
FINN DIXON & HERLING LLP

Small Business Relief During COVID-19: Paycheck Protection Program

April 2020



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Background

During Spring 2020, over \$2 trillion of federal emergency assistance programs for individuals, families and businesses impacted by the COVID-19 pandemic have been signed into law, including the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) and the Paycheck Protection Program and Healthcare Enhancement Act

Under recent federal legislation, capital is available to support businesses, including:



Federally-backed loans, guarantees and investments



Emergency grants



Tax relief and tax credits

Federal Lending Programs: Options

Paycheck Protection Program (“PPP”)

- ✓ Available Amount: Up to \$10mm
- ✓ Features: Loans which are subject to **forgiveness** and **deferred payments**; available until 6/30/20
- ✓ Tax Considerations: **Incompatible** with the (i) Employee Retention Credit and (ii) Payroll Tax Deferral (if debt is forgiven)

7(a) Loans (including Express Loans)

- ✓ Available Amount: Up to \$5mm for standard 7(a) loans and up to \$1mm for Express Loans (vs. \$350K under existing program)
- ✓ Features: Approval within 5-10 b. days (7(a) loans) and 36 hours (Express Loans), max. 85% SBA guarantee, personal guarantee required, collateral required for loans >\$25K, deferred payments

Economic Injury Disaster Loan (“EIDL”) Program + Emergency EIDL Grants

- ✓ Available Loan Amount: Up to \$2mm
- ✓ Features: 3.75% interest rate, \$10K grant available upon request
- ✓ Considerations: New EIDL Loans obtained after April 3 may not be compatible with PPP loans; \$10K advance to be reduced from PPP forgiveness amount

Treasury Lending Program

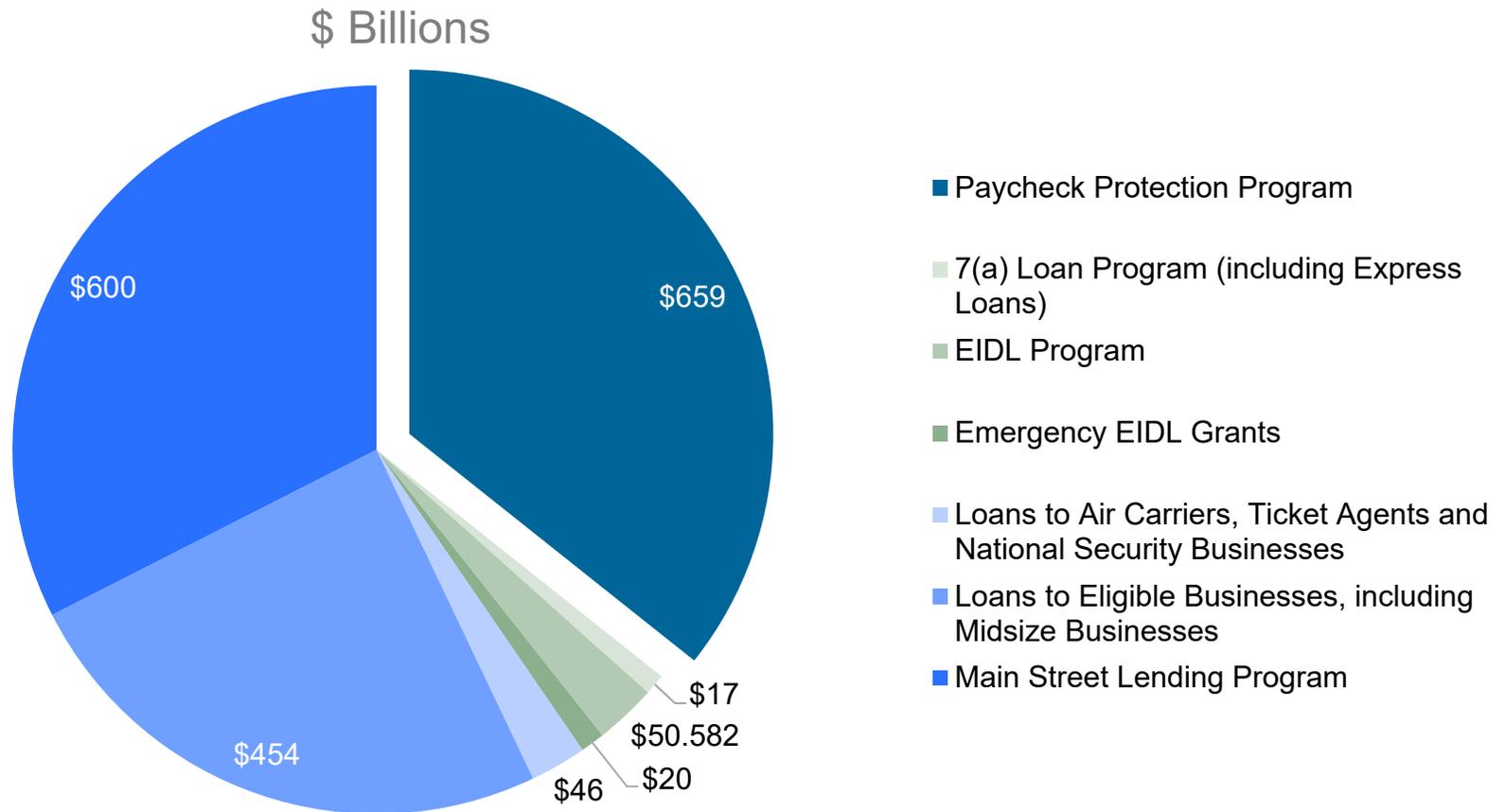
- ✓ Elements: loans, loan guarantees, and other investments
- ✓ Eligibility: Includes businesses with between 500 and 10,000 employees

