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# An Update on Loan Programs Available Under the CARES Act

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## AGENDA

- Updates from Interim Rules and FAQs
- Forgiveness
- Permitted Uses
- Interplay Between CARES Act & Families First Coronavirus Response Act
- Tax Credits vs. Paycheck Protection Program
- Tax Strategy & Planning Surrounding CARES Act Provisions
- Cash Flow Strategies
- Main Street Lending Program
- Questions & Answers

# ELIGIBILITY UPDATES

## Size Standards

- In addition to the 500 employee count, a business can qualify if it meets the SBA employee-based or revenue-based size standards corresponding to its primary industry ([www.sba.gov/size](http://www.sba.gov/size))
- “Alternative Size Standard” – as of March 27, 2020, (i) maximum tangible net worth of the business is not more than \$15m and (ii) the average net income after Federal income taxes (excluding carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5m.
- Non-Profits subject to 500 employee test or SBA employee-based size standard

## Employee Count

- At election of borrower, (i) average employment from the prior 12 months or calendar year 2019 or (ii) average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application.

## APPLICABLE AFFILIATION RULES

- Affiliation based on ownership
- Affiliation arising under stock options, convertible securities, and agreements to merge
- Affiliation based on management
- Affiliation based on identity of interest
- Religious Exemption
- Waiver

## RULES APPLICABLE TO FRANCHISES

- The \$10m cap on PPP Loans is a limit per franchisee entity, and each franchisee is limited to one loan.

## RULES APPLICABLE TO NAICS CODE 72 BUSINESSES

- Any single business entity that is assigned a NAICS code beginning with 72 and that employs not more than 500 employees per physical location is eligible to receive a PPP loan.
- If each business location owned by a parent business is a separate legal entity, each business location that employees not more than 500 employees may apply separately (with its unique EIN).
- The \$10m cap applies to each eligible business entities.
- Businesses owned by a common owner that are not classified with NAICS 72 are not otherwise exempted from the Affiliation Rules because the owner also has a business with a 72 code.

# SELF-EMPLOYED APPLICANTS

## Eligibility:

- If you have income from self-employment and you file a Form 1040, Schedule C then you are eligible for a PPP loan if (i) you were in operation on February 15, 2020; (ii) you are an individual with self-employment income (such as an independent contractor or sole proprietor); (iii) your principal place of residence is in the United States; and (iv) you filed or will file a Form 1040 Schedule C for 2019 taxes.

## Loan Amount:

- Using your 2019 IRS Form 1040 Schedule C, line 31, identify the net profit amount (if in excess of \$100,000, reduce to \$100,000).
- If you have employees, add in payroll costs to employees.
- Divide this amount by 12 to calculate the average monthly net profit amount.
- Multiply the average monthly net profit amount by 2.5.
- Add in any outstanding amount of an Economic Injury Disaster Loan (“EIDL”) EIDL that you seek to refinance.

## SELF-EMPLOYED APPLICANTS (CONT'D)

### Use of Proceeds:

- The Treasury has limited the allowable uses to those types of expenses which the borrower made expenditures on in 2019.
- You must have claimed or be entitled to claim a deduction for such expenses in your 2019 Form 1040 Schedule C for them to be a permissible use during the 8-week period following disbursement.

### Forgiveness:

- The amount of loan forgiveness for self-employed individuals is limited to a proportionate 8-week share of 2019 net-profits, as reflected in the individuals 2019 Form 1040 Schedule C.

## PARTNERSHIPS

- It has been determined that permitting partners to apply as self-employed individuals would create unnecessary confusion regarding which entity, the partner or the partnership, applies for partner and LLC member income, and would generate loan proceeds use coordination and allocation issues. Therefore partners **should be** included as employees of the organization for purposes of the loan application.

## INDEPENDENT CONTRACTOR PAYMENT

- Any amount that an eligible borrower has paid to an independent contract or sole proprietor should be excluded from the eligible business's payroll costs.

# PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS

- Total principal plus accrued interest is eligible to be forgiven
- Eligible costs to be included in the forgiveness calculation must be incurred and paid within the 8-week period beginning after the disbursement of the loan proceeds.
- Interpretation of “paid and incurred”
- Forgiveness is nontaxable
- Eligible costs are:
  - Eligible payroll costs
  - Payments of interest on covered mortgage obligations
  - Covered utility payments

# PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS

## Payroll Costs

- All forms of compensation paid to employees
  - Wages, commission, tips
  - Severance, vacation, sick time
  - State or local tax assessed on employee compensation
  - Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums
  - Retirement plan contributions
- Capped at \$100k annual compensation per employee
- Documentation needed
  - Payroll tax filings reported to the IRS
  - State income tax and payroll tax filings
  - Unemployment insurance filings
  - Payroll reports and other related information for the 8 week period after disbursement of the loan proceeds.
    - Employers may end up needing these through June 30<sup>th</sup> if the reduction elimination carve-out applies.

# PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS

## Non-Payroll Costs

- Applicable agreements must be in effect prior to February 15, 2020
- Interest payments on covered mortgage obligation
  - Does not include principal payments or prepayment of interest.
- Covered rent obligations
- Covered utility payments
  - Payment for distribution of electricity, gas, water, transportation, telephone, or internet
- Documentation needed
  - Cancelled checks
  - Payment receipts
  - Transcripts of accounts
  - Other documents verifying payment

# PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS

- At least 75% of the forgiveness amount must be attributable to eligible payroll costs
- Reduction of FTEs
  - Forgiveness amount is reduced proportionately to the reduction in FTEs under the 8-week covered period when compared to an allowed prior period
  - Based on average FTEs per month from one of the two periods:
    - February 15, 2019 to June 30, 2019
    - January 1, 2020 to February 29, 2020
  - SBA has not yet defined FTEs for purposes of this computation
  - Any reductions in FTEs related to employees who were laid off between February 15, 2020 and April 26, 2020 are disregarded for the forgiveness reduction calculation *as long as the eliminations are reversed by June 30, 2020*
  - Will need to provide lender with verification of the number of FTEs and pay rates

# PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS

- Reduction of Salaries
  - Compare each employee's salary and wages during the 8-week period after funds were disbursed to the employee's salary and wages during the first full quarter prior the 8-week period
  - Loan forgiveness is reduced by any reduction in pay in excess of 25%
  - Employees who made over \$100k on an annualized basis in 2019 are excluded from this calculation.
  
- Loan forgiveness amount should be reduced by any EIDL advance that was received (potentially up to \$10k)

# ALLOWABLE USES OF PPP LOANS UNDER THE CARES ACT (INDEPENDENT OF SECTION 1106)

## What we know so far:

- CARES Act specific:
  - Payroll costs (as specifically defined by the CARES Act Section 1102)
  - Costs related to continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums
  - Employee salaries, commissions, or similar compensations
  - Payment of interest on any mortgage obligation (does not include principal)
  - Rent
  - Utilities
  - Interest on any other debt obligations incurred before February 15, 2020

# ALLOWABLE USES OF PPP LOANS UNDER THE CARES ACT (INDEPENDENT OF SECTION 1106) CONT'D

## What we know so far:

- CARES Act includes a reference that the specific uses defined in Section 1102 are “in addition to the allowable uses of a loan made under this subsection”
- “This subsection” refers to Section 7(a) of the Small Business Act (SBA)
  - “Allowable uses” is not defined by the SBA
  - Flush language of the SBA provides that loans may be made for:
    - Plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern for the purposes of the SBA
- Interim Final Rule references “other allowable uses” under the SBA, but only in reference to the fact that not more than 25% of the loan should be used for such “other allowable uses” which include the non-payroll costs CARES Act allowable uses.

# ALLOWABLE USES OF PPP LOANS UNDER THE CARES ACT IN ORDER FOR LOAN TO BE FORGIVEN (UNDER SECTION 1106)

## What we know so far:

- The definition of “allowable use” under Section 1102 is not the same as the eligible forgiveness items set forth in Section 1106
- Items included in determining forgiveness amount:
  - Payroll costs (same meaning as under 1102)
  - Payment of interest on any mortgage obligation (related to real or personal property) of the borrower incurred before February 15, 2020 (does not include principal);
  - Payment of rent under a leasing agreement in force prior to February 15, 2020
  - Payment for a service for the distribution of electricity, gas, water, transportation, telephone or internet access for which service began before February 15, 2020
- Interest, rent and utility definitions contain date limitations not included under Section 1102
- Does not include SBA “allowable uses”

# WHAT HAPPENS TO LOANS FOR ALLOWABLE USES THAT ARE NOT FORGIVEN?

## What we know so far:

- 2 year maturity date (not 10 as set forth in the CARES Act)
- 1% interest rate
- No payments for 6 months following disbursement of the loan, however interest will be accruing
- The above were all clarified in the Interim Final Rule which largely narrowed the parameters set forth in the CARES Act

# WHAT HAPPENS TO LOANS THAT ARE NOT USED FOR ALLOWABLE USES?

## What we know so far:

- SBA will direct repayment of amounts
- Knowing use for an unauthorized purpose may subject borrower to additional liability including charges for fraud

## Planning tip:

- “Covered period” for expanded CARES Act “allowable uses” ends on June 30, 2020
- Plan to repay excess amounts that cannot otherwise be used for SBA Section 7(a) “allowable uses”

