



MEMORANDUM

FROM: Miller Canfield Paddock and Stone, PLC

RE: **Financial Assistance Available to Business Operations with 500 or Fewer Employees: Understanding the Essentials**

DATE: **Updated** April 9, 2020

Through the recently enacted Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), the U.S. government will be providing over \$2 trillion in financial aid to the U.S. economy. The CARES Act provides two major programs for business operations in the U.S. with 500 or fewer employees (or up to 1,500 for certain businesses)*: *Economic Injury Disaster Loans (EIDLs)* and *Paycheck Protection Program Loans (PPP loans)*. This memorandum focuses on these smaller businesses. Funding programs for non-profits and larger business operations are addressed in separate memoranda.

	Economic Injury Disaster Loans	Paycheck Protection Program Loans
<i>Eligibility Requirements</i>	<ul style="list-style-type: none"> • Businesses, sole proprietors, and independent contractor • 500 or fewer employees, including employees of affiliates* • In operation by Jan 31, 2020 • Not eligible if credit available elsewhere • Located in “eligible area”, listed here, currently the entire U.S. 	<ul style="list-style-type: none"> • Businesses, eligible self-employed, sole proprietors, and independent contractors whose principal place of business is in the U.S. • In operation before Feb 15, 2020 • Paid (i) employee salaries and payroll taxes or (ii) independent contractors reported on 1099-MISC • Any of the following (including affiliates):* <ul style="list-style-type: none"> • 500 or fewer employees [in the U.S.]* • meeting applicable size standards (number of employees or annual revenue) based on NAICS Code • tangible net worth not more than \$15 million and average net income after Federal income taxes (excluding carry over losses) over 2 full fiscal years before the application date not more than \$5 million • Not required to show inability to borrow elsewhere
<i>Disqualifiers</i>	<ul style="list-style-type: none"> • Certain applicants listed on SBA site here 	<ul style="list-style-type: none"> • The applicant or any owner is ineligible or excluded from participation by any federal department or agency • The applicant or any owner, or any business owned by any of them has been in default on a direct or guaranteed loan from the SBA or other federal agency in the past 7 years • Any 20% or greater individual owner is incarcerated, on probation or parole or subject to indictment, criminal information, arraignment or formal criminal charges in any jurisdiction • Any owner has, within the last 5 years, for any felony, been convicted, pleaded guilty or nolo contendere, placed on pretrial diversion or on any form of parole or probation • Business engaged in illegal activity under federal, state

		<ul style="list-style-type: none"> or local law Ineligible business under 13 CFR 121.100 and described in SBA SOP 50 10, subpart B chapter 2
<i>Amount Available</i>	<ul style="list-style-type: none"> Up to \$2 million 	<ul style="list-style-type: none"> 250% of the amount of the average monthly Payroll Costs (over 12 month period prior to application) “Payroll Costs” means amounts paid employees (whose principal place of residence is in the U.S.) for: <ul style="list-style-type: none"> wages, salaries, commissions, tips, similar comp (subject to \$100k cap per employee) vacation, sick leave, parental or family leave severance or dismissal payments health care benefit costs, retirement benefits, state and local taxes assessed on employee compensation Amounts to be <u>excluded</u> from “Payroll Costs”: <ul style="list-style-type: none"> compensation of employees with principal residence outside the US federal payroll taxes, social security taxes qualified sick leave wages or qualified family leave wages for which a credit is allowed under Families First Coronavirus Response Act payments to independent contractors Outstanding amount of EIDL made between Jan 31, 2020 – Apr 3, 2020 to be refinanced, minus EIDL advance, increases loan amount Maximum of \$10 million
<i>Restrictions on Use of Loan Proceeds</i>	<ul style="list-style-type: none"> General working capital necessary until resumption of normal operations and to alleviate economic injury Fixed debts, payroll, accounts payable or other bills that cannot be paid due to COVID-19 outbreak Covered period is Jan 31, 2020 – Dec 31, 2020 	<ul style="list-style-type: none"> Payroll Costs from Feb 15, 2020 – June 30, 2020 Mortgage interest payments, rent on property or equipment leases and utility payments Interest on debt incurred before Feb 15, 2020 Applicant must represent that to the extent feasible it will purchase only US-made equipment and products At least 75% of loan proceeds must be used for Payroll Costs
<i>Interest Rate</i>	<ul style="list-style-type: none"> 3.75% per annum 	<ul style="list-style-type: none"> 1.00% per annum fixed
<i>Repayment</i>	<ul style="list-style-type: none"> Up to 30 years No payments in 1st year 	<ul style="list-style-type: none"> 2 years No payments for 6 months (interest accrues from draw date) No prepayment fees or penalties
<i>Loan Forgiveness Possibilities</i>	<ul style="list-style-type: none"> No. Loan amounts not subject to forgiveness at this time 	<ul style="list-style-type: none"> Amount paid during the 8-week beginning on the date the first disbursement is made on the loan for Payroll Costs, mortgage interest, rent and utilities (per agreements in effect before Feb 15, 2020) eligible for forgiveness. Forgivable amount reduced if: <ul style="list-style-type: none"> Average monthly number of FTE employees from Feb 15, 2020 - June 30, 2020 is less than the average monthly number (at the borrower’s election) during either (i) the period from Feb 15, 2019 through June 30, 2019 or (ii) Jan 1, 2020 through Feb 29, 2020 (different rules if business not in operation at that time or if seasonal employees); or total compensation for FTE employees earning less than \$100,000 reduced by more than 25% from the last full quarter in which employee was employed immediately prior to the date the loan is funded; <u>but</u> these forgiveness reductions can be reduced by rehiring and restoring payroll by June 30, 2020

