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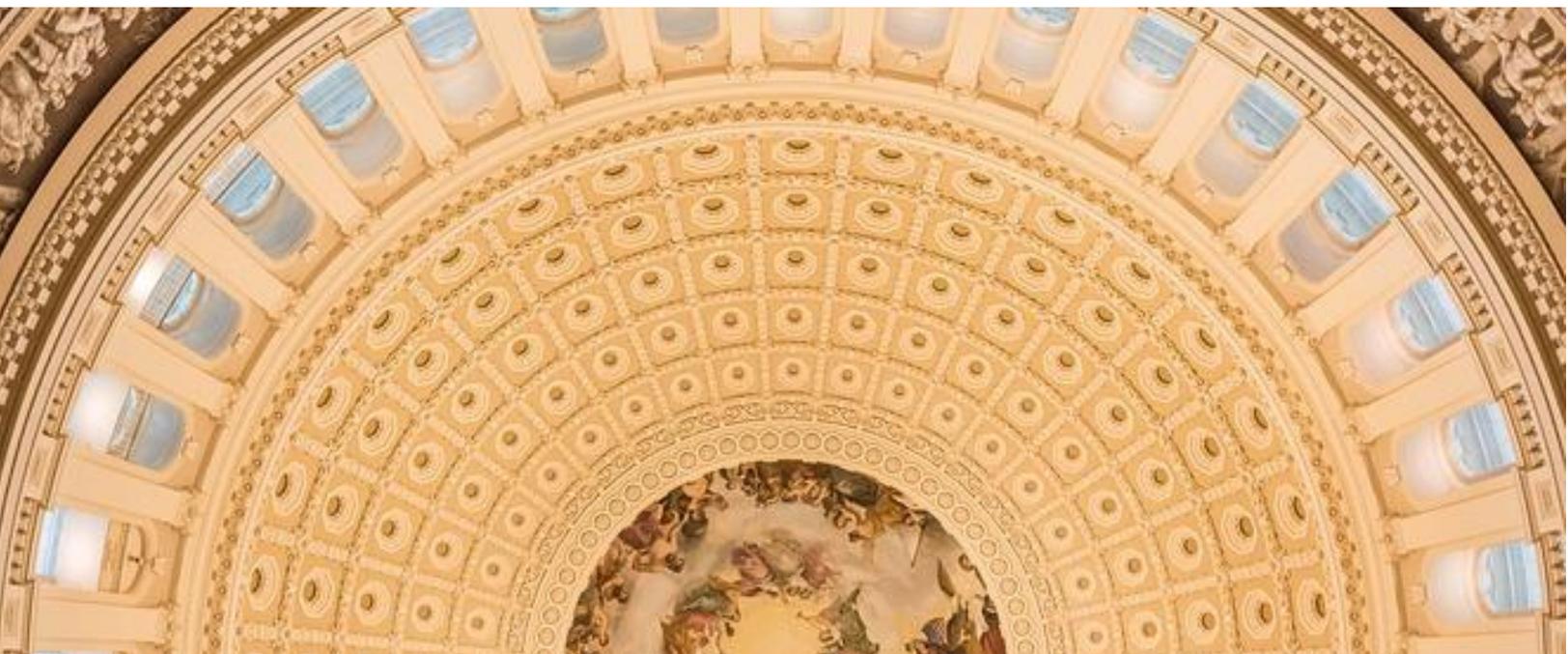
## Small Business Relief under the CARES Act

**Overview of the SBA Paycheck Protection Program**

Effective February 15, 2020 – June 30, 2020

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## Paycheck Protection Program

Below are answers to commonly asked questions about the Paycheck Protection Program established under the recently-enacted CARES Act. The program is designed to encourage employers to maintain payroll and to help small businesses cover their expenses (e.g., payroll, mortgage, rent, utilities, etc.) in the near-term.

### **When will these loans be available?**

According to early Treasury Department guidance, there will be staggered loan availability dates through existing SBA lenders and other federally-insured banks and credit unions:

- April 3, 2020 for small businesses and sole proprietorships; and
- April 10, 2020 for independent contractors and self-employed individuals.

Other lenders who become authorized to issue these loans will be able to make them as they are approved and enrolled in the program.

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

- Loan amounts up to \$10 million per eligible entity;
- Loan payments will be deferred for six months (can extend to 1 year under the law; interest will accrue during deferral period);
- 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 fees;
- Loans are due, per Treasury guidance, in two years, but there is no penalty for prepayment; and
- Fixed interest rate of 0.50% (per Treasury guidance).

### **Who is eligible?**

Entities (including sole proprietors, independent contractors, and self-employed individuals) that were operating and paying workers on February 15, 2020, and that are:

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- “Small business concerns,” as defined under current SBA laws and regulations (check existing SBA industry size requirements based on employees or revenue – **depending on your industry, your business may qualify, even if you have more than 500 employees**); or
- For-profit “business concerns,” 501(c)(3) non-profits, 501(c)(19) veterans organizations, and Tribal businesses with not more than the greater of –
  - 500 employees; or
  - The SBA’s “small” size standard in number of employees for the entity’s industry code.

