

April 15, 2020

# The CARES Act Loan Guidance and Next Steps for Not-for-Profits *April 15, 2020*



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# Paycheck Protection Program in the CARES Act Expands Section 7(a) Loan Program



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## Paycheck Protection Program

### Section 1102 of the CARES Act

#### 1. What It Does:

- i. Authorizes up to \$349 billion in forgivable loans to small businesses to pay their employees during the COVID-19 Crisis
- ii. Provides loans intended to cover certain costs and expenses during the “covered period”
- iii. For purposes of the PPP, “small businesses” includes not-for-profits that (i) are organized under **Section 501(c)(3)** or **Section 501(c)(19)**, (ii) were in business as of February 15, 2020, and (iii) have 500 or fewer employees. Note, certain other not-for-profits organizations such as Section 501(c)(4) social welfare organizations or Section 501(c)(6) business leagues are not eligible for the PPP.

#### 2. Loan Terms: All loans will be the same for every borrower. Terms include:

- i. 1.0% fixed rate (note, early guidance suggested this rate would be 0.5%)
- ii. Payments deferred 6 months, but interest accrues during deferral period
- iii. 2-year loan term
- iv. No collateral or personal guarantee required
- v. No prepayment penalties or fees



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## PPP Loan Eligibility

#### 3. Loan Eligibility: Generally,

- i. small business concerns
- ii. any business concern, **Section 501(c)(3)** or **Section 501(c)(19) nonprofit organization**, veterans organization, or Tribal business concern that employs not more than the **greater** of
  - a. 500 employees (individuals employed on a full-time, part-time or other basis); or
  - b. if applicable, the size standard in number of employees established by the SBA for the industry in which such entity operates, and
- iii. any business concern that is assigned a NAICS code beginning with 72 as of the date of the loan disbursement (“accommodation and food services”) with more than 1 physical location that employs not more than 500 employees per physical location of the business concern.



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## Increased Access to Section 7(a) Loans

4. What: The CARES Act waives aggregate affiliation rules that generally limited access to Section 7(a) loans.
5. How this helps:
  - i. Generally, Section 7(a) loans are available to most companies with ≤ 500 employees – subject to aggregate affiliation rules
  - ii. This “waiver” allows more employers to be eligible to receive loans to pay employees
6. Specifically, the CARES Act waives the affiliation rules for:
  - i. any business concern in the accommodation and food services industry with a NAICS code beginning with 72 and with not more than 500 employees;
  - ii. any business concern operating as a franchise that is assigned a franchise identifier code by the SBA; and
  - iii. any business concern that receives financial assistance from a company licensed under Section 301 of the Small Business Investment Company Act of 1958 (i.e., an SBIC).

## Explaining the PPP

7. Each borrower is limited to only one loan under this program.
8. Covered Period: February 15, 2020 – June 30, 2020
9. Loan Amount: The loan amount will be determined based on tax documents submitted with the application. During the covered period, the maximum loan amount will be the lesser of:
  - i. (a) \$10 million or (b) 2.5 times the applicant’s average total monthly payments for payroll costs for the 12-month period preceding the date of the loan or, for seasonal employers, for the period from February 15, 2019 or March 1, 2019 to June 30, 2019 **plus**
  - ii. the amount of any Economic Injury Disaster Loan (EIDL) made on or after January 31, 2020 and before April 3, 2020, described below that is being refinanced by the Paycheck Protection Program.If the applicant was not in business during the applicable period in clause (b), then the average of total monthly payment for payroll costs in (b) above will be calculated based on the period from January 1, 2020 to February 29, 2020.

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## Allowable Use of PPP Proceeds

10. All PPP loan proceeds must be used for business-related purposes. Specifically, during the covered period, an eligible recipient of a PPP loan may use the proceeds for:

- Payroll Costs;
  - Payroll costs are capped at \$100,000 on an annualized basis for each employee.
- Costs related to continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums;
- Payments of interest on any mortgage obligation (excluding prepayment or principal payment on mortgage obligation);
- Rent (including rent under a lease agreement);
- Interest on any other debt obligations that were incurred before the covered period;
- Refunding of an existing EID Loan that was previously funded for the same purposes as the PPP; and
- Utilities.

## Payroll Cost

### PAYROLL COSTS

- Salary, wage, commission, or similar compensation (capped at \$100,000 in 1 year per employee as prorated)
- payment of cash tip or equivalent
- payment for vacation, parental, family, medical, or sick leave
- allowance for dismissal or separation
- payment required for the provisions of group health care benefits, including insurance premiums
- payment of any retirement benefit
- payment of State or local tax assessed on the compensation of employees

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## Exclusions from Payroll Costs

The Interim Final Rules state the following are excluded for purposes of determining Payroll Costs:

- Compensation for any employees whose principal place of residence is outside the United States;
- Compensation of an individual employee in excess of an annual salary of \$100,000 (prorates as necessary);
- Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees;
- Qualified sick and family leave wages for which a credit is allowed under Section 7001 and 7003 of the Families First Coronavirus Response Act (Public Law 116-127); and
- Life insurance costs or mileage reimbursement.