“Main Street” Lending Program

- ✓ Eligibility: U.S. businesses with (i) fewer than 10,000 employees or (ii) up to \$2.5B in 2019 annual revenue
- ✓ Available Amount: \$1mm - \$150mm
- ✓ Features: compatible with PPP, favorable interest rates, deferred payments, unsecured in certain circumstances

U.S. Small Business Administration (“SBA”) and the U.S. Treasury are issuing evolving guidance and regulations to implement the CARES Act, including the programs described in this publication.

PPP is the Largest and Most Generous of the Federal Lending Programs



Time is of the Essence

- Due to the popularity of the program, PPP funds are expected to be depleted quickly
- To increase likelihood of a successful application, it is crucial for interested applicants to get into the queue as soon as possible

Paycheck Protection Program



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Paycheck Protection Program (“PPP”)

- \$659B expansion of the Section 7(a) loan program administered by the U.S. Small Business Administration (“SBA”) from February 15, 2020 – June 30, 2020
- Loans administered by SBA-approved lenders (list expanded by SBA)
- Benefits of the PPP:

Enables payment of payroll, health care, mortgage interest/rent, utilities and pre-existing interest obligations

No collateral or personal guarantees

Deferral of payments

Hopefully relatively easy to coordinate with existing debt

Loan forgiveness can effectively turn a portion of the loan into a grant, subject to maintaining headcount and compensation levels

Favorable interest rate (1%)

Summary of PPP Loan Terms

Term	Summary
Loan Amount (<i>capped at \$10mm; see Appendix A-1</i>):	<p>Lesser of</p> <ul style="list-style-type: none"> (i) \$10mm or (ii) (a) 2.5 x average total monthly payments for “payroll costs” (see <i>Appendix A-2</i>) based on either 2019 figures or a TTM basis + (b) outstanding amount (if any) of any EIDL loan made between 1/31/20 and 4/3/20
Guarantee:	100% by SBA; no personal guarantees
Collateral:	None
Term	2 years
Interest Rate:	1%
Permitted Uses (see <i>Appendix A-3</i>):	<ul style="list-style-type: none"> ■ Payroll costs (at least 75% of loan must be used for this purpose) ■ Mortgage interest payments ■ Rent ■ Utilities ■ Interest on pre-existing debt obligations from before covered period ■ Other permitted uses under existing SBA 7(a) framework

Summary of PPP Loan Terms (cont.)

Term	Summary
Deferral of Payments:	No payments of principal, interest or fees required for 6 months
Amount Eligible for Forgiveness (<i>up to principal amount plus accrued interest - loan effectively becomes a grant – see Appendix A-4</i>):	Sum of the following expenses made by borrower during 8-week period after loan disbursement: Payroll costs + mortgage interest payments + rent + utilities Qualifications: (i) Mortgage, rent and utility obligations/services must have been in place prior to Feb. 15, 2020 and (ii) Subject to reduction if headcount or salaries for certain employees are reduced during the 8-week period after loan disbursement as compared to historic periods
Prepayment Penalties:	None
Other Notable Features:	(1) No duty to demonstrate inability to obtain credit elsewhere (2) Borrower to certify, among other items, that uncertainty of current economic conditions makes loan request necessary to support ongoing operations

PPP Loan Eligibility

Borrower (including any affiliates) must meet at least one of three criteria:

1

“Small Business Concern”

SBA test based on (a) # of employees or receipts or (b) (i) tangible net worth of up to \$15mm and (ii) average net income (after federal income taxes) of up to \$5mm for last 2 fiscal years

Magnitude and test depends on applicable industry:

- Employee test : 100 – 1,500
- Receipts test: \$1.0mm – \$41.5mm

2

Employee-Only Test

Among other categories, a business concern or 501(c)(3) non-profit employing not more than the *greater* of:

- 500 employees, or
- The size standard (in # of employees) established by the SBA for the applicable industry

3

Accommodation and Food Service Test

For businesses in the Accommodation and Food Services sector (NAICS Code starting in 72), employing not more than 500 employees at each location

Note: certain self-employed individuals, independent contractors and sole proprietors are also eligible if they were in business as of February 15, 2020.



