


**MEMORANDUM**

TO: OUR CLIENTS AND PROFESSIONAL COLLEAGUES

FROM: EUGENE GORRIN, ESQ. 

RE: PAYCHECK PROTECTION PROGRAM – ADDITIONAL FUNDING AVAILABLE

DATE: APRIL 24, 2020

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Congress has just voted to add additional funds to the Paycheck Protection Program (“PPP”) and that the program will be reopening for new loans.

The PPP launched on April 3, 2020 and exhausted its original \$349 billion in funding after just two weeks, thus preventing many businesses from taking advantage of the program. Congress has now passed, and the President is expected to sign, the Paycheck Protection Program and Health Care Enhancement Act (“PPP Enhancement Act”), adding another \$310 billion in funds to the program.

This presents another opportunity for your business to avail itself of the program.

As you most likely already know, the PPP is a new emergency Small Business Administration (“SBA”) loan program that was included as part of the \$2 trillion Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) signed into law on March 27, 2020. What differentiates the PPP from other SBA loan programs is that most of the loans under the PPP will be forgiven on a tax-free basis, meaning that borrowers are effectively receiving a grant

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from the federal government - a one-time cash infusion in exchange for which they are expected to maintain employee headcounts at the levels they were at before the COVID-19 emergency.

In addition to the potential for tax-free loan forgiveness, PPP loans offer the following benefits:

- Interest rates set at 1% for all borrowers.
- No personal guarantee is required.
- No collateral is required.
- Loans are nonrecourse with respect to shareholders, members, and partners as long as proceeds are used in accordance with the loan terms.
- No fees for borrowers.
- All loan payments are deferred for six months (however, interest still accrues).
- To the extent balances are not forgiven, loans mature in two years.
- Fully guaranteed by the SBA.
- Not contingent on the borrower's creditworthiness (but delinquency on other open SBA loans and past defaults can be disqualifying).

The main downside of PPP loans is that they are heavily predicated on borrowers maintaining the employee headcounts that they had going into the COVID-19 crisis, and keeping any reductions in wages and salaries within specified limits - actions that may not be feasible in this highly uncertain business environment.

If you think you might want to pursue a PPP loan, please note a couple of time constraints: (1) the last day to apply for and receive a loan under this program is June 30, 2020; and (2) the program will likely run out of funding again and close before then. The SBA and the Treasury Department have said that PPP loans will be available on a first-come, first-serve basis and the program will close when the additional \$310 billion budgeted by the PPP Enhancement Act. So, if you or those you advise are interested in applying for a PPP loan, the sooner you and they get started, the better.

An overview of the program follows.

### **Eligibility for a PPP Loan**

The PPP is for any small business with fewer than 500 employees (including sole proprietorships, independent contractors, and self-employed persons), private non-profit organizations, or Section 501(c)(19) veterans organizations affected by COVID-19. Businesses in certain industries may also be eligible where they have more than 500 employees and meet the SBA's size standards for those industries. Small businesses in the hospitality and food industry with more than one location could also be eligible if their individual locations employ fewer than 500 workers.

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You are ineligible for a PPP loan if –

- (1) you are a household employer (individuals who employ household employees such as nannies or housekeepers);
- (2) you are engaged in any activity that is illegal under federal, state, or local law;
- (3) the owner of 20% or more of a business 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
- (4) you, or any business owned or controlled by you or any of the business owners, have 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.

**Maximum Amount of Loan**

The maximum loan amount is the lesser of \$10 million or an amount calculated using a payroll formula based on aggregate payroll costs from the last 12 months less any compensation paid to an employee in excess of an annual salary of \$100,000 per year. The resulting amount is divided by 12 to arrive at the average monthly payroll costs and that amount is multiplied by 2.5. To the resulting amount is added the outstanding amount of an Economic Injury Disaster Loan (“EIDL”) made between January 31, 2020, and April 3, 2020, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).



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**Payroll Costs Defined.** In calculating the maximum amount of the loan, payroll costs consist of

- compensation to employees (whose principal place of residence is in the United States) in the form of salary, wages, commissions, or similar compensation;
- 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);
- payment for vacation, parental, family, medical, or sick leave;
- allowance for separation or dismissal;
- payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement;
- payment of state and local taxes assessed on compensation of employees; and
- for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment or similar compensation.

**Amounts Excluded from Payroll Costs.** The following are not included in the payroll cost calculation:

- any compensation of an employee whose principal place of residence is outside of the United States;
- the compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;
- federal employment taxes imposed or withheld between February 15, 2020, and June 30, 2020, including the employee's and employer's share of FICA (Federal Insurance

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Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and

- qualified sick and family leave wages for which a payroll tax credit is allowed under the Families First Coronavirus Response Act.

### **Repayment of PPP**

Loan payments are deferred for six months. Accordingly, you will not have to make any payments of principal and interest for six months following receipt of the loan. However, interest will continue to accrue on the loan during this six-month deferment period. The SBA Administrator is authorized to defer loan payments for up to one year. PPP loans have a maturity of 2 years and an interest rate of 1%.

### **Loan Forgiveness Details**

For most borrowers, receiving tax-free loan forgiveness is the ultimate goal in seeking a PPP loan. Your loan will be fully forgiven if the funds are used for payroll costs, interest on mortgages, rent, and utilities during the 8-week period beginning on the date your loan is funded. At least 75% of the forgiven amount must have been used for payroll costs. Forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salaries at least 75% of the level they were at in the full calendar quarter preceding the funding of the loan. Forgiveness will be reduced if full-time headcount declines, or if salaries and wages are cut by more than 25%. Employers who reduce headcount or salaries between February 15, 2020 and April 26, 2020 can avoid reductions in the loan forgiveness amount by rehiring and/or restoring salaries by June 30, 2020.

To obtain loan forgiveness, you'll need to submit an application with your loan servicing provider, who is required to reach a decision on your request within 60 days. Any loan forgiveness will be provided on a tax-free basis, meaning that even though the loan proceeds were effectively income to your business or organization, that income will not be subject to income tax.

### **Other Answers**

#### **Do Independent Contractors Count as Employees for Purposes of PPP Loan Calculations?**

No. Because independent contractors have the ability to apply for a PPP loan on their own, they do not count for purposes of a borrower's PPP loan calculation.

**Is More Than One PPP Loan Allowed?** No. No eligible borrower may receive more than one PPP loan. Therefore, if you apply for a PPP loan, you should consider applying for the maximum amount.

**Where Can I Apply for a PPP Loan?** Contact the bank or lender you do business with and see if they are making PPP loans and, if so, whether or not they are processing applications yet. Certain lenders are only considering making loans to businesses with which they have a preexisting relationship. If your lender isn't making PPP loans, you'll need to begin looking for a lender as soon as possible. It may take some time for other banks and lenders to become part of the program, so don't be discouraged. The main idea is to begin your search as soon as possible.

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As you can see, the requirements for calculating the maximum loan amount available can be a bit tricky. If you are interested in applying for such a loan and have additional questions or would like help in determining if a PPP loan makes sense, please contact me.

Alternatively, if you know that you want to proceed and you have your payroll data for the past year or so handy, there's nothing wrong with getting a loan application started and calling. Either way, I'm here to help.

Stay well and be safe!