## Additional Requirements

11. The applicant/borrower will have to represent and certify the following\*:

- i. the loan is necessary to support its ongoing business operations;
- ii. the loan proceeds will be used for the approved purposes (as explained);
- iii. no EIDL under Section 1110 of the CARES Act has been applied for or is or will be obtained through December 31, 2020, for the same purpose as a Section 7(a) loan, except that PPP loans can be used to refinance an existing EIDL. However, a borrower can apply for a loan under the EIDL program for purposes other than the allowable use of proceeds under a Section 7(a) loan;
- iv. the borrower, to the extent feasible, will purchase only American-made equipment and products; and
- v. the borrower is not engaged in any illegal activity.

\*This list is not exhaustive of what the applicant/borrower must represent, authorize, and certify in applying for a PPP loan.

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## Applying for a PPP Loan

12. When: Application periods started April 3, 2020, for certain borrowers. Applications must be submitted with the necessary documentation by June 30, 2020.

13. Where: Through any existing SBA lender or through any participating federally insured depository institution, federally insured credit union, and Farm Credit System institution

14. The application and a list of lenders can be found at [www.sba.gov](http://www.sba.gov).

SBA Form 1502-PPF

## PPP Loan Forgiveness

### Section 1106 of the CARES Act

15. What: A borrower will be eligible for loan forgiveness under Section 1106 of the CARES Act (subject to reduction).

16. Forgiven Amount: The forgivable amount of the loan is, up to the principal amount of a PPP loan, the total amount of the loan used during the covered period for:

- i. compensation with respect to employees (other than compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period) that is salary, wage, commission, tips, etc.,
- ii. vacation,
- iii. leave,
- iv. separation allowance,
- v. group health care benefits costs (including insurance premiums),
- vi. retirement benefit
- vii. or certain payroll taxes

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## PPP Loan Forgiveness (cont.)

- i. payments of interest on any mortgage on real and personal property that is a liability of the borrower and was incurred before February 15, 2020;
- ii. payments of any rent obligation under a lease agreement in effect before February 15, 2020; and
- iii. payments for electricity, gas, water, transportation, telephone or internet services that began before February 15, 2020.

17. Not more than 25% of the forgiven amount may be for non-payroll costs. 75% to payroll costs.

## Reduction of PPP Loan Forgiveness

18. Loan forgiveness is subject to reduction based on:

- i. the average number of FTEE per month employed by the borrower during the covered period, as compared to the average number of full-time equivalent employees employed (at the borrower's option):
  - a. from February 15, 2019 to June 30, 2019; or
  - b. from January 1, 2020 to February 29, 2020; or
  - c. in the case of seasonal employers, from February 15, 2019 to June 30, 2019.
- ii. any reduction in total salary or wages of any employee (who did not receive during 2019 an annual salary of more than \$100,000) during the covered period that is in excess of 25% of the total salary or wages of such employee during the most recent full quarter during which such employee was employed before the covered period.

EX: 2,000 forgivable amount.  $x=A/B$  where:  $x$ =loan to be forgiven;  $A$ =FTE during 8 wk;  $B$ =FTE prior period if in the prior period borrower had 300 employees, and in 8 wk 100:  
2000 (100/300), loan forgiveness equals 666.

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## Reduction of PPP Loan Forgiveness

- Any reductions in salary or terminations between February 15, 2020, and April 27, 2020, will not be counted for purposes of the calculations above if not later than June 30, 2020, the borrower has eliminated the reduction in number of full-time equivalent employees or in the salary or wages of such employees, as applicable.
- Reductions of salaries of employees paid more than \$100,000 to an amount equal to or in excess of \$100,000 does not result in any reduction of loan forgiveness – in other words, the pay of senior staff can be reduced to \$100,000 without adverse impact.
- The SBA Interim Final Rules state that SBA will come out with more guidance on loan forgiveness. All organizations should maintain records that evidence the use of loan proceeds to pay allowed expenses. Use of proceeds for unauthorized purposes may subject the entity to liability, including fraud charges or recourse.

## Other Favorable Features of the PPP

### Notes:

- Supporting documentation for forgiveness is stated to include:
  - i. the number of employees on the payroll and pay rates BOTH prior to the covered period and as of the end of the covered period.
  - ii. evidence of payment on eligible mortgages, lease and/or utility obligations.
  - iii. Borrower certification that it used the forgiveness amount to keep employees and make eligible payments.
- An application for loan forgiveness should be made to the lender servicing the loan
- Interest on the PPP loan will be deferred for a period of 6 months, giving the Borrower the opportunity to file for forgiveness before any payments will be due.
- Lender is expected to make a decision on forgiveness within 60 days of request.
- SBA will not collect certain otherwise applicable fees.
- No personal guarantee or collateral is required and the SBA will not have recourse against any individual shareholder, member or partner of an eligible recipient unless the proceeds were used for an unauthorized purpose.
- SBA will waive the requirement that would otherwise apply that a small business concern is unable to obtain credit elsewhere.