		<ul style="list-style-type: none"> • Reduced by amount of any EIDL Advance Grant • Total forgiveness amount may not include more than 25% of non-Payroll Costs
<i>Personal Guarantees or Collateral</i>	<ul style="list-style-type: none"> • None for loans less than \$200,000 • Loans over \$200,000 must be guaranteed by each 20% owner 	<ul style="list-style-type: none"> • None
<i>Expedited Advance of \$10,000 Grant</i>	<ul style="list-style-type: none"> • Any business applying for an EIDL can also apply for an expedited grant of \$10,000 (available within three days) • Any business is eligible, but the SBA will approve the grant solely on basis of applicant's credit score • No requirement to repay any advance payments, even if later denied an EIDL • Advance may only be used for (1) providing sick leave to employees due to COVID-19, (2) maintaining payroll, (3) meeting increased costs due to supply chain disruptions, (4) rent or mortgage payments, and (5) repaying obligations that cannot be met due to revenue losses • Advance reduces aggregate loan available for forgiveness under PPP loan 	<ul style="list-style-type: none"> • No advances available
<i>How to apply</i>	<ul style="list-style-type: none"> • Online with Small Business Administration here • Or at local SPA district office 	<ul style="list-style-type: none"> • Contact bank or lender that handles SBA 7(a) loans • Click here to obtain the Paycheck Protection Program Application Form • Click here to obtain the Paycheck Protection Program Information Sheet • Lenders to make available their applications shortly

IMPORTANT FAQS

**** In counting number of employees, do I need to add employees of affiliates, subsidiaries and parent?***

Yes, **subject to the next FAQ below**, in counting the number of employees for qualification as a small business, the summary of the SBA affiliation rules ([here](#)) require that you count all employees employed on a full-time, part-time or other basis, including employees of the applicant's foreign and domestic affiliated businesses, such as the business' parent company and all subsidiaries. (Special rules apply to seasonal employees and professional employer organization (PEO) workers.) However, these affiliation rules do not apply to accommodation and food service business (with NAICS codes starting with 72) with 500 or fewer employees and those with multiple physical employment locations with 500 or fewer employees per location, SBA designated franchises, or businesses receiving assistance under section 301 of the Small Business Investment Act. Note that the SBA affiliation rules used for determining eligibility for EIDL and PPP loans are different than the affiliation rules used for purposes of having to pay for sick leave and FMLA requirements under the Families First Coronavirus Response Act (FFCRA). The SBA rules require that the number of employees for these purposes be determined by calculating (i) the average number of employees for each pay period in the preceding completed 12 months or (ii) the average employment over the same time periods as apply to the calculation of average payroll.

****In counting number of employees, do I include foreign employees or just U.S. employees?***

The SBA has recently issued new guidance on PPP loan program ([here](#)) that indicates that an applicant can still be eligible for a PPP loan if it, combined with its affiliates, has **“500 or fewer employees whose principal place of residence is in the United States”**. Such guidance suggests that the foreign employees of an applicant and its affiliates might not need to be included in the employee count. It is to be noted that such guidance, which

appears in both the Interim Final Rule and a SBA FAQ dated April 8, 2020, conflicts with the way employees are counted under the affiliation rules in 13 CFR Section 121.301, subject to certain statutory waivers. It is unclear whether the SBA will issue clarifying guidance on this issue.

**** If my business and all affiliates have more than 500 employees, can I still qualify for a PPP loan?***

Yes, an applicant can still be eligible if (including all its foreign and domestic affiliates) it satisfies at least one of these additional tests:

- The applicant's North American Industrial Classification System ("NAICS") code number, identifying its type of business, is one of the types of businesses on SBA's list ([here](#)) of businesses with NAICS codes that either allow a higher number of employees (up to 1,500) or a maximum annual revenue amount; or
- An alternative size standard, i.e., it has a maximum tangible net worth of not more than \$15 million and average net income after Federal income taxes (excluding carry over losses) over the 2 full fiscal years before the application date of not more than \$5 million.

