

On March 27, 2020, President Donald Trump passed the Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES) Act after the Act received overwhelming bipartisan support from both the US Senate and the US House of Representatives.

As part of an overall package expected to cost more than US\$2 trillion, the CARES Act provides more than US\$360 billion in immediate loan assistance for small businesses, including (a) an expanded Economic Injury Disaster Loan (EIDL) program; and (b) the Paycheck Protection Program (PPP), administered under the Small Business Administration's (SBA's) 7(a) program.

While the PPP will provide small business owners with forgivable, low-interest, no-collateral loans to provide the liquidity that businesses need to support employees during the impacts related to the coronavirus disease 2019 (COVID-19) pandemic, the EIDL program will help small businesses recover for broader economic injury related to the outbreak.

Below is guidance for small businesses seeking to secure stimulus funding to stay afloat during this unprecedented pandemic.

Economic Injury Disaster Loan (EIDL) Program

What is the Eligibility Period?

The EIDL eligibility period ends December 31, 2020.

What Businesses are Eligible for an EIDL?

EIDLs are generally available to a business (including a sole proprietorship, independent contractor, self-employed individual, or a qualifying nonprofit organization) if it:

- Meets the applicable North American Industry Classification System (NAICS) code-based size standard or other applicable SBA 7(a) loan size standard, both alone and together with its affiliates
- Has an employee headcount that is lower than the greater of (i) 500 employees or (ii) the employee size standard, if any, under the applicable NAICS Code

Note that the CARES Act provides that businesses that received a PPP Loan (defined below) **are not** eligible for EIDLs. However, businesses receiving an EIDL are eligible for a PPP loan.

Am I a Small Business?

Pursuant to the SBA's "affiliation rules," applicants for EIDL loans must include their affiliates when applying size tests to determine eligibility. Accordingly, employees of other businesses under common control will be counted toward the maximum number of permitted employees.

Section 121.103 of Title 13 of the Code of Federal Regulations sets forth the general principles SBA uses to determine affiliation. Business concerns and other persons (entities or individuals) are affiliates of each other when one controls or has the power to control the other, or a third party (or parties) controls, or has the power to control, both. 13 CFR §121.103(a). Control of a business concern may be established by, for example, ownership or control, or the power to control 50% or more of such party's voting stock, or a block of such party's voting stock that is large compared to all other outstanding blocks of voting stock. 13 CFR §121.103(c). Control of a business concern may also be established through, among other things, a party's ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders of the business concern.

How Much Can be Borrowed?

Up to US\$2 million.

What Collateral and Guarantees are Required?

No collateral is required.

EIDLs of greater than US\$200,000 must be guaranteed by any owner having a 20% or greater ownership interest in the borrower.

What can the EIDL Proceeds be Used For?

Proceeds can be used for working capital (including fixed debts, payroll, accounts payable and other bills that cannot be paid because of the disaster's impact). Proceeds may not be used for refinancing of long-term debt, expanding facilities, paying dividends or bonuses, or relocation.

Can Loan Payments be Deferred?

EIDL borrowers may defer payment of remaining principal, interest and fee balances for at least six months and up to one year after any loan forgiveness.

What is the Maturity and Interest of the Loan?

EIDLs have variable maturity dates and have a maximum interest rate of 4%.

Where can you Apply for EIDLs?

You can apply directly from SBA online.

Can I Get an Advance on my EIDL?

Yes. An applicant for an EIDL may receive, within three days after applying, an emergency advance of US\$10,000. If the application is denied, the applicant is not required to repay the US\$10,000 advance. The US\$10,000 advance can be used for payroll costs, increased material costs, rent or mortgage payments, or for repaying obligations that cannot be met due to revenue loss.

Payment Protection Program (PPP)

What is the Eligibility Period?

The PPP eligibility period ends on June 30, 2020.

What Businesses are Eligible for a PPP Loan?

PPP loans are generally available to a business (including a sole proprietorship, independent contractor, self-employed individual, or a qualifying nonprofit organization) if it:

- Meets the applicable North American Industry Classification System (NAICS) Code-based size standard or other applicable SBA 7(a) loan size standard, both alone and together with its affiliates
- Has an employee headcount that is lower than the greater of (i) 500 employees or (ii) the employee-size standard, if any, under the applicable NAICS Code

However, the employee limit does not apply for businesses that (a) are in the “accommodation and food services” sector under the NAICS (NAICS codes beginning with 72) and (b) maintain more than one physical location, in which case the 500-employee cap applies for each physical location. It is unclear as of what date the size test will be applied; however, historically, SBA size tests have been applied on the date of application for financing.

Affiliation Considerations Related to “Small Business” Eligibility

Pursuant to SBA “affiliation rules,” applicants for PPP loans must include their affiliates when applying size tests to determine eligibility. Accordingly, employees of other businesses under common control would count toward the maximum number of permitted employees. A business that is controlled by a private equity sponsor would likely be deemed an affiliate of the other businesses controlled by that sponsor and could, thus, be ineligible for PPP loans if the total number of employees aggregated exceeds 500.

However, the CARES Act waives the affiliation requirement for the following applicants:

- Businesses within NAICS Code 72 with no more than 500 employees
- Franchises with codes assigned by SBA, as reflected on SBA franchise registry
- Businesses that receive financial assistance from one or more small business investment companies (SBIC)

Section 121.103 of Title 13 of the Code of Federal Regulations sets forth the general principles SBA uses to determine affiliation. Business concerns and other persons (entities or individuals) are affiliates of each other when one controls or has the power to control the other, or a third party (or parties) controls, or has the power to control, both. 13 CFR § 121.103(a). Control of a business concern may be established by, for example, ownership or control, or the power to control 50% or more of such party’s voting stock, or a block of such party’s voting stock that is large compared to all other outstanding blocks of voting stock. 13 CFR § 121.103(c). Control of a business concern may also be established through, among other things, a party’s ability, under the concern’s charter, by-laws, or shareholder’s agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders of the business concern.

