

BUSINESS STRATEGIES: COPING WITH COVID-19

The CARES Act

What businesses need to know

Panelist

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PAYCHECK PROTECTION
PROGRAM

WHAT YOU NEED TO KNOW

PRESENTED BY:



The Paycheck Protection Program*

- On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), a \$2.2 trillion groundbreaking piece of legislation intended to curb the detrimental impacts of the Coronavirus Disease 2019 (COVID-19).
- A major component of the CARES Act is the Paycheck Protection Program (“PPP”), the primary purpose of which is to provide economic relief to small businesses nationwide adversely impacted by COVID-19.

PPP Resources*

- Legislation:
 - The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)
- Guidance:
 - Interim Final Rule (“IFR”)
 - Interim Final Rule – Affiliation (“IFR-Affiliation”)
 - Affiliation Rules Applicable to SBA PPP (“Affiliation Rules”)
 - Paycheck Protection Program Loans FAQs as of April 8, 2020 (“FAQs”)
- Borrowers may rely on the laws, rules, and guidance available at the time of the relevant application. FAQ 17.
- However, Borrowers whose previously submitted loan applications have not yet been processed may revise their applications based on clarifications reflected in the FAQs. FAQ 17.

PPP Overview: Deadlines*

- Lenders began accepting applications April 3, 2020.
- PPP available through June 30, 2020, or until funds made available for the program are exhausted.
 - “First come, first served.” IFR, Section III(2)(m), at 13.
 - \$349,000,000 allocated to PPP.
 - It is anticipated the entire allocation will be earmarked within the first few weeks of availability.
 - **As of late Wednesday, SBA had approved more than 1.5 million loans valued at more than \$324 billion.**
 - **LIKELY FULLY EXHAUSTED TODAY.**
 - Congress is considering additional funding for the program.

PPP Overview: Loan Terms

- Maturity: Two years.
- Maximum loan amount: Lesser of \$10 million or an amount calculated using a payroll-based formula (discussed below).
- Interest rate: 1%.
- Repayment: Loan payments are deferred for six months following the date of disbursement of the loan. However, interest accrues during the six-month deferment.
- No collateral or personal guarantees will be required.
- Borrower may receive only one PPP loan.

PPP Loan Process*

- Application
 - PPP Certifications
 - PPP Eligibility
 - PPP Ineligibility
 - Qualifying Loan Amount
 - Calculation Methodology
 - Definition of “Payroll Costs”
 - Exclusions from Calculation
- Use of PPP Loan Proceeds
- Loan Forgiveness

PPP Certifications*

- Borrower must make numerous good faith certifications as part of the application, including:
 - “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.”
- No SBA guidance as to interpretation of this certification.
- No requirement to prove necessity during the application process.
- Language vague, two examples are illustrative:
 - Example 1: Borrower can demonstrate tangible adverse impact of COVID-19 to business, such as: (1) employee layoffs or furloughs; (2) employee salary cuts; (3) slow payment of AR; (4) budgetary revisions; etc.
 - Example 2: Borrower can demonstrate no tangible adverse impact.
- Risks
 - Reputational damage that comes with disclosure of PPP participation if no adverse impact of COVID-19 to business.
 - CARES Act provides remedies against Borrower for violations or fraud.

PPP Eligibility

- In general, a business is eligible for a PPP loan if the business:
 - has 500 or fewer employees whose principal place of residence is in the United States to whom salaries and payroll taxes were paid; and
 - was in operation on February 15, 2020.
- Tax exempt non-profit organizations and veterans organizations are eligible as well.
- Small business concerns can be eligible if they have more than 500 employees so long as they satisfy the existing statutory and regulatory definition of a “small business concern” under Section 3 of the Small Business Act, 15 U.S.C. 632.
 - Specifically, a business can qualify if it meets the SBA employee-based or revenue size standard corresponding to its primary industry.
 - See www.sba.gov/size for the industry size standards.
- In most cases, a Borrower will be considered together with its affiliates for purposes of determining eligibility for the PPP.
 - SBA has issued separate guidance regarding addressing the application of certain affiliate rules to the PPP. See IFR-Affiliation and Affiliation Rules.

