
2. Issue: how to get funds to these businesses in a timely manner?

3. Solution: the Paycheck Protection Program (PPP) under the CARES Act authorizes loans totaling up to $660 billion for “small business concerns” (500 or fewer employees, subject to certain exceptions) using the Small Business Administration’s (SBA) existing 7(a) loan program.
PPP Loans Under the SBA’s 7(a) Loan Program

WHAT ARE PPP LOANS?

Made by SBA certified lenders and other lenders authorized by the SBA.
Key point: Relies on SBA Act.

100% guaranteed by federal government

Available through June 30, 2020

Borrower must certify:

• Uncertainty of current economic conditions makes necessary the loan request to support ongoing operations.

• No duplicative SBA business loan.

• Funds will be used to retain workers and maintain payroll or make certain permitted mortgage payments, lease payments, and utility payments.

• Accuracy of other required documentation
ELIGIBLE BUSINESSES

In operation on February 15, 2020 and have employees to whom it paid salaries and payroll taxes

500 or fewer employees (or meet the size standard established by SBA for the relevant industry, if larger)

Must include employees of all Affiliates to determine eligibility

- “Affiliate” – Entities that control or under common control
- “Control” – Voting control, board control, and/or negative control over certain matters
### PPP Loans – SBA’s Affiliation Rules

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<tr>
<th>AFFIRMATIVE CONTROL</th>
<th>NEGATIVE CONTROL</th>
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<td>Control through voting shares or Board seats</td>
<td>Ability to block ordinary company actions</td>
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<td>Ownership of 50% or more of the applicant’s voting securities</td>
<td>Examples:</td>
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<td>• Prevent quorum</td>
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<td>• Making changes to a budget</td>
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“Totality of the Circumstances”
PPP Loans – SBA’s Affiliation Rules

WAIVER OF AFFILIATION RULE

• Waived for:
  • Businesses with an NAICS Code beginning with 72 (food services and lodging), as long as they have 500 or fewer employees per location
  • Business operating as franchises; and
  • Businesses that receive financial assistance from a Small Business Investment Company
Application of PPP Affiliation Rule to Private Equity or Venture Capital Backed Companies

**Majority Ownership of the Voting Equity?**
- Fully diluted cap table
- Options, convertible securities, agreements to merge generally given present effect
- If yes, then affiliation

**Minority Ownership**
Can a single minority SH prevent a quorum or otherwise block action by the board of directors or shareholders?
- Prevent a quorum = affiliation
- Other blocking rights — focus on operational decisions, not purely protective provisions
- “If the minority investor exercised its right to block every single time it arose, what operational effect would that have?”

**Other Bases of Affiliation**
See 13 C.F.R 121.30(f)
- Common management, identity of interest, close family relationship, newly organized concern rule
PPP Loan Terms

Maximum Amount =
lesser of:
• 2.5x average monthly payroll cost during the applicable measurement period; and
• $10 million

Interest Rate =
• No more than 4% (pursuant to the CARES Act)
• 1% (pursuant to SBA interim final rule issued on April 2, 2020)

Payment Terms =
• Deferred for 6-12 months (pursuant to the CARES Act)
• Deferred for 6 months (pursuant to SBA rule)
Forgiveness =
• Principal amount of loan will be forgiven to the extent used for permitted purposes, subject to certain limitations (pursuant to the CARES Act)
• Principal and interest may be subject to forgiveness (pursuant to SBA rule)

Maturity Date =
To the extent not forgiven, loan is to have maturity date of:
• up to 10 years after application for loan forgiveness (pursuant to the CARES Act)
• 2 years after application for loan forgiveness (pursuant to SBA rule)

Loan Fees =
• SBA loan fees waived
• Agent fees incurred in applying for PPP Loans are to be paid by the lender
Collateral =
• 7(a) collateral requirements waived for PPP Loans

Personal Guarantees =
• 7(a) personal guarantees from principals (owners) waived for PPP Loans

Permitted Uses =
Payroll Costs (up to $100,000 per individual, on an annualized basis) and other employee salaries, commissions, and other compensation; group healthcare benefits during periods of paid sick, medical, or family leave, and insurance premiums; covered rent payments; covered mortgage interest; utility payments; and interest on debt incurred prior to February 15, 2020.
LENDERS TO RELY ON BORROWER CERTIFICATIONS.

LENDERS REQUIRED TO:

• Confirm receipt of borrower certifications.

• Confirm receipt of information regarding payroll expenses.

• Confirm the dollar amount of average monthly payroll costs in submitted documentation.

• Follow BSA rules – e.g. anti-money laundering
Available Funds Gone Quickly
- April 3, 2020 – $350 billion in funds available
- Thirteen days later – funds exhausted

Bank Struggles
- Not SBA lenders
- Diligence concerns

Perceived Abuses
- Some large borrowers obtained PPP Loans

Many rules

Funds replenished April 24, 2020 - $310 Billion
FOCUS

“Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.”

APRIL 23

FAQ “Do businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?”

• Take into account ‘ability to access other sources of liquidity’ that are sufficient.

• “A public company with substantial market value and access to capital markets” is unlikely to be able to certify in good faith to the need.
AVAILABLE LENDERS & ONLINE PORTALS

• A wide variety of federally regulated lenders are authorized to issue PPP Loans
• Your existing lender or bank is probably the best place to start
• Applications are processed on a first-come, first-served basis, creating a sense of urgency
• The process to apply will be largely determined by your specific lender

SBA regional director: 'We're being bombarded right now' with PPP loan

An onslaught of applications for #PaycheckProtectionProgram loans for #smallbiz is creatin...

