

### Summary of SBA Section 7(a) Paycheck Protection Program Loans

The attorneys at Bodman PLC summarized the SBA's latest guidance on SBA 7(a) (Paycheck Protection Program) loan eligibility, loan terms (including forgiveness), loan amount calculations and other PPP loan-related information that may be useful for borrowers and lenders.

This Update originated from the SBA's guidance in the Interim Final Rule published on Thursday, April 2nd can be found [here](#). It will be updated from time to time as additional or different guidance arises.

#### 1. General Q&A

- a. Are rules still being made by the SBA that may impact a loan?
  - i. Yes, guidance on how to determine how loans are forgiven, how forgiveness is calculated, and how to determine who is an "Affiliate" of a borrower are subject to further rulemaking
- b. When does the loan program begin and end?
  - i. The SBA has informed banks it will open applications as of April 3, 2020. The SBA is authorized to fully guarantee loans under the PPP through June 30, 2020.
- c. Can I use e-signatures or e-consents if a borrower has multiple owners?
  - i. Yes, e-signature or e-consents can be used regardless of the number of owners.
- d. Is the PPP "first-come, first-served?"
  - i. Yes.
- e. My lender is not currently accepting applications for a PPP loan; is the PPP program delayed?
  - i. No, while certain lenders may have notified their customers that they are delaying the processing of Paycheck Protection Loans, or limiting applications to its existing clients given the high demand, any such delay or limitation is being instituted by such

individual lender only. The Paycheck Protection Program is otherwise effective, and you may apply today to any SBA lender currently accepting applications.

## **1. FAQ for Borrowers**

### *a. How do you know if you are eligible?*

- i. You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry, and:
  - A. You are:
    - A small business concern (generally less than 500 employees when you count related / “Affiliated” entities) unless specific exceptions apply;
    - A tax-exempt 501(c)(3), a tax-exempt veterans organization, or Tribal business concern described in section 31(b)(2)(C) of the Small Business Act; and
  - B. You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.
- ii. You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual, and you were in operation on February 15, 2020.

### *b. What makes a borrower ineligible?*

- i. You are ineligible for a PPP loan if, for example:
  - A. You are engaged in any activity that is illegal under federal, state, or local law;
  - B. You are a household employer (individuals who employ household employees such as nannies or housekeepers);
  - C. An owner of 20% or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years; or
  - D. You, or any business owned or controlled by you or any of your owners, has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.
    - **NOTE:** also that existing SBA rules prohibit the

following types of businesses, among others, from obtaining SBA (including PPP) loans: banks, financial institutions, foreign businesses, gambling operations, passive businesses, and lobbying or speculative businesses.

*c. How much can I borrow?*

- i. Under the PPP, the maximum loan amount is the lesser of: (A) \$10 million and (B) 2.5x your average monthly payroll costs (see calculation below)

*d. How to calculate the amount you can borrow?*

**Step 1:** Aggregate payroll costs (defined below) from the last 12 months for employees whose principal place of residence is the United States.

**Step 2:** Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year.

**Step 3:** Calculate average monthly payroll costs (divide the amount from Step 2 by 12).

**Step 4:** Multiply the average monthly payroll costs from Step 3 by 2.5.

**Step 5:** Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 (but subtract the amount of any “advance” under an EIDL COVID-19 loan because such “advance” does not have to be repaid).<sup>1</sup>

**Examples:**

<p>Example 1 –</p> <p>No employees make more than \$100,000</p> <p>Annual payroll: \$120,000</p> <p>Average monthly payroll: \$10,000</p> <p>Multiply by 2.5 = \$25,000</p> <p>Maximum loan amount is \$25,000</p>	<p>Example 2 –</p> <p>Some employees make more than \$100,000</p> <p>Annual payroll: \$1,500,000</p> <p>Subtract compensation amounts in excess of an annual salary of \$100,000 (e.g. \$300,000): \$1,200,000</p> <p>Average monthly qualifying payroll:</p>
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<sup>1</sup> Note: if such EIDL loan was used to pay payroll costs, the SBA loan must be used (in part) to refinance that EIDL Loan (and such portion of EIDL loan proceeds used for payroll costs will be considered to have been used for “payroll costs” for purposes of the requirement that 75% of SBA loan proceeds be used for payroll costs, as discussed below)

	<p>\$100,000 Multiply by 2.5 = \$250,000</p> <p>Maximum loan amount is \$250,000</p>
<p>Example 3 – No employees make more than \$100,000, outstanding EIDL loan of \$10,000.</p> <p>Annual payroll: \$120,000</p> <p>Average monthly payroll: \$10,000</p> <p>Multiply by 2.5 = \$25,000</p> <p>Add EIDL loan of \$10,000</p> <p>Maximum loan amount is \$35,000</p>	<p>Example 4 – Some employees make more than \$100,000, outstanding EIDL loan of \$10,000</p> <p>Annual payroll: \$1,500,000</p> <p>Subtract compensation amounts in excess of an annual salary of \$100,000 (e.g. \$300,000): \$1,200,000</p> <p>Average monthly qualifying payroll: \$100,000</p> <p>Multiply by 2.5 = \$250,000</p> <p>Add EIDL loan of \$10,000</p> <p>Maximum loan amount is \$260,000</p>