How Much can I Borrow?

The amount to be guaranteed is an amount equal to 2.5 times the average total monthly payroll costs in the one-year period before the loan is made (or from January 1, 2020 through February 29, 2020, if the business did not exist in the previous year) with a **cap of US\$10 million**. Under the CARES Act, “payroll costs” is the sum of all payments for compensation, which includes (1) salaries, wages, commissions, or similar compensation; (2) payment of cash tip or equivalent; (3) payment for vacation, parental, family, medical and sick leave; (4) allowances for dismissal or separation; (5) payments for group health care benefits and premiums; (6) retirement benefits; and (7) state and local tax assessed on employee compensation.

Payroll costs do not include (1) employee compensation over US\$100,000 per year; (2) compensation of an employee whose principal place of residence is outside the US; or (3) qualified sick leave or family leave wages for which a credit is allowed under Section 7001 or 7003 of the Families First Coronavirus Response Act.

If a borrower has also obtained an EIDL after January 31, 2020, the outstanding amount of the EIDL will count against the US\$10 million cap for purposes of calculating the amount available. EIDL loans made after January 31, 2020, and ending on the date when PPP loans are made available may be refinanced as part of the PPP loan.

What Collateral and Guarantees are Required and Fees Incurred?

The PPP loans do not require collateral or personal guarantees. The loans are non-recourse, except to the extent that loan proceeds are used for disallowed costs and expenses.

The guarantee fee and annual servicing fee are waived, as is the requirement that the business is not able to access credit elsewhere.

What can the Loan Proceeds be Used For?

Loan proceeds under the PPP must be used to pay allowable payroll costs, interest on mortgage obligations (but not principal payments), rent (including utilities) and interest on debt that existed as of February 15, 2020. The loan proceeds may not be used to pay salaries over US\$100,000.

PPP loans may not be used for the same purpose as other SBA loans a company may have. For example, if a PPP loan is used to cover payroll for the eight-week covered period, a company cannot use an EIDL for those same payroll costs during that same period, but the company could use it for different payroll period or for different workers. See US Senate Committee on Small Business & Entrepreneurship's "The Small Business Owner Guide's to the CARES Act."

What is Forgiven Under the PPP Loans?

The principal amount of a PPP loan may be forgiven for costs incurred and paid during the eight-week period after the origination of the loan for eligible payroll costs, interest payments on mortgages (not including any principal payment), rent payments, and utility payments.

Forgiveness for rent under a lease agreement, mortgage interest and utility payments are only allowed for those services and contracts that were in place before February 15, 2020.

To the extent that proceeds of the loan applied to ineligible expenses, that is, expenses other than rent, utility payments mortgage interest payments, or excess compensation (individual employee or 1099 contractor compensation in excess of US\$100,000 per year), those expenses are not eligible for forgiveness.

The amount of loan forgiveness may be ratably reduced if the employer reduces the number of full-time equivalent (FTE) employees as compared to either (a) the period February 15, 2019, through June 30, 2019, or (b) the period January 1, 2020, to February 29, 2020 (the employer chooses which period to compare) or if the employer reduces the pay of any employee by more than 25% as of the last calendar quarter.

Employers who re-hire workers previously laid off as a result of the COVID-19 crisis will not be penalized for having a reduced payroll for the beginning of the relevant period. If, during the period from February 15, 2020, through 30 days after enactment of the CARES Act, there is either a reduction in the number of, or wages paid to, FTE employees and the employer eliminates the reduction by June 30, 2020, the amount of loan forgiveness will be determined without regard to the reduction. Forgiveness may also include additional wages paid to tipped workers.

To apply for forgiveness, the PPP loan borrower must submit to the lender an application with the following information: (1) documentation verifying the number of FTE employees on payroll and pay rates for the eight-week period (including payroll tax filings reported to the IRS and state income, payroll, and unemployment insurance filings); (2) documentation (including cancelled checks, payment receipts or other documentation) verifying payments of covered mortgage obligations, covered lease obligations, and covered utility payments; (3) a certification from a company representative that the documentation is true and correct and the amount for requested forgiveness was used to retain employees and make covered payments (mortgage interest, rent and utilities); and 4) any other documentation requested by SBA.

Can Loan Payments be Deferred?

PPP loans only start to mature following the business's application for loan forgiveness. The PPP loan recipient may defer payment of remaining principal, interest and fee balances for at least six months and up to one year after any loan forgiveness.

What is the Maturity and Interest of the Loan?

PPP loans mature no later than 10 years after issuance and have a maximum interest rate of 4%.

Where can you Apply for a PPP Loan?

PPP loans are made by SBA-certified lenders (more than 800 financial institutions currently), in all 50 states, through delegated authority from SBA. SBA provides a tool to match you to a SBA-certified lender. The SBA Administrator and Secretary of Treasury authorize additional lenders to join the program, as needed. SBA-certified lenders simply need to verify that a small business was in operation on February 15, 2020, and paid employee salaries and payroll taxes or paid independent contractors, as reported on Form 1099-MISC, for eligibility in the PPP. Thus, the process should be relatively simple.

Will SBA Issue Further Guidance on the PPP Loans?

SBA is expected to produce further guidance on the PPP in the coming weeks. The CARES Act specifically requires SBA to provide guidance on the payment deferrals of PPP loans within 30 days of enactment of the CARES Act.

Recently, the Senate recommended that SBA provide guidance to lenders to prioritize PPP loans for small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals, women and businesses in operation for less than two years.

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