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

### General Rules

All businesses count full-time, part-time, and “other basis” employees. You must count employees of all US and foreign affiliates. SBA affiliation determinations can be complex and generally are based on “totality of the circumstances” evaluations (e.g., ownership, management, common interests, economic dependence, etc.) to determine whether “control or ability to control” exists. This analysis can be quite involved for entities in private equity portfolios, for instance.

### Special Rules for Certain Industries

There are special employee counting rules for “business concerns” with NAICS industry codes starting with 72 (generally, “accommodations and food services”); namely:

- You are eligible for a PPL if you have 500 or fewer employees per location; and
- SBA affiliation rules are waived for these loan applicants.

SBA affiliation rules also are waived for “business concerns” that:

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

### A Few More Things to Consider Regarding These Counting Rules

If your business 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.

“Business concerns” under the SBA are for-profit businesses 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.

The CARES Act is very short on details pertaining to these employee counting rules and we anticipate some clarification in forthcoming SBA regulations. In the meantime, it likely is worth evaluating PPL eligibility from the perspective of each separately organized business concern.

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## How do I apply for a loan?

Loans may be delivered immediately by banks that already issue SBA Business Loans and, it appears from informal Treasury guidance, all other federally-insured depository institutions, federally-insured credit unions, and Farm Credit institutions that choose to participate. Treasury is soliciting applications from additional lenders to participate in the program to expand the network of institutions delivering these loans.

Treasury Department has released a standard PPL loan application that is dramatically streamlined compared to standard SBA Business Loan applications. All applicants will need to supply payroll documentation to their lender along with the application.

The application generally requires:

- Basic business identification information;
- A list of all owners of the applicant with greater than 20% ownership stake;
- A list of any businesses under common ownership or management with the applicant;
- Details on any EIDL loan received by the business between January 1, 2020 and April 3, 2020;
- Information about individual applicants' and 20%-plus owners' criminal history and citizenship status; and
- The certifications described below, which must be certified in good faith by the business and each 20% or greater owner.

The only blanket "borrower requirement" imposed by the CARES Act for PPLs, which is incorporated in the application, is a good-faith certification by the applicant that:

- The loan is needed to "support ongoing operations" during the COVID-19 emergency;
- Funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments; and
- They do not have an application pending for, nor have they received, any other SBA Business Loan for the same purpose since February 15, 2020.

The loan application requires further certification that:

- You will provide to the lender documentation that verifies the number of full-time equivalent employees on payroll and the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight weeks after getting this loan.
- Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. *Due to likely high subscription, it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs* (discussed in further detail below).
- All the information you provided in your application and in all supporting documents and forms is true and accurate. Knowingly making a false statement to get a loan under this program is punishable by law.

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- You acknowledge that the lender will calculate the eligible loan amount using the tax documents you submitted. You affirm that the tax documents are identical to those you submitted to the IRS. And you also understand, acknowledge, and agree that the lender can share the tax information with the SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Note that you will not be approved for a loan if you are presently involved in a bankruptcy or if the business or any owner has defaulted on a federal government loan in the last 7 years.

It also is worth noting that lenders will be instructed to prioritize certain PPL applicants, including: rural businesses, women, businesses that were started in the last two years, and others. It is expected that the initial \$350 billion allocated for this program will run out, so we encourage clients who are interested in obtaining a PPL to start communicating with their banks and compiling the application and payroll documentation.

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

SBA economic injury disaster loans (EIDLs) made under the SBA's Disaster Loan Program on or after January 31, 2020 may be refinanced as PPLs. You also may have a post-January 31, 2020 EIDL and a PPL if the EIDL is for a purpose other than paying payroll costs and other obligations that may be paid with PPLs (see full list below).

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

Loan amounts generally are 250% of average monthly "payroll costs" during the last year (with different look-back period options for new and seasonal businesses), plus any outstanding EIDL amounts to be refinanced, up to \$10 million.

Loan dollars may be used for:

- Any uses already permitted for SBA Business Loans (e.g., inventory, supplies, building or land purchases, construction, site improvements, etc.);
- Payroll Costs
  - Include: individual employee or sole proprietor/independent contractor compensation up to annualized compensation of \$100,000; paid leave; severance payments; payment for group health benefits, including insurance premiums; retirement benefits; and state and local payroll taxes;
  - Exclude: excess compensation above the \$100,000 threshold; certain federal taxes; compensation to non-US employees; and sick and family leave wages for which credit is allowed under the Families First Coronavirus Relief Act;
- Group health care benefits during periods of paid sick, medical, or family leave;
- Insurance premiums;
- Payments of interest on mortgage obligations;
- Rent (including rent under a lease agreement);

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- Utilities; and
- Interest on any other debt obligations incurred before February 15, 2020.

