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CORPORATE AND BANKING LAW E-ALERT: COVID-19 SBA Loans

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Businesses moved quickly on Friday, April 3, 2020 to take advantage of the U.S. Small Business Administration loan program featuring the Paycheck Protection Program (PPP), as authorized by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (P.L. 116-136). While the CARES Act authorized a record $349 billion dollars to fund the program, these funds are expected to go quickly and the loans are on a "first come, first served" basis, putting pressure on eligible businesses to determine whether they should apply for a PPP loan, a loan under another SBA loan program, such as the Economic Injury Disaster Loan (EIDL) program, or both.[1]

Loan Proceeds Amounts and Allowable Uses

There is overlap in how loan proceeds under either program can be used, including payroll costs and rent, but overall, an EIDL allows for a broader allowable use of loan proceeds.

- EIDLs provide **up to $2 million** for working capital, including payroll, fixed debts (such as rent), accounts payable and other bills that cannot be paid due to the disaster's impact. The impact or loss is determined by comparison to the applicant's 2019 operations/financials. The amount of an EIDL is based on actual economic injury and financial need of the applicant.

- PPP loans provide **up to $10 million** for payroll costs, mortgage interest, rent, and utility payments. The amount of a PPP loan will be for up to 2 months of an applicant's average monthly payroll costs from the last year, plus an additional 25% of that amount.

Eligible payroll costs include salary, wages, employee benefits (including costs for vacation, leave, group health care payments including insurance premiums, and retirement benefit payments), and state and local taxes assessed on compensation.

Eligibility Criteria

In general, a loan under either program is available to eligible small businesses with no more than 500 employees, most private, nonprofit organizations, sole proprietorships and independent contractors.[2]

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[1] Independent contractors and self-employed individuals cannot apply for a PPP loan until April 10. All other eligible entities were eligible to apply beginning April 3.

[2] Eligible applicants also include businesses in certain industries with more than 500 employees, Employee Stock Ownership Plans (with not more than 500 employees), tribal small business concerns, certain cooperative organizations, veterans' organizations, and certain other entities.

The CARES Act not only created PPP loans, but it also made it easier for more entities to qualify for an EIDL.[3] Under either loan program, an applicant:

- Does not have to demonstrate that it could not obtain credit elsewhere
- May be approved based solely on its credit score
- Is not required to submit a tax return or tax return transcript for approval
- Does not have to be in business for more than 1 year

An applicant for an EIDL will have to show that it has an acceptable credit history and is able to repay the loan. No personal guarantee is required for an EIDL advance or loan of not more than $200,000. No personal guarantee is required for a PPP loan, regardless of the amount of the loan.

Key Features

Loan forgiveness is the key feature of a PPP loan. Loan forgiveness is limited in certain respects, including:

- The primary driver for determining the amount forgiven are payroll costs: 75% of the forgiven amount must have been used for payroll, leaving 25% for other costs (*e.g.*, rent, mortgage interest).
- The amount of payroll forgiven is limited to an 8-week period.
- No more than the principal amount of the loan will be forgiven (you will need to pay the interest).
- For employees who earn more than $100,000 on an annualized basis, the amount of compensation above $100,000 (on a pro-rata basis) is not eligible for loan forgiveness (in addition, compensation for those who earn above $100,000, on a pro-rata basis, is also not eligible for calculating the amount of the loan).
- The amount forgiven is **reduced** if the applicant *(i)* decreases its full-time employee headcount, *(ii)* decreases salary or wages by more than 25% for employees who make less than $100,000/year (using 2019 figures), and *(iii)* does not, by June 30, 2020, restore its full-time employment and salary levels for employees whose employment or salaries were changed during the period between February 15, 2020 and April 26, 2020.

Eligible EIDL applicants will receive an advance payment of up to $10,000, within 3 days of submitting their application. The advance does not need to be repaid, even if the applicant is not ultimately approved for the EIDL. (If an applicant receives proceeds under both loan programs,

[3] Under the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (P.L. 116-123), the coronavirus was deemed to be a disaster, making economic injury from the coronavirus an eligible expense under the EIDL program. Businesses that historically would have been unable to apply for a loan under the EIDL program may now qualify because of the CARES Act.

the $10,000 advance cannot be used towards the payroll costs that are being forgiven under a PPP loan.)

Another key difference between a PPP loan and an EIDL is the time period used for calculating the loan amount. For a PPP loan, allowable expenses incurred during an 8-week period may be covered (starting from the date of loan origination), whereas for an EIDL that is based on COVID-19, the loan may cover the expenses and losses experienced during the period between January 31, 2020 through December 31, 2020.

Interest Rates and Terms

- An EIDL interest rate is 3.75% for small businesses and 2.75% for nonprofit organizations. The term is dependent on the borrower's ability to repay, as determined on a case-by-case basis, up to a maximum of 30 years.
- The interest rate on a PPP loan is 1.0% and the term is 2 years.[4]

Deferment, No Prepayment Penalties

PPP loans and existing loans under the EIDL program receive deferment relief from the CARES Act – six months for PPP loans and until December 31, 2020 for EIDLs. In each case, interest will continue to accrue during the period of deferment. There is **no prepayment penalty** for a PPP loan or an EIDL.

Deciding Which Loan is Right for You

- Confirm that you are eligible.
- Look at the allowable uses of the loan proceeds, which are slightly different under the two programs, and determine if your expected costs and expenses can be paid by loan proceeds.
- Determine how quickly you need the funds. The $10,000 advance under an EIDL is available within 3 days of submitting your loan application, whereas proceeds for a PPP loan are expected to be available within 2 weeks after the application is submitted.
- Determine how quickly you can apply for a PPP loan. The funding under the PPP loan program is available on a first come, first served basis, and it is expected to run out quickly. Applicants are reportedly experiencing obstacles, including finding lenders that are willing to process their applications, and should mobilize quickly if they intend to apply for a PPP loan.

[4] This is in accordance with regulations from the U.S. Treasury Department and differs from the language of the CARES Act, which allowed for a term of up to 10 years.