# CARES ACT VS. FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Generally, FFCRA is a federal paid sick and family leave program
  - Includes an employment tax credit for employers who are required to provide such leave
  - Credit is available for employers with fewer than 500 employees
- CARES Act contains incentives to keep employees on their payroll
  - Specifically provides that you cannot “double dip” under the PPP Loan Program (amounts eligible for credit under FFCRA are excluded from “payroll costs” under Section 1102)
  - Employee Retention Credit does not include the amount of qualified sick or family leave wages paid under the FFCRA
  - Employee Retention Credit is available to employers regardless of size

# TAX CREDITS VS. PAYCHECK PROTECTION PROGRAM

## Payroll Tax Credits vs. Deferral

Employee Retention Credit	Deferral of Payroll Taxes
<ul style="list-style-type: none"><li>• Refundable credit against social security taxes</li><li>• Qualified Employer – closed due to COVID-19 <u>or</u> comparative revenue down 50% year over year</li><li>• Amount of credit:<ul style="list-style-type: none"><li>• 50% of employee wages</li><li>• \$10,000 of wages per employee</li></ul></li><li>• <b># of Employees matters!</b><ul style="list-style-type: none"><li>• &gt;100 FTEs – only wages paid to employees unable to work due to COVID-19 closures are eligible</li><li>• &lt;100 FTEs – all wages eligible whether business is closed or not</li></ul></li><li>• Covers wages paid from 3/13/2020 through 12/31/2020</li><li>• If you get a PPP, no credit</li></ul>	<ul style="list-style-type: none"><li>• Elect to defer</li><li>• 50% deferred amount due 12/31/2021; 50% due 12/31/2022</li><li>• If you get PPP loan <b>forgiven</b>, you are not eligible<ul style="list-style-type: none"><li>• Recent updates to FAQs clarify that deferral allowed without penalty until the loan is officially forgiven. Amounts deferred during that time are still due in 2021 and 2022; just no new deferrals.</li></ul></li></ul>

# TAX CREDITS VS. PAYCHECK PROTECTION PROGRAM

## **Paycheck Protection Loan vs. Payroll Tax Credit or Deferral**

- Some businesses will not qualify for the Paycheck Protection Loan
- Can defer until you know if you have forgiveness

## TAX PLANNING STRATEGIES

- Amend returns to take advantage of retroactive changes to TCJA provisions:
  - QIP
  - NOL limitations
  - Business interest limitations
  - Business loss limitations
- NOL Carryback Claims
  - NOLs generated in 2018, 2019, or 2020 eligible
  - Carryback period is 5 years
  - Forms 1139 and 1045 – new guidance out re: faxing forms instead of mailing
- Estimated payment planning:
  - Annualized income estimates for 2020 payments
  - Safe-harbor v. current year strategies

## CASH FLOW STRATEGIES

- Deferring payments:
  - 2019 balances due
  - 2020 Q1 & Q2
  - Employer payroll taxes (if applicable)
  - Notice 2020-23
- Loan programs – PPP, EIDL, re-fi
- Innovation – retool or reorg to provide services or goods needed during this time
  - R&D credits and/or NYS ITC for change in production

## MAIN STREET LENDING PROGRAM

- \$600 billion available for loans to companies employing up to 10,000 workers or having up to \$2.5 billion in 2019 annual revenues.
- The Main Street New Loan Facility will provide for newly originated loans to eligible businesses, while a second facility, the Main Street Expanded Loan Facility, will allow companies to upsize existing loans.
- Not forgivable

## MAIN STREET LENDING PROGRAM (CONT'D)

- An “Eligible Borrower”:
  - May have up to 10,000 employees or up to \$2.5 billion in 2019 annual revenues.
  - Must be U.S. business, with significant operations and a majority of its employees in the U.S.
  - May **not** participate in the both the Expanded Loan and New Loan programs.
  - May **not** participate in the Primary Market Corporate Credit Facility.
  - **May** be a participate in the Paycheck Protection Program.
- No indication from SBA or Treasury that affiliation rules apply.

## MAIN STREET LENDING PROGRAM (CONT'D)

- Borrowers must follow the compensation, stock repurchase and dividend restrictions that apply to direct loan programs under the CARES Act
- Borrowers must attest, in part, that:
  - Proceeds will not be used to repay other loan balances
  - The borrower will refrain from repaying other debt of equal or lower priority with the exception of mandatory principal payments
  - The borrower will not seek to cancel or reduce existing lines of credit
  - The borrower requires financing due to the exigent circumstances presented by COVID-19
  - The borrower will “make reasonable efforts to maintain its payroll and retain its employees” during the loan term

## MAIN STREET LENDING PROGRAM (CONT'D)

- 4-year maturity;
- A rate equal to the Secure Overnight Financing Rate (currently 0.01%) + 2.50-4.00%;
- Minimum loan size of \$1 million;
- New Loan - The maximum loan size is the lesser of (i) \$25 million or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed four times the Eligible Borrower's 2019 EBITDA; and
- Expanded Loan - The maximum loan size is the lesser of (i) \$150 million, (ii) 30% of the Eligible Borrower's existing outstanding and committed but undrawn bank debt, or (iii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed six times the Eligible Borrower's 2019 EBITDA.
- Principal and interest payments deferred for one year.