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PPP Loan Eligibility – Employees and Receipts Tests

For purposes of applying the applicable PPP loan eligibility test, the employee and receipts tests (as applicable) are applied as follows:

Employees Test

Equal to the average # of employees per pay period, generally based upon either the # of employees for each of the pay periods for either (i) the preceding completed 12 calendar months or (ii) 2019 (this calculation should be done in a manner consistent with the loan amount calculation)

- **Employees:** Count every individual employed on a full-time, part-time, or other basis

Receipts Test

Equal to average total receipts for the 3 most recently-completed fiscal years

- **Receipts:** means “total income” plus “cost of goods sold” as reported on federal tax return forms (subject to certain exclusions)

PPP Application Considerations

- Interested businesses should do the following as soon as possible:
 - Identify and reach out to an SBA lender – focus on small local and/or regional banks or lenders with whom you have an existing relationship
 - Prepare SBA application form and gather supporting materials (see *Appendix B* for sample application)
 - Reach out to 20%+ owners of your business for assistance in completing the application
 - Reach out to existing lender(s), if any, to determine if any modifications are needed to existing loan documents to permit the incurrence of the PPP loan and/or any other modifications that may be needed in connection therewith.

PPP Application Considerations (cont.)

If you apply, after your application has been submitted:

1

Follow up and Finalize Loan Documentation



- Confirm that application has been processed.
- Confirm that lender has availability (banks are prioritizing existing customers). If no availability, shift application to another lender.
- Provide any follow-up materials requested by SBA Lender (see next slide).
- Coordinate with existing lender(s) to amend existing loan documents with respect to incurrence of PPP Loans.

2

After Receipt of Loan



- Keep detailed records of use of proceeds.
- Permitted Uses: At least 75% must be spent on Payroll Costs¹ (see Appendix A-3). See also Lender's PPP Note.
- Plan carefully - only proceeds used within 8 weeks after loan is disbursed are eligible for forgiveness (including at least 75% for payroll costs).
- Apply for loan forgiveness as soon as permitted by SBA and your lender. (See Appendix A-4 for amounts that can be forgiven).
- Headcount and salary/wage reductions may limit the forgiveness feature of the PPP loan.

3

Tax Impact



- Forgiven amounts are excluded from gross income.
- Payroll Tax Deferral Election: Can elect to defer payroll taxes but will need to unwind if any portion of PPP Loan is forgiven (e.g., taxes become immediately due and payable but, per latest guidance, no interest/ penalties will be charged).

¹ Interim Rules require that 75% of PPP proceeds be used for Payroll Costs, whether or not borrower is seeking forgiveness of PPP Loan.

Have Handy - Possible Materials Lender May Request Before Finalizing Underwriting

Payroll information		Detailed payroll backup (if not already provided) for FY2019 or TTM prior to application date (Borrower's choice)
Employee calculation		Back-up for employee calculation (SBA guidance provides calculation should be an average based on calendar year 2019 or TTM prior to application date; this calculation should be done in a manner consistent with the payroll application)
Proposed uses of funds		Proposed uses of funds, particularly showing that 75%+ will be used for payroll costs, and remaining up to 25% to be used for other permitted uses

Additional Resources

- Feel free to visit the Finn Dixon & Herling LLP Coronavirus Resource Center for additional information at:
- <https://www.fdh.com/coronavirus-covid-19>

Appendix A-1 – Calculation of Loan Amount

- Loan Amount = (i) 2.5 x average monthly “payroll costs” (see *Appendix A-2*) + (ii) outstanding amount (if any) of any EIDL loan made between 1/31/20 and 4/3/20
 - Average monthly “payroll costs” are calculated based on either 2019 amounts or amounts for the 12 months preceding the application (Borrower’s choice)
- Supporting materials can include:
 - Federal tax returns (varies depending on the type of applicant)
 - Form W-2s
 - Payroll processor reports, records from retirement administrator, records from health insurance company or third-party administrator
- Loan Amount is capped at \$10 million

Appendix A-2 – Payroll Costs



Payroll costs *include*

- Salary, wages, commissions and cash tips (subject to exclusions in right column)
- Vacation, parental, family, medical and sick leave (subject to exclusions in right column)
- Group health care benefits, retirement benefits
- State or local tax assessed on employee compensation



Payroll costs *exclude*

- Portion of individual employee cash compensation which exceeds annual salary of \$100K, pro-rated for covered period
- Certain federal taxes, including the employer's share of payroll tax
- Compensation to employees based outside of the United States and payments to independent contractors
- Sick and family leave wages entitled to credits under the Families First Coronavirus Response Act

Payroll costs are relevant in the following contexts:

- Loan Amount: based on historic payroll costs
- Use of Proceeds: at least 75% of proceeds must be used for payroll costs
- Amount of Loan Forgiveness: payroll costs during 8-week period following PPP loan disbursement are eligible for forgiveness (must represent at least 75% of forgiven amount)

Note: Per interim rules, payroll costs must comprise 75% of uses of proceeds.

