

PPP LOAN PROGRAM UNDER THE CARES ACT

MASSACHUSETTS CHAPTER
ASSOCIATED BUILDERS AND CONTRACTORS
APRIL 29, 2020

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DISCLAIMER

The views in this document are not necessarily the views of WithumSmith+Brown, PC. These are the interpretation of the presenter and cannot be relied upon without a full review of the CARES Act released on March 27, 2020 and the subsequent SBA Interim Final Rules and FAQs released through April 27, 2020

It is your responsibility to perform your own interpretation of the guidance that has been published.

SBA Assistance

SBA has several different financial assistance programs for small businesses

- SBA Disaster Assistance Loans for businesses impacted by COVID-19
 - Economic Injury Disaster Loan (EIDL) Program –may be used to pay fixed debts, payroll, accounts payable and other bills that can't be paid because of the disaster's impact
 - Emergency EIDL Grants up to \$10,000
- Standard 7(a) Loan Program with amendments under the CARES Act
- Express Loan Program – increased amount from \$350,000 to \$1,000,000

SBA EIDL

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SBA EIDL

- Entities eligible
 - Sole-proprietor (with or without employees); independent contractor; business, cooperative, ESOP tribal small business concern with not more than 500 employees, and entities that meet the small business definition of the SBA
- Maximum Loan Determined by SBA: \$2,000,000
- Interest Rates: 3.75% for businesses and 2.75% for nonprofit entities
- Term: up to 30 years
- SBA is waiving
 - “credit elsewhere” clause
 - Personal guarantees for loans under \$200,000
 - Applicant needs to be in business for 1 yr. (but must have started prior to 1/31/20)
- SBA can approve based solely on credit score and not require tax returns
- May be used to pay fixed debts, payroll, accounts payable and other bills that can’t be paid because of the disaster’s impact

EIDL Emergency Advance

- Complete application on line
- Receive an advance of up to \$10,000
- Can be rolled into PPP loan
- Caseworker will contact borrower for next steps

SBA 7(A) LOAN UNDER PAYCHECK PROTECTION PROGRAM

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Certifications

- **Certifications of borrower made under penalties of perjury**
 - **Current economic uncertainty makes the loan necessary to support your ongoing operations**
 - **Funds will be used to retain workers and maintain payroll or to make mortgage, lease, and utility payments**
 - You have not and will not receive another loan under this program
 - To the extent feasible, you will purchase only American-made equipment and products
 - And others . . .

Additional Emphasis FAQ Released 4-23-20

31. Question: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, **before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”** Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower's certification regarding the necessity of the loan request.

Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

Eligibility

■ Eligible borrowers

- All businesses, including 501 (c)(3) nonprofits and veterans organizations and Tribal business concerns that were in business before 2/15/20
- Small business concerns with 500 or fewer employees (including FTEs and PTEs)
 - If more than 500 employees -
 - May qualify if it meets the SBA employee based or revenue based size standard corresponding to their “primary” industry
 - If they don’t meet this standard can still qualify if
 - They meet the SBA’s “alternative” size standard as of March 27, 2020
 - Maximum tangible net worth is not more than \$15MM AND
 - Average net income after federal taxes (excluding carryover NOLs) is not more than \$5Mm for the last two full years
- Includes sole-proprietors, independent contractors and eligible self-employed individuals
- Affiliation rules apply – businesses under common control need to aggregate all entities to determine the number of employees
 - Waived for small business (i) in the [NAICS](#) code 72 (hotel and food services) and (ii) that are franchises in the SBA’s [Franchise Directory](#), and (iii) that receive financial assistance from small business investment companies licensed by the SBA

Ineligible Borrowers

- Ineligible borrowers

- Businesses engaged in any activity illegal under federal, state or local law
- You are a household employer (you employ nannies, housekeepers)
- An owner of 20% or more of the equity who is incarcerated, on probation or parole
- Delinquent on any loan from SBA in past 7 years
- Finance businesses primarily engaged in lending such as banks, finance companies and factors
- Passive business owned by developers and landlords that do not actively use or occupy the assets
- Life insurance companies