## QUESTIONS & ANSWERS

**Q:** Can you have different employees and still qualify for loan forgiveness?

**A:** Based on our interpretation of the FTE reduction calculations, you are able to hire different employees and not be negatively impacted by that reduction. However, different employees may not help with the salary reduction calculation since it is done on an individual employee-basis.

## QUESTIONS & ANSWERS

**Q:** Will a company lose debt forgiveness eligibility if they are unable to hire back non-essential employees?

**A:** A company can still be eligible for partial forgiveness, but there will be a reduction in the amount eligible for forgiveness if there is a decrease in FTEs.

## QUESTIONS & ANSWERS

**Q:** What is the calculation for the penalty/unforgiven amount if headcount doesn't stay flat?

**A:** We expect further guidance to be issued on the calculation, as the language in the CARES Act can be interpreted in multiple ways. However, we believe that the intent was for the calculation is based off of percentage of FTEs. For example, if a company maintains 90% of its average FTEs during the 8-week covered period, its forgiveness is reduced by 10%.

## QUESTIONS & ANSWERS

**Q:** How do we provide proof that we haven't laid off anyone?

**A:** You will submit documentation to your lender with your loan forgiveness application. This will include payroll tax filings, unemployment insurance filings, and other payroll reports.

## QUESTIONS & ANSWERS

**Q:** How is the \$100K cap calculated for purposes of forgiveness?

**A:**

- The max compensation per employee for purposes of the calculation is \$15,385. ( $\$100k * (8 \text{ weeks}/52)$ ). Certain payments are not subject to the cap, such as employer-paid retirement and health insurance.
- Employees who received annualized pay over \$100k in 2019 are excluded from the salary reduction calculation.

## QUESTIONS & ANSWERS

**Q:** Does the 75/25 split have to be maintained each week in such a manner that amounts riding over the 25% are screened off?

**A:** The 75% test is done in total for the 8-week covered period and is not a weekly test.

## QUESTIONS & ANSWERS

**Q:** What collateral is needed for the Main Street lending program?

**A:** New loans under the Main Street Loan Program will be unsecured. Existing collateral on upsized loans under the Main Street Loan Program will secure the upsized loan on a pro rata basis.

## QUESTIONS & ANSWERS

**Q:** After SBA & bank approval, are there options to delay the receipt of PPP loan proceeds from the bank?

**A:** Guidance from the SBA indicates that banks must pay out loans within 10 days of SBA approval.

## QUESTIONS & ANSWERS

**Q:** What other borrowing opportunities exist outside the PPP Loans?

**A:**

- Main Street Lending Program
- Economic Injury Disaster Loans
- SBA Express Loans
- Additional Loan Programs TBD

## QUESTIONS & ANSWERS

**Q:** What is the "date of origination of a covered loan" for determining beginning of 8 week period for "forgiveness" tracking?

**A:** The forgiveness "covered loan" period begins on the date you receive your loan proceeds.

## QUESTIONS & ANSWERS

**Q:** Do companies with a history of negative EBITDA qualify for this program?

**A:** Yes, there is no EBITDA test on the PPP loan program. We are not sure what creditworthiness standards the Main Street Loan Program will have.

## QUESTIONS & ANSWERS

**Q:** My 2 banks have both suspended applications - won't even let me complete an application. Is that allowed?

**A:** It is not clear from the regulations whether this is permitted under the CAREs Act but we anticipate, based on guidance from the Treasury, that additional funds will open up for the PPP Loans.

## QUESTIONS & ANSWERS

**Q:** If economy is not open for business by June 30, will the 8 weeks be extended? The 8 week rule begins right after the funds land. However, given the restaurant industry is closed, is there a special rule allowing us to pick when the 8 weeks start?

**A:** The CAREs Act does not provide for an extension beyond the June 30<sup>th</sup> date. There is no ability for borrower's to pick when their forgiveness period begins. We expect future guidance on this issue.

## QUESTIONS & ANSWERS

**Q:** Should we consider an employee bonus during the 8 week period to help utilize the forgiveness portion?

**A:** This is a case by case basis but employee bonuses and increased pay are permitted as the CAREs Act is currently drafted.

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