

SMALL BUSINESS ADMINISTRATION'S PAYCHECK PROTECTION LOAN PROGRAM

SCOTT SINDER & KATE JENSEN
STEPTOE & JOHNSON LLP

BENEFITS OF PAYCHECK PROTECTION LOANS

AVAILABLE APRIL 3 FOR SMALL BUSINESSES AND SOLE PROPRIETORS APRIL 10 FOR INDEPENDENT CONTRACTORS AND ~~SELF~~EMPLOYED INDIVIDUALS

100% GUARANTEED

The loans are 100% federally guaranteed. No collateral, personal guarantees, or SBA fees are required.

\$10 MILLION LOAN CAP

Loan amounts of up to \$10 million per eligible entity.

2 YEAR DUE DATE

Loans are due, per Treasury guidance, in 2 years, but there is no penalty for prepayment.

LOAN FORGIVENESS

Full loan forgiveness for employers that maintain or restore pre-crisis payroll.

DEFERMENT RELIEF

Loan payments will be deferred for 6 months (with the ability to extend to 1 year under the law, though interest will accrue during the deferral period).

0.5% INTEREST RATE

Per Treasury guidance, the interest rate will be fixed at 0.5%

NO RECOURSE

SBA has no recourse against individuals, shareholders, members, or partners or loan recipients for non-payment, unless loan dollars are used for impermissible purposes.

BENEFITS OF PAYCHECK PROTECTION LOANS

Entities that were operating and paying workers on February 15, 2020 are eligible, provided they are either—

SMALL BUSINESS CONCERNS

“Small business concerns” as defined in existing SBA laws and rules (based on SBA industry size requirements tied to employees or revenue).

OTHER ELIGIBLE RECIPIENTS

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.

Depending on your industry, your business may qualify, even if you have more than 500 employees.

DETERMINING EMPLOYER SIZE

GENERAL RULES

- In general, all entities count full-time, part-time, and “other basis” employees of all U.S. and foreign affiliates.
- Affiliation 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.

SPECIAL COUNTING RULES

Business concerns with **NAICS codes starting with 72** (accommodations or food service) are eligible if they have 500 or fewer employees per location (use “primary industry” code).

SBA affiliation rules waived for any business concern:

- With a **72 NAICS code**;
- Operating as a franchise under an **SBA franchise identifier code** ; or
- Receiving financial assistance from Small Business Investment Act licensees.

MORE ON SPECIAL COUNTING RULES

“BUSINESS CONCERNS” UNDER THE SBA

“A business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.”

May be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

SPECIAL COUNTING RULES APPLY AT THE “BUSINESS CONCERN” LEVEL

- Any business concern with a 72 NAICS code may count per location and affiliation rules are waived
- Any business concern operating as a franchise under an SBA franchise identifier code affiliation rules are waived

IMPACT OF AFFILIATION RULE WAIVER?

Applicant affiliations should not be considered by SBA when determining business size

REMINDER

The CARES Act is very short on details. In the meantime, it likely is worth evaluating eligibility for paycheck protection loans from the perspective of each separately organized business concern.

THE APPLICATION PROCESS

THE TREASURY DEPARTMENT HAS RELEASED A STANDARD, STREAMLINED PAYCHECK PROTECTION LOAN APPLICATION. IT 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 emergency injury disaster loans 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 required certifications, which must be certified in good faith by the business and each 20% or greater owner.

IN CONJUNCTION WITH THEIR APPLICATION, ALL APPLICANTS MUST SUBMIT PAYROLL DOCUMENTATION.

THE APPLICATION PROCESS

SPECIFICALLY, BORROWERS MUST PROVIDE A GOOD-FAITH CERTIFICATION THAT—

- ✓ The loan is needed to "support ongoing operations" during the COVID emergency.
- ✓ Funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments.
- ✓ They do not have an applications pending for, nor have they received, any other SBA business loan for the same purpose since February 15, 2020.
- ✓ The borrower will provide the lender documentation that verifies the number of full-time equivalent employees on payroll, the dollar amount of payroll costs, covered mortgage interest payments, covered rent payments, and covered utility payments for the eight weeks after getting the loan.
- ✓ Loan forgiveness will be provided for the sum of documented payroll costs, covered rent payments, and covered utilities. Also must acknowledge/ agree to the possibility that "not more than 25% of the forgiven amount may be for non-payroll costs."
- ✓ All the information provided by the borrower is true and accurate.
- ✓ The lender will calculate the eligible loan amount using the tax documents submitted.

MAXIMUM LOAN AMOUNT

LOANS ARE CAPPED AT THE LESSER OF—

\$ 10 MILLION

OR

250% OF AVERAGE MONTHLY
"PAYROLL COSTS" DURING THE
LAST YEAR (OR ALTERNATIVE
LOOK-BACK PERIODS FOR NEW
AND SEASONAL BUSINESSES)

Plus any outstanding EIDL amounts to be refinanced

USES FOR LOANS

LOAN DOLLARS MAY BE USED FOR—

GROUP HEALTH CARE BENEFITS & INSURANCE PREMIUMS

Group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums.

MORTGAGE INTEREST

Payments of interest on mortgage obligations.

PAYROLL COSTS

This includes 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.

It excludes excess compensation above the \$100,000 threshold; certain federal taxes; compensation to non-U.S. employees; and sick and family leave wages for which credit is allowed under the Families First Coronavirus Relief Act.

