



Memorandum

To: Clients

From: Jon Talcott, Peter Strand, Mike Bradshaw, Callen Carroll

Date: April 6, 2020

Re: **SBA Paycheck Protection Program with Eligibility Questionnaire**

On Friday, April 3, 2020, eligible lenders began accepting applications for loans under the \$349 billion Paycheck Protection Program, the cornerstone lending program under the Coronavirus Aid, Relief, and Economic Security Act, or the CARES Act, the \$2.2 trillion stimulus package signed into law on March 27, 2020. Since the CARES Act was adopted, the Small Business Administration (“SBA”) and Treasury have been hard at work to implement the program and provide guidance to both lenders and borrowers.

The SBA issued an interim final rule late Thursday April 2, 2020, and has also issued and updated as of April 3, 2020, a form borrower application and lender application, as well as guidance on affiliate issues, an interim final rule on affiliation and faith-based organizations, and FAQs, that the SBA has committed to supplement in the coming days. Paycheck Protection Program applications are being accepted by eligible lenders until June 30, 2020, or until the \$349 billion in allocated funds is exhausted. While the Paycheck Protection Program is described as “first-come, first-served,” the President has indicated that he will seek additional funding if the funding is depleted. As the guidance is constantly changing and being added to, it is important to understand the Paycheck Protection Program as it evolves and develops.

Paycheck Protection Program under the CARES Act

Potential borrowers may be eligible for loans fully guaranteed by the SBA under the Paycheck Protection Program at 1% interest rate over a two-year term, and subject to possible loan forgiveness depending on the borrower’s workforce and salary/wage levels. Eligible borrowers may borrow an amount based on 2.5 times the previous year’s average monthly payroll, up to a maximum of \$10 million, and a portion of the loan equal to eight weeks of payroll costs, interest on mortgage obligations, rent and utility, will be eligible for forgiveness, subject to reduction based on any reductions in workforce or wages/salary.

Borrowers will not be required to provide collateral or a personal guarantee, there will be no administration fees or prepayment penalties, they will not need to demonstrate that they cannot obtain credit elsewhere, payments will be deferred for six months, and the debt forgiveness will not count as income for tax purposes.

While this program is administered by the SBA, it is important to note that the loans are actually made by eligible banks and lenders, and there may be substantive differences in the implementation of the program from lender to lender.

1. Am I eligible?

You may be eligible if:

- a. you are a company that 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, material or labor and were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors; and
- b. you have 500 or fewer employees whose principal place of residence is the United States (or greater number of employees if provided here).

Note that the SBA's affiliation rules apply unless you are in the accommodation or restaurant industries, a listed franchise in the SBA's franchise directory, or companies that receive financial assistance from Small Business Investment Companies ("SBICs"). Hotels and restaurants must have 500 or fewer employees *per physical location*. 501(c)(3) non-profits, sole proprietors, independent contractors and certain self-employed individuals may also be eligible.

Certain felons and other bad actors are disqualified, as are persons that have defaulted on an SBA or federal loan and caused a loss to the government within the last seven years. The program will also not be available to certain industries that have traditionally been ineligible for SBA loans. See our eligibility checklist attached hereto as **Appendix A**.

The SBA's affiliate rules require you to also count the employees of any other entity that is under common control with the borrower. Equity ownership over 50%, common management, or other negative control over the operation of the company will likely lead to a finding of control under the SBA's affiliate rules.

Private equity or venture capital-controlled companies may need to count the employees of all of the other companies controlled by such funds, and may find it hard to fall below the applicable size thresholds. As stated above, the affiliation rules are waived for businesses in the accommodation or restaurant industries, franchises listed in the SBA's franchise directory, and companies that receive financial assistance from an SBIC. Businesses are encouraged to review

the affiliation rules and guidance published by the SBA to determine their eligibility.

Borrowers will also need to certify in good faith that the loan is necessary to support ongoing operations and the funds will be used to retain workers and maintain payroll, or make mortgage, lease and utility payments. At least 75% of the loan forgiveness amount must have been used to cover payroll costs.

2. How much can I borrow?

Loans may be made in amounts equal to 2.5 times the average total monthly payroll costs incurred in the prior one-year period (12-week period for seasonal employers) plus the amount of any existing Section 7(b)(2) disaster loans to be refinanced that were entered into between January 31, 2020 and April 3, 2020, up to a maximum loan amount of \$10 million.