PPP Ineligibility*

Businesses are ineligible for the PPP if an owner of 20 percent or more of the equity of the applicant is presently incarcerated, on probation, on parole; subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or, within the last five years, for any felony, has been convicted; pleaded guilty; pleaded nolo contendere; been placed on pretrial diversion; or been placed on any form of parole or probation (including probation before judgment). FAQ 12.

Qualifying Loan Amount: Calculation Methodology

- Step 1: Aggregate “payroll costs” from the last 12 months for employees whose principal place of residence is the United States.
 - SBA Clarification: In general, Borrowers can calculate their aggregate payroll costs using data either from the previous 12 months or from calendar year 2019. FAQ 14.
- Step 2: Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year.
- Step 3: Calculate average monthly payroll costs by dividing the amount from Step 2 by 12.
- Step 4: Add the outstanding amount of an Economic Injury Disaster Loan (“EIDL”) made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL COVID-19 loan (because it does not have to be repaid).
 - Practice Pointer: The Interim Final Rule contains several examples illustrating this calculation methodology.

Qualifying Loan Amount

Definition of “Payroll Costs”

- Payroll Costs consist of:
 - Compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation;
 - Cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips);
 - Payment for vacation, parental, family, medical, or sick leave;
 - Allowance for separation or dismissal;
 - Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; and
 - Payment of state and local taxes assessed on compensation of employees.
- Payroll costs are calculated on a gross basis without regard to federal taxes imposed or withheld. FAQ 16.

Qualifying Loan Amount:*

Exclusions from Calculation

- Compensation of any employee who resides outside of the United States;
- Compensation of any employee in excess of an annual salary of \$100,000 (prorated as necessary);
 - SBA Clarification: Exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, not to non-cash benefits, including: employer contributions to defined-benefit or defined-contribution retirement plans; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and payment of state and local taxes assessed on compensation of employees. FAQ 7.
- Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee’s and employer’s share of FICA (Federal Insurance Contribution Act) and Railroad Retirement Act taxes, and incomes taxes required to be withheld from employees; and
- Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (“FFCRA”)
 - FFCRA Interplay: The SBA recently clarified in its FAQs that, although PPP loans covers payroll costs — including costs for employee vacation, parental, family, medical, and sick leave — the CARES Act excludes sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the FFCRA. FAQ 8.
- Amounts that an eligible Borrower paid to an independent contractor or sole proprietor should be excluded from the eligible business’s payroll costs. FAQ 15.

Use of PPP Loan Proceeds

- Loan proceeds may be used for:
 - Payroll Costs;
 - Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
 - Mortgage interest payments (but not mortgage prepayments or principal payments);
 - Rent Payments;
 - Utility Payments;
 - Interest Payments on other debt obligations incurred before February 15, 2020; and/or
 - Refinancing and SBA EIDL loan made between January 31, 2020 and April 3, 2020.
 - EIDL Loan Interplay: A Borrower may apply for both an EIDL loan and a PPP loan. However, if EIDL loan was used for payroll costs, the PPP loan must be used to refinance the EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP Loan.

Loan Forgiveness

- Borrower is eligible for loan forgiveness up to the full principal amount of the loan and any accrued interest.
- The amount of loan forgiveness is calculated by aggregating all payment by the Borrower over an eight-week period following the lender's first disbursement of loan proceeds for the following:
 - Payroll costs
 - Mortgage interest payments (but not mortgage prepayments or principal payments);
 - Rent payments; and
 - Utility Payments.
- At least 75% of the forgiven amount must be used for payroll costs.
- The amount of loan forgiveness may be reduced if the Borrower reduces the number of employees or the reduces the salary of employees making \$100,000 or less by more than 25%).
- Borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness.
- SBA will issue additional guidance on loan forgiveness.
 - Practice Pointer: Deposit loan proceeds in separate bank account outside of general operating account so as to ensure loan proceeds remain segregated and not commingled with other business funds.

Additional Resources

- <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>
- <https://www.fwlaw.com/insights/the-paycheck-protection-program---the-cares-act-11011114>

THANK YOU!



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