On PPP launch day, few local banks are accepting stimulus-loan

Many small businesses in Greater Boston who are hoping to receive their slice of the $349 billion stimulus pie were still ...
• On April 2, 2020, the SBA released Form 2483 (the PPP Application Form), which all PPP lenders will be required to provide to the SBA

• If you haven’t already done so, you can begin gathering information called for by Form 2483 since it will be required by all lenders

• Form 2483 calls for the applicant to calculate their Average Monthly Payroll and Loan Request

Form 2483 asks you to:

- Calculate Average Monthly Payroll:
- Multiply payrolls by 2.5
- Deduct any Advance
- Result is Loan Request

For more information, please see the form or contact your lender.
PPP Application (Form 2483) also calls for:

- The applicant’s number of employees;
  - Important – independent contractors do not count
- Identification of each owner of 20% or more of the business;
- Information regarding any other business owned or under common management with the applicant or its owners;
- Details regarding any EIDL obtained between January 31, 2020 and April 3, 2020; and
- Various certifications related to eligibility.
PPP APPLICATION (FORM 2483)

- Form 2483 includes important certifications regarding eligibility and good faith certifications regarding the necessity of the loan, the use of the loan proceeds, and documentation obligations.

- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).

- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant’s industry.

Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant’s payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.
Prospective borrowers should carefully consider their ability to make these certifications because potential fraud liability, exposing the applicant to treble (3x) damages, and criminal liability may apply.

This could include liability for applying for a loan when you do not meet the eligibility requirements.

The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1011 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than $5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than $1,000,000.
LOAN AMOUNT BASED ON AVERAGE MONTHLY PAYROLL COSTS, SUBJECT TO ADJUSTMENTS

• **Step 1** – Determine applicable measurement period:

  • **General Rule:** One-year period prior to the loan (pursuant to CARES Act), although the SBA rules and application form indicate that many applicants will use calendar year 2019

  • **Seasonal businesses:** Can elect between (1) February 15, 2019 through June 30, 2019, OR (2) the 12-week period beginning on March 1, 2019

  • **Newly formed businesses:** If not in business from February 15, 2019 through June 30, 2019, can elect to use period of January 1, 2020 through February 29, 2020 – May not help startups.

Average Monthly Payroll Costs = \[
\frac{\text{Payroll Costs} - \text{Excluded Costs}}{\text{Number of Months in Applicable Period}}
\]

Maximum Loan Amount = (Average Monthly Payroll Costs \times 2.5) + EIDL that is required to be repaid

Actual Loan Amount = lesser of $10M and the Maximum Loan Amount
LOAN AMOUNT BASED ON AVERAGE MONTHLY PAYROLL COSTS, SUBJECT TO ADJUSTMENTS

• Step 2 – Calculate total “Payroll Costs” for the applicable measurement period:
  • **General Rule:** any compensation with respect to employees that is a—
    • salary, wage, commission, or similar compensation;
    • payment of cash tip or equivalent;
    • payment for vacation, parental, family, medical, or sick leave;
    • allowance for dismissal or separation (including severance payments);
    • payment required for the provisions of group health care benefits, including insurance premiums;
    • payment of any retirement benefit; or
    • payment of State or local tax assessed on the compensation of employees

  • **Independent Contractors and Sole Proprietorships:** wages, commissions, income, net earnings from self-employment, or similar compensation, not to exceed $100,000 in 1 year, as prorated
LOAN AMOUNT BASED ON AVERAGE MONTHLY PAYROLL COSTS, SUBJECT TO ADJUSTMENTS

• **Step 3 – Subtract excluded costs:**
  • the cash compensation of an individual employee in excess of an annual salary of $100,000, as prorated for the covered period;
  • taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986;
  • any compensation of an employee whose principal place of residence is outside of the United States;
  • qualified sick leave wages for which a credit is allowed under the Families First Coronavirus Response Act (FFCRA); or
  • qualified family leave wages for which a credit is allowed under the FFCRA.
LOAN AMOUNT BASED ON AVERAGE MONTHLY PAYROLL COSTS, SUBJECT TO ADJUSTMENTS

- **Step 4** – Calculate the average monthly payroll costs by dividing the amount calculated under steps 1-3 by the number of months in the applicable measurement period (12 for most applicants), and then multiply the quotient by 2.5.

- **Step 5** – Add the amount of any EIDL that was received between January 31, 2020 and April 3, 2020 that is required to be repaid – exclude the amount of any "advance" under an EIDL COVID-19 loan. The resulting amount is the maximum loan amount.

- **Step 6** – The actual loan amount is the lesser of the maximum loan amount calculated above, OR $10 million.
FORGIVENESS

- CARES Act provides for forgiveness of the principal amount loaned under the PPP loans based on the amount used for permitted purposes, subject to limitations for:
  - A reduction in the number of full-time equivalent employees during the 8-week period after the loan is made; or
  - A reduction in compensation for employees who have a salary of less than $100,000 on an annualized basis.
- However, such reduction may not apply if the reduction in headcount or salaries is “eliminated” by June 30, 2020.
- SBA’s April 2, 2020 Interim Final Rule indicates that interest accrued on a PPP Loan may also be subject to forgiveness.
1. Two Key Documents
   • PPP Loan Application (Form 2483) - https://www.sba.gov/document/sba-form--paycheck-protection-program-borrower-application-form - Updated April 20 (v3)

2. SBA Site: https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program

3. Treasury: https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses

4. Perkins Coie:
   • https://www.covid19businessguidance.com/ - blog
   • www.perkinscoie.com – COVID 19 guidance for businesses
Questions?
This is a high level overview of the PPP aspect of the CARES Act. As mentioned in the discussion, this is a highly fluid area with a number of unresolved issues. If you do have specific legal questions about the Act we recommend that you consult with counsel who can analyze them in light of your own circumstances.