*e. What costs are included in “payroll costs?”*

- i. Payroll costs consist of:
  - ii. compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation;
  - iii. cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips);
  - iv. payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal;
  - v. payment for the provision of retirement costs and employee benefits costs consisting of group health care coverage, including insurance premiums;
  - vi. payment of state and local taxes assessed on compensation of employees; and
  - vii. for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

*f. What is expressly excluded from the definition of payroll costs?*

- i. Any compensation of an employee whose principal place of residence is outside of the United States;
- ii. The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;

- iii. Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee's and employer's share of FICA and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and
  - iv. Families First Coronavirus Response Act (FFCRA) costs, including qualified sick and family leave wages for which a credit.
- g. Do independent contractors count as employees for purposes of PPP loan calculations?*
- i. No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan calculation.
- h. Can I apply for more than one PPP loan?*
- i. No. The Administrator, in consultation with the Secretary, determined that no eligible borrower may receive more than one PPP loan (and any such PPP loan must be made by June 30, 2020).
- i. Can my PPP loan be forgiven in whole or in part?*
- i. Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes described below and employee and compensation levels are maintained. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan.
  - ii. However, not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs. In fact, borrowers are prohibited from using more than 25% of the loan for non-payroll costs.
  - iii. SBA will issue additional guidance on loan forgiveness.
- j. Do independent contractors count as employees for purposes of PPP loan forgiveness?*
- i. No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan forgiveness.
- k. What forms do I need and how do I submit an application?*
- i. The applicant must submit SBA Form 2483 (Paycheck Protection Program Application Form) and payroll documentation, as described above. The lender must submit SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.

*l. How can PPP loan proceeds be used?*

i. The proceeds of a PPP loan may be used for:

A. payroll costs;

- **Note:** at least 75 percent of the PPP loan proceeds **shall** be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included (see subsection G. below). For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs (including proceeds originally from the EIDL) in order to determine the amount of forgiveness.

B. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;

C. mortgage interest payments (but not mortgage prepayments or principal payments);

D. rent payments;

E. utility payments;

F. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or

G. Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

*m. What happens if PPP loan funds are misused?*

- i. If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use. The SBA PPP Application requires certain certifications from the borrower and its owners.

- n. What certifications does the SBA PPP application require?
- i. An authorized representative of the applicant that is legally authorized to certify on behalf of the borrower must certify in good faith to all of the below:
    - A. The applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.
    - B. Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.
    - C. The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments; 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. As explained above, not more than 25 percent of loan proceeds may be used for non-payroll costs.
    - D. Documentation verifying the number of full-time equivalent employees on 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 will be provided to the lender.
    - E. Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. As explained above, not more than 25 percent of the forgiven amount may be for non-payroll costs.
    - F. During the period beginning on February 15, 2020 and ending on December 31, 2020, the applicant has not and will not receive another loan under this program.
    - G. The authorized representative must 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 1001 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.
    - H. The authorized representative must further acknowledge that the lender will confirm the eligible loan amount using tax documents I have submitted. The authorized representative

must affirm that these tax documents are identical to those submitted to the Internal Revenue Service. The authorized representative must further acknowledge that he or she understands, acknowledges, and agrees that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

- o. A few important notes on SBA PPP loan application certifications:
- i. Many of the certifications are unclear and causing concern for both lenders and prospective borrowers. Additional guidance is expected but note that the following certifications contain un-clear standards and should be closely reviewed by the borrower and lender:
    - “To the extent feasible, I will purchase only American-made equipment and products.”
      - **Bodman note:** It is unclear whether this allows an applicant to purchase any non-American-made equipment or products and what makes that requirement “feasi-ble” versus impractical.
    - “Current economic uncertainty makes this loan request necessary to support the ongoing opera-tions of the Applicant.”
      - **Bodman note:** It is unclear whether this imposes a need-based standard for PPP loans or what “necessary” means in the context of “support... ongoing operations.”
    - “I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.”
      - **Bodman note:** There is currently no clear guidance on how loan expenditures will be reported and forgiveness calculated.
    - “I will comply, whenever applicable, with the civil rights and other limitations in this form”
      - **Bodman note:** If no limits are set forth in the application, at a minimum we expect general compliance with law requirements to apply.

## **2. Loan Terms**

- a. *What is the interest rate on a PPP loan?*
  - i. The interest rate will be 1%.
- b. *What will be the maturity date on a PPP loan?*
  - i. The maturity is two years.
- c. *When will I have to begin paying principal and interest on my PPP loan?*

- i. You will not have to make any payments for six months following the date of disbursement of the loan. However, interest will continue to accrue on PPP loans during this six-month deferment period.
- d. *What are the loan terms and conditions?*
- i. Loans will be guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans, with certain changes including but not limited to:
  - ii. The guarantee percentage is 100 percent.
  - iii. No collateral will be required.
  - iv. No personal guarantees will be required.
- e. *Are there fees for the Borrower?*
- i. There will be no up-front guarantee fee payable to SBA by the Borrower;
  - ii. There will be no lender's annual service fee ("on-going guaranty fee") payable to SBA;
  - iii. There will be no subsidy recoupment fee; and
  - iv. There will be no fee payable to SBA for any guarantee sold into the secondary market.
  - v. Note: origination/processing fees earned by lenders are paid by SBA.

Please contact your Bodman attorney or Adam Weiner (313) 392-1076 or [aweiner@bodmanlaw.com](mailto:aweiner@bodmanlaw.com) for more information. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.