Appendix A-3 – Permitted Use of Proceeds

Required: 75% Must be Spent on Payroll Costs

Interim Rules provide that in all cases, whether or not seeking forgiveness for PPP Loans, 75% of proceeds must be spent on Payroll Costs (See Appendix A-2)

Other Uses of PPP Loans Which Qualify for Forgiveness



All or a portion of the remaining 25% of PPP Loans can be forgiven if used for the following:¹

- Mortgage interest payments
- Rent
- Utilities

Other Permitted Uses of PPP Loans (but Not Eligible for Forgiveness)



- Interest on debt obligations in effect before covered period
- Refinancing SBA Economic Injury Disaster Loan originated between Jan. 31, 2020 and April 3, 2020
- Additional categories under existing SBA framework (hyper-technical, subject to qualifications and limitations, requiring a fact-specific analysis)

¹ Loan/Leases/Contracts must have been in effect prior to 2/15/20

Appendix A-4 – Loan Forgiveness Calculation

Important note: The following are general, summary descriptions of very complex statutory calculations. Please also review the language of Section 1106 of the Act carefully. We expect further SBA guidance on the following.

Base Amount (includes both principal + accrued interest¹)

- Sum of the following expenses incurred during the 8-week period after the loan is disbursed (the “8-Week Period”):
- Payroll costs² + mortgage interest payments + rent + utilities



Reductions

- **Headcount reduction** – Forgiveness Base Amount reduced by an amount equal to the product of the Base Amount multiplied by

$$1 - \frac{\# \text{ of FTE's during 8 - Week period}}{\text{Historic Avg \# of FTE's}}$$

- **Salary/wages decreased by more than 25%** - Additional dollar-for-dollar reduction based on reduction in salary/wages for each employee (who made <\$100K in 2019) during 8-Week Period compared to the most recent full quarter prior to the 8-Week Period.
- **Reduction Mitigation:** Reductions will be mitigated by rehires and/or restorations of salary/wages by June 30, 2020.



Increases

- Additional wages paid to tipped workers (in lieu of tip income)

¹ Interim Rules permit accrued interest to be forgiven

² Subject to 75% requirement

Appendix B – PPP Application



Paycheck Protection Program Borrower Application Form

OMB Control No. 3245-0447
Expiration Date: 09/30/2020

Check One: <input type="checkbox"/> Sole proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC <input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual <input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other		DBA or Tradename if Applicable _____	
Business Legal Name _____			
Business Address _____		Business TIN (EIN, SSN) _____	Business Phone () - _____
		Primary Contact _____	Email Address _____
Average Monthly Payroll: \$ _____	x 2.5 = EIDL, Net of Advance (if Applicable) Equals Loan Request. \$ _____	Number of Employees: _____	
Purpose of the loan (select more than one): <input type="checkbox"/> Payroll <input type="checkbox"/> Lease / Mortgage interest <input type="checkbox"/> Utilities <input type="checkbox"/> Other (explain): _____			

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN, SSN)	Address

If questions (1) or (2) below are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	<input type="checkbox"/>	<input type="checkbox"/>
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A.	<input type="checkbox"/>	<input checked="" type="checkbox"/>
4. Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	<input type="checkbox"/>	<input checked="" type="checkbox"/>

If questions (5) or (6) are answered "Yes," the loan will not be approved.

Question	Yes	No
5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole? Initial here to confirm your response to question 5 → _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>
6. Within the last 5 years, for any felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 6 → _____	<input type="checkbox"/>	<input checked="" type="checkbox"/>
7. Is the United States the principal place of residence for all employees of the Applicant included in the Applicant's payroll calculation above?	<input type="checkbox"/>	<input type="checkbox"/>
8. Is the Applicant a franchise that is listed in the SBA's Franchise Directory?	<input type="checkbox"/>	<input checked="" type="checkbox"/>



Paycheck Protection Program Borrower Application Form

By Signing Below, You Make the Following Representations, Authorizations, and Certifications:

CERTIFICATIONS AND AUTHORIZATIONS

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 705(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

For Applicants who are individuals: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by initialing next to each one:

- _____ The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.
- _____ Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.
- _____ The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.
- _____ The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.
- _____ I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.
- _____ During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.
- _____ I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.
- _____ I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Signature of Authorized Representative of Applicant _____ Date _____
 Print Name _____ Title _____



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