Payroll costs include salary, wages, commissions or similar compensation of employees; payment of cash tips or equivalents; payment of vacation, parental, family, medical or sick leave; allowance for dismissal or separation; payment required for provision of group health benefits; retirement benefits; and payment of state and local tax assessed on the compensation of employees. Payroll costs will not include more than \$100,000 in compensation to any one employee; compensation for an employee living outside of the United States; federal income tax withholding between February 15, 2020 and June 30, 2020; and qualified sick leave or FMLA leave wage for which a credit is allowed under the Families First Coronavirus Response Act.

You may increase the amount of your loan to refinance any Section 7(b)(2) disaster loans entered into between January 31, 2020 and April 3, 2020, provided that if such disaster loan was used on payroll costs, you must refinance such loan under the Paycheck Protection Program.

3. Can I get loan forgiveness?

Paycheck Protection Program loans will be eligible for loan forgiveness (subject to reduction based on reductions in workforce or wages/salaries) in an amount equal to the amount actually incurred or paid during the first eight weeks of the loan on payroll costs, eligible rent obligations, interest on mortgages, and utilities, up to the original principal amount. At least 75% of the forgiveness amount must be used towards payroll costs.

The amount of debt forgiveness will be reduced by the proportion of any reduction in average monthly workforce compared to the period from either, at the borrower's choice, February 15, 2019 to June 30, 2019, or January 1, 2020 to February 29, 2020, and will further be reduced by the amount that the wages/salary of any single employee making under \$100,000 is reduced by greater than 25%. Reductions in workforce or wages/salaries occurring between February 15, 2020 and April 26, 2020 will not count against the forgiveness amount if all such reductions are reversed before June 30, 2020.

Borrowers will need to apply with the lender for the forgiveness and be able to provide documentation supporting the calculation of the forgiveness amount, as well as all employment levels and wage and salary amounts.

4. What are the next steps?

If you think that you are eligible for the Paycheck Protection Program, you may submit an application with any eligible lender. Many lenders are only accepting applications from existing business customers. If you do not already have a relationship with an eligible lender, the SBA's website may be able to match you with an eligible lender. Payroll Protection Program funds will be disbursed on a "first come, first served" basis, but the President has indicated that he will seek additional funds if the funding runs out. Independent contractors and self-employed individuals can apply for Paycheck Protection Program loans beginning April 10, 2020.

For more information, please feel free to contact:

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Appendix A Eligibility

Paycheck Protection Program (“PPP”)		
Is your business potentially eligible?	YES	<p>Applicants which have been in operation since February 15, 2020, with <u>fewer than 500</u> employees (unless more per industry size guidelines), may qualify, including:</p> <ul style="list-style-type: none"> • Small businesses • Sole proprietorships • Independent contractors • Self-employed individuals • Non-profit organizations • Tribal businesses • Veteran organizations • For-profit subsidiaries of non-profit business • Pawn shops in some circumstances (although engaged in lending) • Businesses in the United States owned by aliens <p>Hotels, restaurants, franchisors and other businesses <u>with 500 or fewer</u> employees at <u>each</u> of their physical locations also may qualify.</p>
		<p>Applicants may be <u>ineligible</u> if any of the below applies:</p> <ul style="list-style-type: none"> • Already applied for a PPP loan • Household employer (such as for a nanny or housekeeper) • Financial businesses primarily engaged in the business of lending, such as banks and finance companies • Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111) • Life insurance companies • Businesses located in a foreign country • Pyramid sale distribution plans • Businesses primarily engaged in political or lobbying activities • Businesses that previously defaulted on an SBA or Federal loan or Federally assisted financing, resulting in the Federal government or any of its agencies or Departments sustaining a loss in the last seven years <ul style="list-style-type: none"> ○ <i>(A compromise agreement shall also be considered a loss)</i>

	<ul style="list-style-type: none">• Certain casinos or businesses deriving more than one-third of gross annual revenue from legal gambling activities• Private clubs and businesses that limit the number of memberships for reasons other than capacity• Government-owned entities (except for those owned or controlled by a Native American tribe), and business in which the lender or CDC or any of its Associates owns an equity interest• Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting• Loan packagers earning more than one-third of their gross annual revenue from packaging SBA loans• Businesses engaged in any activity illegal under federal, state or local law• Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude• An owner of 20% or more of the equity of the borrower is incarcerated, on probation or parole, subject to an indictment, criminal information, arraignment or has been convicted of a felony in the last five years• Debarred or declared ineligible from the Payroll Protection Program• Presently involved in a bankruptcy• Businesses that present live performances of a prurient sexual nature; or derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature• Speculative businesses (such as oil wildcatting)
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