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# Steptoe

## 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.

The Small Business Administration (SBA) has issued a final loan application, multiple interim final rules, and FAQ guidance to implement this program. The program requirements in those rules supersede any conflicting SBA Loan Program Requirements contained in SBA Business Loan regulations (13 CFR 120.10) until this program expires on June 30, 2020.

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

There are staggered loan availability dates:

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

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

- Loan amounts up to \$10 million per eligible entity;
- Loan payments are automatically deferred for six months, but interest will accrue during the 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 have a maturity of two years, but there is no penalty for prepayment; and
- Fixed interest rate of 1%.

### **Who is eligible?**

According to the rules, entities (including sole proprietors, independent contractors, and self-employed individuals) that were operating and paying workers on February 15, 2020, and:

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- Have 500 or fewer employees whose principal place of residence is in the US; **or**
- Satisfy the “small” SBA employee-based size standards for the entity’s industry.

“Employees” for purposes of this employee count are defined as “individuals employed on a full-time, part-time, or other basis.” Eligible entities include for-profit businesses, 501(c)(3) nonprofits, 501(c)(19) veterans organizations, and Tribal business concerns.

Rules released on April 3, 2020 contain special eligibility provisions for faith-based organizations. Such entities that satisfy the following criteria are eligible if they:

- Have not more than 500 employees (but see special rules below on affiliations); 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)).

The rules explicitly exclude “household employers” of nannies, housekeepers, etc. from eligibility. The rules also exclude from this program entities that are ineligible for SBA Business Loans under 13 CFR 120.110, “except that nonprofit organizations authorized under the [CARES] Act are eligible.” We encourage you to check the full list, but examples of excluded businesses 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;
- Businesses deriving more than one-third of gross annual revenue from legal gambling activities; and
- Businesses primarily engaged in political or lobbying activities.

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

### General Rules

All entities count full-time, part-time, and “other basis” employees of the entity **and** of all of the entity’s affiliates, unless an affiliation rule exception applies (see below).

The SBA 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 party has the power to control both. The guidance sets forth four tests/circumstances that will establish affiliation 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 50%+ ownership, SBA will consider the CEO, Board of

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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 and Affiliation Rules for Certain Industries

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”); 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 (meaning only the employee count of the entity, not the entity’s affiliates, should count).

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

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

Additionally, by SBA’s rules, the 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

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religion.” The rules suggest that the religious entity must otherwise be eligible for a PPL (see eligibility for faith-based organizations above). SBA also will permit faith-based applicants to make a good-faith determination about whether and to what extent this waiver applies to them and will not require lenders to assess the reasonableness of the applicant’s determination.

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

Based on the information we have to date, it likely is worth evaluating PPL eligibility from the perspective of each separately organized business concern.

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 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.

## **How do I apply for a loan?**

The rules clarify that entities may not apply for or receive more than one PPL.

Loans may be delivered immediately by banks that already issue SBA Business Loans and any other federally-insured depository institutions, federally-insured credit unions, and Farm Credit System institutions that choose to participate in the program. Treasury is authorizing additional lenders that satisfy certain criteria to participate in the program to expand the network of institutions available to deliver these loans.

## **What is Required for the Loan Application?**

There is a standard PPL loan application (SBA Form 2483), which is significantly streamlined compared to normal SBA Business Loan applications. Bank underwriting obligations for PPLs are very limited (essentially, verifying that documentation is submitted, payroll averages are substantiated, etc.) and banks may rely on borrowers’ documentation and certifications to determine eligibility.

The application generally requires:

- Basic business identification information;
- A list of all owners of the applicant with 20% or greater 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
- The good-faith certifications described below.

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The only blanket “borrower requirements” imposed by the CARES Act for PPLs are certain good-faith certifications. Under the application and rules, an authorized business representative must certify, among other things:

- The applicant was in operation on February 15, 2020 and paid workers at that time, and is otherwise eligible for a PPL.
- 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.
- You will provide to the lender documentation that verifies the number of full-time equivalent employees on payroll and the dollar amounts of forgiveness-eligible costs for the eight weeks after getting the loan.
- 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 25% of the forgiven amount may be for non-payroll costs (as discussed below).
- The applicant has not and will not receive another PPL from now until December 31, 2020.
- 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.
- You acknowledge that the lender will calculate the eligible loan amount using the tax documents you submitted.

The rules clarify that e-signatures and e-consents are permitted.

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 seven years, among other circumstances.

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

All applicants will need to supply payroll documentation to their lender along with Form 2483. SBA FAQs suggest that payroll reports from recognized third-party processors will suffice.

Based on the application and the rules, it appears that lenders will use payroll documentation from calendar year 2019 to verify loan amount calculations, even though the law and rules reference the “last 12 months” as the look-back period for such calculations. SBA guidance clarifies that it is the borrower’s obligation to accurately calculate payroll costs and lenders need only do a “good faith review in a reasonable time” – but ultimately, the lender may rely on the borrower’s certification that the numbers submitted are correct.

## **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 on or after January 31, 2020 may be refinanced as PPLs. The rules state that if your EIDL loan was used for payroll costs, your PPL loan must be used to refinance your EIDL loan (note that a certification was also added to the application that your EIDL is not for payroll costs). But if your EIDL loan was not used for payroll costs, it does not impact your eligibility for a PPL.

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Additionally, the CARES Act clarifies that you 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?

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

- 250% of average monthly “payroll costs” (defined below) paid by the applicant during the last 12 months (but see above – likely this actually will be based on calendar year 2019 payroll documents collected by your lender; also, there are different look-back period options for new and seasonal businesses), plus
- Any outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less any advances taken under a COVID-19 EIDL loan.

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, as defined in the rules:**
  - Include: individual employee compensation (salary, wages, commissions, cash tips, or similar) 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; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation;
  - Exclude: excess individual compensation above the \$100,000 threshold; federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020 (e.g., FICA, income taxes withheld from employees); compensation to employees whose principal place of residence is not the U.S.; 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);
- Utilities;
- Interest on any other debt obligations incurred before February 15, 2020; and/or
- Refinancing an SBA EIDL loan made between January 1, 2020 and April 3, 2020.

**The rules clarify that independent contractors do not count as “employees” for purposes of loan calculations (or for forgiveness amount determinations) because independent contractors can apply for their own loans under the program.**

**The rules also provide that at least 75% of the PPL proceeds “shall” be used for payroll costs.**

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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?

The rules and guidance issued to date generally do not address the forgiveness provisions discussed below, but we do anticipate that further details will be provided later by SBA.

### First, Determine Your Maximum Available Forgiveness Amount

Under the rules, the maximum available forgiveness amount (capped at principal amount of the loan plus any accrued interest) 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 incentivize quick deployment of loan dollars to these priority buckets of expenses, particularly payroll. The rules clarify that **not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs**. Moreover, any dollars spent more than 8 weeks after your loan is originated, even for these forgiveness-eligible expenses, will not be included in your forgiveness amount.

### 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.

Note that the law does not say whether FTEEs will be based on a 40-hour work week or some other measure, but we hope this point will be clarified in future SBA guidance.

### 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:

- Reductions (compared to February 15, 2020) in the number of FTEEs made between February 15, 2020 and April 26, 2020; and/or, as applicable,

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- 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).

## 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 amounts remaining after the forgiveness determination, it appears that the intent of the CARES Act is for the same loan terms to continue applying (e.g., 1% interest rate, federally-guaranteed, two-year maturity, etc.), but future SBA guidance on the forgiveness provisions may elaborate more on this topic.

## 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).

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

The SBA already has released rules and FAQ guidance on the PPL program, which is updated frequently. 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](#).*

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