original PPP (including loan terms, forgiveness requirements and processes, etc.) and all rules, guidance, and FAQs issued under the first program, unless SBA provides otherwise to comply with terms of the Economic Aid Act. Below is a brief discussion of some key differences between the two programs.

Eligibility for SDPPLs

The same types of entities remain eligible for the SDPPP, but they must:

- Employ **300** or fewer employees (there are no alternative size tests for SDPPLs, but see affiliation rule waivers and *per location* counting rules for some organizations below);
- Have taken an original PPL and have used or will use that full loan amount before the SDPPP disbursement (you must certify that you used or will use your original PPL fund “only for eligible expenses” – you can still make this certification if you did not spend at least 60% on payroll, but that will impact your forgiveness determination on your SDPPP); and

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- Have had at least at 25% reduction in gross receipts in the first, second, third, or fourth quarter of 2020 compared to the same quarter in 2019 (with special comparison periods described below for newer businesses not in operation for all or part of 2019).

For for-profit entities, "gross receipts" generally are all revenue in whatever form received or accrued (in accordance with the entity's accounting method, i.e., accrual or cash) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances but excluding net capital gains and losses.

Gross receipts do not include:

- Taxes collected for and remitted to a taxing authority if included in gross or total in come, such as sales or other taxes collected from customers (this does not include taxes levied on the concern or its employees);
- Proceeds from transactions between a concern and its domestic or foreign affiliates;
- Amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker;
- Original PPL amounts that are forgiven; or
- EIDL advances.

Alternative gross receipts comparison periods include:

- Applicants may compare annual gross receipts in 2020 with annual gross receipts in 2019 if they were in business in 2019 (rather than the standard quarter-to-quarter comparison).
- For entities not in business during the first and second quarters of 2019 but in operation during the third and fourth quarters of 2019, applicants must demonstrate that gross receipts in any quarter of 2020 were at least 25% lower than during either the third or fourth quarters of 2019.
- For entities not in business during the first, second, and third quarters of 2019 but in operation during the fourth quarter of 2019, applicants must demonstrate that gross receipts in any quarter of 2020 were at least 25% lower than the fourth quarter of 2019.
- For entities not in business during 2019 **but in operation on February 15, 2020** (this is a threshold requirement for PPP and SDPPP eligibility), applicants must demonstrate that gross receipts in the second, third, or fourth quarter of 2020 were at least 25% lower than the first quarter of 2020.

SDPPP applicants will be asked to provide quarterly financial statements, quarterly or monthly bank statements, or IRS income tax filings (if you choose the annual reference period) to demonstrate the requisite gross receipts reduction. For loans of $150,000 or less, however, this documentation does not need to be provided until the forgiveness stage.

Borrowers without an affiliation rule waiver should include gross receipts and employees of all affiliates, including those acquired during 2020. Generally, the same affiliation rules and waivers for the original PPP apply to the SDPPP (except where the waiver previously depended on having 500 or fewer employees, the entity must have 300 or fewer employees for the SDPPP).

For purposes of employee counts, the following entities (if they have multiple locations) get to count employees *per location*:

- Applicants with NAICS codes beginning with 72;
- News organizations majority owned or controlled by a business concern with a 511110 NAICS code or code beginning with 5151;
- Nonprofit public broadcasting entities with trades or businesses under NAICS code 511110 or 5151;
- Internet-only news or periodical publishers with NAICS code 519130;
- Eligible 501(c) organizations;
- Eligible destination marketing organizations; and
- Internet publishing organizations that were not eligible to receive PPLs before March 11, 2021, but are otherwise eligible to receive a SDPPL.

Entities ineligible for original PPLs also are ineligible for the SDPPP. The list of **ineligible entities** for SDPPP also is expanded to cover:

- Self-described "think tanks;"
- Businesses with certain ties to China or Hong Kong; organizations registered under the Foreign Agents Registration Act (FARA);
- Entities that receive grants under the Economic Aid Act's Shuttered Venue Operator Grant (SVOG) Program *before* receiving a PPL/SDPPL (entities that receive a PPL or SDPPL after December 27, 2020 are eligible to receive a subsequent SVOG, but the SVOG amount will be reduced by the amount of the PPP loan(s); PPLs received prior to December 27, 2020 will not reduce subsequent SVOG amounts); and
- Entities with certain ownership ties to White House, federal agency, or congressional officials.

SDPPP Loan Amounts

Loan amounts still are calculated based on average monthly payroll, but generally are **capped at the lesser of 2.5 times average monthly payroll and $2 million**. **Businesses with NAICS codes starting in 72 may receive loans up to 3.5 times average monthly payroll costs (still capped at $2 million).** Average payroll calculations may be made using calendar year 2019 or 2020 payroll, or for non-self-employed borrowers, the 12 months preceding SDPPL origination (with special comparison periods for seasonal and newer businesses not in operation for all of 2019; see: https://home.treasury.gov/system/files/136/Second-Draw-PPP-Loans--How-Calculate-Revenue-Reduction-Maximum-Loan-Amounts-Including-Documentation-Provide1192021.pdf).

SBA has released detailed rules for different types of entities to calculate and document maximum loan amounts under the SDPPP: https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses.

Finally, **SBA rules cap the total loan amount for any corporate group at $4 million**.

Applying for SDPPLs

SDPPL applications are available at: https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses. They generally mirror the original PPP applications, with the addition of gross receipts reduction calculations.

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The "need certification" and other certifications from the original PPP remain in place for SDPPP applications, plus certifications regarding the eligibility requirements for SDPPP. SBA FAQs state, however, that **because of the receipts reduction eligibility requirement for SDPPPs, all SDPPP borrowers will be deemed to have made the necessity certification in good faith.**

Original PPP-eligible lenders also are authorized to issue SDPPPs. Borrowers may only receive one SDPPP. The SDPPP application form (SBA Form 2483-SD) and payroll documentation requirements for SDPPPs are generally the same as the original program, but borrowers who use 2019 payroll data for both programs and use the same lender do not need to submit any additional documentation. SDPPP borrowers with loans over $150,000 must also submit documentation establishing the requisite loss in gross receipts (e.g., tax forms, bank statements, financial statements) at the time of application (borrowers of $150,000 or less must submit that documentation when they apply for forgiveness).

Notably, the SBA is conducting "front end compliance checks" on applications for SDPPLs (and for first draw PPLs issued in 2021). The lender will receive an error message if SBA's data shows that a borrower may have been ineligible for a first draw loan or if there are other problems with the 2021 loan application. For certain "technical" issues related to the 2021 application (e.g., suspected dormant business, tax ID or business name discrepancy, etc.), the lender can move the application along in the process with a **lender certification** that the issue(s) have been resolved in accordance with program rules (and if the lender retains supporting documentation). For issues related to first-round eligibility or more complex questions about the 2021 application, the lender must provide documentation to resolve the issue and SBA will review before the new loan will be issued.

SDPPL Forgiveness

The same forgiveness rules, safe harbors, applications and processes described above under the original program apply for the SDPPP. SDPPP forgiveness applications must be submitted after or simultaneously with First Draw forgiveness applications.

For additional guidance, please refer to Steptoe's COVID-19 Resource Center.

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