Are U.S. subsidiaries of foreign-owned businesses eligible to apply?

Yes, the SBA has clarified that a business based in the U.S., whether or not owned by a foreign investor, can apply so long as it meets the eligibility requirements.

Can I apply for both an EIDL and a PPP loan?

You can apply for a PPP loan if you received an EIDL between Jan 31, 2020 – Apr 3, 2020. If the EIDL loan was used for Payroll Costs, it must be refinanced with the PPP loan. If the EIDL was not used for Payroll Costs it does not affect your eligibility for a PPP loan. The CARES Act does not expressly address whether you may apply after April 3, 2020 for both an EIDL and a PPP loan. Further clarification on this issue is expected, but we currently anticipate that a business that has applied for an EIDL may be able to apply for a PPP loan ONLY if it will not duplicate its use of the EIDL.

When should my business apply?

Because demand will be great, and the applications are processed on a first-come, first-served basis, if your business will need funding, you should apply as soon as possible. There are no application fees, guarantee fees, servicing fee or prepayment fees, and no obligation to accept the loan. You can only apply for one PPP loan. Applications for EIDL are available now and can be submitted online with the SBA. Applications for PPP loans are also available now and must be submitted to a qualified SBA lender by June 30, 2020, and can be submitted now for small businesses and sole proprietorships through exiting SBA lenders, and beginning April 10, 2020 for independent contractors and self-employed.

What if my business already has a SBA loan?

Not only is your business still eligible to apply for and EIDL or PPP loan, but if your business has any existing SBA loans (except for the PPP loans), the SBA will pay all principal, interest and fees on all these SBA loans for 6 months as additional relief to small businesses.

Are there any additional specific certifications and acknowledgement my business will need to make?

Yes, for the PPP loan program the business applicant will need to certify:

- The applicant was in operation on Feb 15, 2020 and paid salaries and payroll taxes to employees or paid independent contractors as reported on Form 1099-MISC
- current economic uncertainty makes the loan request necessary to support ongoing operations
- loan proceeds will be used to retain workers and fund payroll, mortgage interest, lease and utility expenses, acknowledging that the U.S. government may pursue criminal fraud charges if loan funds are used for unauthorized purposes
- documentation will be provided to lender to verify number of employees, Payroll Costs, mortgage interest payments, rent and utility payments for the 8-week period following loan disbursement
- loan forgiveness will be provided for documented Payroll Costs and covered mortgage, lease and utility

- payments, and not more than 25% of the forgiven amount may be for non-Payroll Costs
- between Feb 15, 2020 - Dec 31, 2020 the applicant has not and will not receive another PPP loan
- all information and supporting documents are true and accurate
- acknowledgement that lender will confirm the loan amount on the basis of documents submitted and an affirmation that the tax documents provided to the lender are identical to those provided to the IRS and that the lender can share the tax information provided within the SBA

What if I already laid off some workers or reduced compensation? Can I re-hire employees?

Your business is still eligible for the loans under both programs, but it may affect how much of the PPP loan will be forgiven: the PPP loan amount subject to forgiveness will be reduced in proportion to the monthly average number of fewer FTE employees you employed during the 8-week period following the funding of the PPP loan as compared to the monthly average number of such workers employed (at your election) during either (i) the period from Feb 15, 2019 through June 30, 2019 or (ii) Jan 1, 2020 through Feb 29, 2020. Likewise, the amount of the PPP loan forgiven is reduced by any reduction in excess of 25% for any employee as compared to the first full quarter immediately prior to the loan funding date in which the employee was employed. However, if you reduced your workforce or payroll between Feb 15, 2020, and Apr 26, 2020, the amount of PPP loan forgiveness for which you are eligible will not be reduced according to the formulas above if, not later than June 30, 2020, you eliminate the reduction (see below), as compared to Feb 15, 2020, in the number of full-time equivalent employees and/or wages of 1 or more employees.

What does it mean to “eliminate the reduction” for purposes of PPP loan forgiveness?

While not entirely clear, and additional guidance on this question is expected, current SBA guidance implies that, no later than June 30, 2020, the applicant must eliminate the reduction in the number of its full-time equivalent employees, as well as reverse salary reductions of its employees. Also note that employees brought back must be maintained on payroll for at least 8 weeks following their return to work date.

What if I have more questions?

Please contact your attorney at Miller Canfield, or contact any of the following:

Richard A. Walawender
walawender@MillerCanfield.com

Thomas Appleman
appleman@MillerCanfield.com

Jeffrey LaBine
labine@MillerCanfield.com