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

## How much of my loan will be forgiven?

### First, Determine Your Maximum Available Forgiveness Amount

Under the CARES Act, the maximum available forgiveness amount (capped at principal amount of the loan) is the sum of the following incurred and paid within 8 weeks of your loan origination (the “forgiveness period”):

- Payroll costs (as defined above);
- Interest on mortgage obligations incurred before February 15, 2020;
- Rent obligations in place since before February 15, 2020; and
- Utility payments for services that began before February 15, 2020.

The forgiveness rules appear to incentivize quick deployment of loan dollars to these priority buckets of expenses. Note that your maximum forgiveness amount is tied to dollars that are spent in these four categories in the first eight weeks of your loan. So, to the extent you do not spend your full loan amount in that timeframe on these specific items, your forgiveness amount will be less.

Early Treasury Department guidance cautions that they anticipate that not more than 25% of the forgiven amount may be for non-payroll costs. The CARES Act does not contain any such restriction, but the loan application does require applicants to acknowledge this possibility in their certifications.

### Second, Be Aware of 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, the maximum forgiveness amount will be reduced:

- Proportionately for reductions in average full-time equivalent employees (FTEEs) between pre-crisis levels and the eight-week forgiveness period;
- Via a straight reduction for payroll reductions over 25% (compared to the prior completed quarter of employment) for workers making less than \$100,000 annually; and
- For any advances taken on SBA EIDLs.

### Third, There are Opportunities to Negate Forgiveness Amount Penalties

There is relief from these forgiveness penalties for businesses that restore payroll to pre-crisis levels in the next few months. Specifically, the reduction rules described above will not apply (i.e., eligibility for your maximum forgiveness amount is restored), if the employer eliminates by June 30, 2020:

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- Reductions (compared to February 15, 2020) in the number of FTEEs made between February 15, 2020 and April 26, 2020; and/or, as applicable,
- Salary reductions (compared to February 15, 2020) made between February 15, 2020 and April 26, 2020 for one or more employees (\*Note: the legislation does not specify whether this also is limited to employees making under \$100,000 per year).

The CARES Act does not include any further detail on payroll decisions/actions made by PPL recipients after June 30, 2020 (i.e., there do not appear to be longer-term payroll maintenance requirements beyond the expiration of the PPL program on June 30, 2020).

## **How do I get my loan forgiven and what if I have unforgiven amounts?**

To receive loan forgiveness, you must apply to the lender servicing your loan with documentation:

- Verifying FTEEs on payroll and their pay rates (IRS payroll tax filings and state income, payroll, and unemployment filings);
- On covered costs/payments (e.g., canceled checks, receipts, or other documents verifying mortgage, rent, and utility payments); and
- Certifying (by an authorized business representative) that the documentation is true and correct and that forgiveness amounts requested were used to retain employees and make other forgiveness-eligible payments.

For loan balances remaining after forgiveness, they will continue to be federally guaranteed under the SBA Business Loan Program rules, interest rates remain capped at four percent, and the loan maturity is capped at 10 years from the forgiveness application date.

## **Are there other considerations I should evaluate before I apply for a PPL?**

There do appear to be some trade-offs for businesses that receive PPL loans and/or loan forgiveness with respect to some tax benefits in the CARES Act.

For instance, an employer that receives a PPL is not eligible for the employee retention credit in section 2301 of the law, which provides eligible employers a refundable credit against payroll tax (Social Security and Railroad Retirement) liability equal to 50% of the first \$10,000 in wages per employee (including value of health plan benefits). Eligible employers must have carried on a trade or business during 2020 and be experiencing either: at least a partial suspension of operations due to government orders (e.g., limiting commerce, travel, group meetings, etc.); or a year-over-year gross receipts reduction of at least 50%.

In addition, an employer that receives loan forgiveness on a PPL is not eligible for the employment tax deferral in section 2302 of the CARES Act, which postpones the due date for depositing employer payroll taxes and certain self-employment taxes.

Businesses will have to compare the benefits of PPLs and these tax credits/deferrals to determine which path provides the greater financial benefit (e.g., compare immediate liquidity needs with longer-term time value of money calculations).

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## **When can we expect further guidance from the SBA on this new program?**

The Treasury Department already is issuing informal guidance for lenders and borrowers on its website. Under the CARES Act, the SBA has until April 10, 2020 to issue regulations implementing this new PPL program, but given the loan availability date of April 3, we expect to see those regulations sooner. That SBA rulemaking will not be subject to typical public notice and comment processes, but we are weighing in with the SBA on issues that need further clarification.

The SBA also has until April 26, 2020 to issue specific guidance on loan payment deferment relief and the loan forgiveness provisions.

*For additional guidance, please refer to [Step toe's COVID-19 Resource Center](#).*

**Last modified: March 31, 2020**