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## Economic Injury Disaster Loan in the CARES Act

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## Economic Injury Disaster Loan

### New COVID-19 Expansion

1. What: Small businesses suffering substantial economic injury as a result of the Coronavirus may borrow low interest loans for working capital (a “EIDL”).
2. Who: “Small businesses” includes “private nonprofit organization”, defined in the federal regulations as requiring:
  - a. an IRS determination letter stating that the organization is organized under **Section 501(c), (d), or (e) of the Code**, or
  - b. satisfactory evidence from the applicable state that the applying organization is a “non-revenue producing” nonprofit “organization or entity” that is “organized or doing business under State law.” While this standard is broad, some nonprofits that self-declare their tax-exempt status (*g.*, certain churches, social welfare organizations, unions, and business leagues) may lack an IRS determination letter, and nonprofits that are unincorporated associations (*e.g.*, many labor unions) may also lack state-issued evidence of nonprofit status.



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## Economic Injury Disaster Loan

### New COVID-19 Expansion

#### 3. Loan Terms:

- i. Up to \$2 million in assistance to support the temporary loss in revenue (based on actual economic injury sustained)
- ii. Use includes fixed debts, payroll, accounts payable and other bills that could have been paid had the disaster not occurred; to exclude refinance of long term debts
- iii. Nonprofit interest rate is fixed at 2.75%.
- iv. SBA is offering long-term repayment options, up to 30 years, based on each borrower's eligibility to repay.
- v. No personal guarantee for loans under \$200,000
- vi. Applicants must have a credit history acceptable to SBA or alternative method for determining applicant ability to repay

4. Loan Amount: SBA will determined the amount of grant based on the information provided by the borrower, which determination will include evaluation of the business interruption insurance and other recoverable income payable.

## Emergency Advance Economic Injury Disaster Loan

### New COVID-19 Expansion

#### 5. Emergency Advance of EIDL (up to \$10,000)

- i. Applicant must certify that:
  - (a) it is not engaged in any illegal activity (as defined by Federal Guidelines)
  - (b) the applicant does not derive more than 1/3 of gross annual revenue from legal gambling activities
  - (c) is not an agricultural enterprise (farm)
  - (d) the applicant is not in the business of lobbying
  - (e) the applicant is not a state, local or municipal government entity or member of Congress\*
- ii. Applicant must have an effective ruling letter from the IRS granting tax exemption under Sections 501(c), (d) or (e) of the Code or satisfactory evidence from the State that the nonrevenue producing organization or entity is a nonprofit organization

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## EIDL Emergency Advance

### New COVID-19 Expansion

#### 6. Note:

- i. Emergency Advance to be made available within 3 days of a successful application
- ii. Applicant must have been in business on January 31, 2020 when the COVID-19 public health crisis was announced
- iii. Emergency Advance funds do not need to be repaid (even if application if denied) if spent on paid leave, maintaining payroll, increased costs due to supply chain disruption, mortgage or lease payments, or repaying obligations that cannot be met due to revenue losses
- iv. Applicant must also disclose compensation from Other Sources (generally and as a result of the disaster) in order to qualify for EIDL
- v. Emergency EIDL grants will end on December 30, 2020
- vi. Any applicant who subsequently receives a PPP Loan, the Emergency EIDL advance will be subtracted from the calculation of the forgiveness amount of the PPP loan program
- vii. If more EIDL funds are needed, applicants can submit supporting documentation and request and increase. Likewise, a reduction can be requested as well.

## What To Do Now

### Payroll Protection Program and EIDL

- Determine eligibility
- Talk to your existing banking relationships. Many lenders have limited PPP applications to existing clients due to the volume of applications.
- Go to [SBA.GOV/paycheckprotection/find](https://www.sba.gov/paycheckprotection/find) to find an SBA approved lender for PPP
- EIDL Loans are administered by SBA and application instructions are available at <https://disasterloan.sba.gov/ela/Information/ApplyOnline>
- There is no cost to apply
- Consult with your tax advisor

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- Please see the latest updates on our website  
<https://www.akerman.com/en/perspectives/coronavirus-legal-update-center.html>



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- **Lawyers Alliance for New York** is the leading provider of business and transactional legal services for nonprofit organizations and social enterprises that are improving the quality of life in New York City neighborhoods.
- Visit the website, <https://lawyersalliance.org/>; special Coronavirus Information webpage, <https://lawyersalliance.org/coronavirus-information>; or call the Resource Call Hotline at (212) 219-1800 ext. 224.



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