EXISTING SBA USES

Any uses already permitted for SBA Business Loans (e.g., inventory, supplies, building or land purchases, construction, site improvements, etc.).

INTEREST ON OTHER OBLIGATIONS

Interest on any other debt obligations incurred before February 15, 2020.

RENT & UTILITIES

Rent (including rent under a lease agreement) and utilities.

MAXIMUM LOAN FORGIVENESS AMOUNT

THE MAXIMUM AVAILABLE FORGIVENESS AMOUNT (UP TO THE FULL PRINCIPAL AMOUNT OF THE LOAN) IS THE SUM OF THE FOLLOWING INCURRED AND PAID WITHIN 8 WEEKS OF YOUR LOAN ORIGINATION (I.E., THE “FORGIVENESS PERIOD”)—

- Payroll costs;
- 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 provisions seem to incentivize quick deployment of loan dollars to these priority buckets of expenses. If you do not spend your full loan amount in these four areas within 8 weeks of getting your loan, you will not be eligible for forgiveness of your full loan amount.

NOTE: EARLY TREASURY GUIDANCE CAUTIONS THAT THEY ANTICIPATE THAT NOT MORE THAN 25% OF THE FORGIVEN AMOUNT MAY BE FOR-PAYROLL COSTS.

REDUCTIONS IN LOAN FORGIVENESS

REDUCTIONS / PENALTIES

Maximum forgiveness amounts will be reduced:

- Proportionately for reductions in average full-time equivalent employees between pre-crisis levels and the 8-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 economic injury disaster loans (EIDLs).

RELIEF FROM REDUCTION PENALTIES

There is relief from these forgiveness penalties for businesses that restore payroll to pre-crisis levels in the next few months. The above reduction rules will not apply, if the employer eliminates by June 30, 2020:

- Reductions (compared to February 15, 2020) in the number of full-time equivalent employees 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 1 or more employees.

LONGER-TERM PAYROLL COMMITMENTS?

There do not appear to be any long-term payroll maintenance requirements beyond the expiration of the paycheck protection loan program on June 30, 2020.

APPLYING FOR LOAN FORGIVENESS

TO RECEIVE LOAN FORGIVENESS, BORROWERS MUST APPLY TO THEIR LENDER WITH DOCUMENTATION—

Verifying full-time equivalent employees on payroll and their pay rates (via 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, THE SAME LOAN TERMS REMAIN IN PLACE (E.G., GOVERNMENT GUARANTEE, INTEREST RATE, ETC.).

INTERACTION WITH CARES ACT TAX BENEFITS

NO EMPLOYEE RETENTION CREDIT FOR PPL RECIPIENTS

- The employee retention credit 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 reduction in gross receipts of at least 50%.
- For employers with more than 100 full-time employees, only employees who are currently not providing services for the employer due to COVID-19 causes are eligible for the credit.

NO EMPLOYMENT TAX DEFERRAL FOR RECIPIENTS OF PPL FORGIVENESS

- Employment tax deferral relief under the CARES Act postpones the due date for depositing employer payroll taxes and certain self-employment taxes attributable to wages paid during 2020. The deferred taxes would be payable over the next two years—half due December 31, 2021 and half due December 31, 2022.

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).

WHAT'S NEXT?

APRIL 3, 2020

According to early Treasury guidance, there will be staggered loan availability dates through existing SBA lenders and other federally-insured banks and credit unions. On April 3, 2020, loans will be available for small businesses and sole proprietorships.



APRIL 10, 2020

On April 10, 2020 loans will be available for independent contractors and self-employed individuals.

SBA has until April 10, 2020 to issue regulations implementing the paycheck protection loan program, but we anticipate much sooner. The rulemaking will not be subject to typical public notice and comment processes, but we are weighing in with SBA on issues that need further clarification.



APRIL 26, 2020

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

OTHER FUNDING OPTIONS TO CONSIDER

DIRECT LOAN PROGRAM FOR ELIGIBLE BUSINESSES

Eligible entities are businesses created or organized in the U.S. that have significant operations and a majority of employees based in the U.S.

DIRECT LOAN PROGRAM FOR MID-SIZE BUSINESSES

Eligible entities are businesses with 500-10,000 employees who are domiciled in the U.S. with significant operations and a majority of employees based in the U.S. Other eligibility criteria include:

- The business must not be a debtor in bankruptcy; and
- The uncertainty of the economic conditions must make the loan necessary to support ongoing operations.

DIRECT LOAN PROGRAM FOR AIR CARRIERS, CARGO AIR CARRIERS, AND BUSINESSES CRITICAL TO MAINTAINING NATIONAL SECURITY

Eligible entities are businesses created or organized in the U.S. with significant operations and a majority of employees based in the U.S. Other eligibility criteria include:

- Credit must not be reasonably available;
- The business must have incurred/ be expected to incur covered losses such that continued operations of the business are jeopardized; and
- The intended obligation is prudently incurred.

MAIN STREET BUSINESS LENDING PROGRAM

Eligible entities would be small- and mid-sized borrowers, though the Federal Reserve has not provided details on the Program's operation.

COMPLEMENTS THE PAYCHECK PROTECTION LOAN PROGRAM WITH AN ADDED IMPACT ON MID-SIZE BUSINESSES.

QUESTIONS?



SCOTT SINDER

202-429-6289

ssinder@steptoe.com



KATE JENSEN

202-429-6259

kjensen@steptoe.com