Payroll Costs Defined

■ Payroll Costs

- Employee (covers compensation up to \$100,000 annually)
 - Wages, salary, commissions, or tips (up to cap of \$100K/year/person)
 - Vacation, parental, family, medical, or sick leave
 - Dismissal or separation payments
 - Payments for group health care benefits, including insurance premiums
 - Retirement benefits
 - Employer state or local taxes on compensation
 - **DOES NOT INCLUDE INDEPENDENT CONTRACTORS**
- Sole proprietor or independent contractor (up to \$100,000 annually)
 - Wage; commission; income; net earnings from self-employment – **From 2019 Schedule C even if not yet filed with IRS**
- Partners in a partnership – **file with partnership application**
 - Net earnings from self-employment, computed from box 14a (reduced by any section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties) multiplied by 0.9235,2 up to \$100,000 per partner
- Excludes (i) employer's share of Federal employment taxes and federal income tax withholding, (ii) compensation to an employee whose principal place of residence is outside the United States, and (iii) qualified sick leave and family leave under the Families First Coronavirus Response Act

Maximum Loan Calculation

- Maximum Loan amount (capped at \$10,000,000)
 - 2.5 times the average **monthly** payroll costs incurred during the last 12 months before the date on which the loan is made **PLUS**
 - Outstanding amount of loans under 7(b)(2) that were made during January 31, 2020 and April 3, 2020 less the amount of any “advance” under the EIDL Covid-19 loan (because it does not have to be repaid)

Loan Terms

■ Loan Terms

- One loan per person
- In general, the maximum loan amount is the lesser of:
 - \$10,000,000, or
 - 250% of the average monthly payroll costs incurred during the 1 year period before the date on which the loan is made
- Not clear whether banks will use monthly average during 2019, or 12-month rolling average
- Lender will calculate the amount of the loan – review calculations
- No need to prove credit is unavailable elsewhere (*i.e.*, waiver of Credit Elsewhere requirement)
- Interest rate to 1% (based on Interim Final Rule released 4/2/20)
- Term 2 years from date borrower applies for loan forgiveness
- No collateral required – loan is 100% guaranteed by the SBA
- No personal guarantee required
- No prepayment penalties or fees
- Deferral for 6 months following the date of the loan; interest will accrue from date of loan
- Borrower can obtain EIDL after 1/31/20 and until 4/3/20 is obtained if used for a purpose other than payroll costs

Use of Proceeds

- Uses of loan proceeds
 - Payroll costs (per SBA fact sheet)
 - Rent under a lease in force before 2/15/2020
 - Utilities for which service began before 2/15/2020
 - Interest on mortgage obligations incurred before 2/15/2020
 - Interest on any other debt obligation incurred before 2/15/2020

Loan Forgiveness

- Loan Forgiveness
 - Includes all eligible expenses paid during the 8-week period after the loan is made
 - Eligible expenses:
 - Payroll costs (up to \$100K/year/employee – presumably same rules as loan use rules apply)
 - Interest on mortgages incurred before 2/15/2020
 - Rent under a lease in force before 2/15/2020
 - Utilities for which service began before 2/15/2020 (*e.g.*, electric, gas, water, transportation, telephone, and internet)
 - Cannot exceed the principal amount of the loan
 - **Anticipated that no more than 25% of amount forgiven can be for non-payroll costs**
 - Amount is tax-free to the borrower
 - Amount of forgiveness is reduced if there are certain headcount or wage reductions
 - Borrower will need to document the number of FTEs and pay rates, as well as the use of funds for all purposes
 - Lender has 60 days to make a decision after it receives a completed application for forgiveness

Forgiveness Example - non-payroll costs exceed 25%

		Max that can be forgiven	Loan to be repaid
Loan amount	\$100,000		
Payroll during 8 weeks	60,000	\$60,000	\$-0-
Rent, Utilities and Interest	30,000	$(60K/75\% = \$80,000 \text{ less } \$60,000) = \$20,000$	\$10,000
Total spent	90,000		
Amount to be repaid as it was not spent			$(\$100,000 \text{ less } \$90,000 \text{ spent}) \$10,000$
TOTALS		\$80,000	\$20,000

Loan Forgiveness Reductions

- Reduction based on headcount reduction

- Multiply total eligible expenses paid during 8-week period after loan is made (covered period) by the following fraction:
 - Average number of FTEs per month during 8-week period after the loan is made, divided by
 - At the election of borrower:
 - Average number of FTEs per month during 2/15/19 to 6/30/19, or
 - Average number of FTEs per month during 1/1/20 to 2/29/20

- Reduction based on wage reduction

- Reduction amount per employee is equal to:
 - the amount by which total salary and wages paid during the covered period is less than 25% of total wages paid during most recent full quarter before the covered period
- Although unclear, calculation of the reduction applies only to employees making less than \$100K/year

- Can restore headcount and wages by 6/30/2020 to account for any reductions made between 2/15/2020 and 4/26/2020

Loan Forgiveness Reductions Eliminated

RE-HIRE

(5) Exemption for re-hires.—

(B) Circumstances.— A circumstance described in this subparagraph is a circumstance—

(i) in which—

(I) during the period beginning on 2/15/20 and ending on 4/26/20, there is a reduction, as compared to 2/15/20, in the number of full-time equivalent employees of an eligible recipient;

and

(II) Not later than 6/30/20, the eligible employer has eliminated the reduction in the number of full-time equivalent employees;

(ii) in which—

(I) during the period beginning on 2/15/20 and ending on 4/26/20, there a reduction, as compared to 2/15/20, in the salary or wages of 1 or more employees of the eligible recipient;

and

(II) not later than 6/30/20, the eligible employer has eliminated the reduction in the salary or wages of such employees; **or**

(iii) in which the events described in clause (i) and (ii) occur.

DATES

Received loan on May 1, 2020

To apply for loan

- Use either calendar **2019** or **12 months ended 3/31/20**

Proceeds used during 8 weeks after loan is received **(5/1/20 to 6/25/20)**

Reduction of forgiveness based on:

- Reduction in # of employees
 - Average # FTEs **5/1/20 to 6/25/20** compared to either:
 - Average number of FTEs per month during **2/15/19 to 6/30/19**, or
 - Average number of FTEs per month during **1/1/20 to 2/29/20**
- Reduction in wages (more than 25%)
 - Salaries of employee during **4/1/20 to 5/31/20** compared to
 - First full quarter before loan **1/1/20 to 3/31/20**

Reduction eliminated by Re-Hire

- Average FTEs during **2/15/20 to 4/26/20** compared to **2/15/20**
- Salaries **2/15/20 to 4/26/20** compared to **2/15/20**
- If cured by **6/30/20** then there is no reduction in number of employees and/or salary

Unclear Items

- Loan amount was based on average monthly payroll but forgiveness is based on weekly payroll. Thus an employee making \$100,000
 - To calculate loan $\$100,000 / 12 \times 2 = \$16,667$
 - To calculate forgiveness $\$100,000 / 52 \times 8 = \$15,385$
 - Therefore, there will always be an amount that is not forgiven
- Can eliminate headcount reduction if employee is re-hired by 6/30/20, what if person is not available, can employer replace that employee – is this acceptable?
- Can eliminate salary reduction if employee salary is re-instated by 6/30/20, what if person is not available, does 75% of that persons wages reduce the forgiveness amount?

More Unclear Items

- To cure head count reduction, need to compare average FTEs between 2/15/20 – 4/26/20 and the FTEs on 2/15/20.
 - These dates have nothing to do with the FTEs used to determine loan or FTEs used to determine if there was a reduction in the first place (8 week period vs either 2/15/19 to 6/30/19 or 1/1/20 to 2/29/20)
- Sole-proprietor is automatically forgiven her loan BUT
 - Assume \$100,000 annual net earnings
 - Loan received is \$20,833 ($\$100,000 / 12 \times 2.5$)
 - Forgiveness \$15,385 ($\$100,000 / 52 \times 8$)
 - Loan repayment \$5,448