

Paycheck Protection Program

Where Are We Now?
An Up-to-Date Guide to the
Paycheck Protection Program



Coronavirus Resource Center

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DISCLAIMER: This publication will be updated regularly to reflect any further changes in the key terms of the PPP resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed the principal criteria of the program and will endeavor to add updates, it is not possible to cover all of the (ever-changing) rules and guidance published by the SBA and Treasury. THIS PUBLICATION IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION.

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PAYCHECK PROTECTION PROGRAM – WHERE ARE WE NOW?
An up-to-date guide to the Paycheck Protection Program

Last updated as of the evening of May 25, 2020

Since the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) on March 27, 2020, the U.S. Small Business Administration (the “SBA”) and the U.S. Treasury Department (“Treasury”) have issued a sizable number of rules and additional guidance to implement the CARES Act’s marquee small business loan component – the Paycheck Protection Program (the “PPP”).

To date, the SBA and Treasury have issued a number of Interim Final Rules governing the PPP (collectively, the “PPP Rules”).ⁱ In addition, the SBA and Treasury have also published: borrower (SBA Form 2483) and lender (SBA Form 2484) application forms; program “fact sheets” for borrowers and lenders; a summary of the applicable affiliation rules; a forgiveness application form (SBA Form 3508); and responses to certain Frequently Asked Questions (“FAQ”) (which the SBA has updated numerous times). This rapidly changing regulatory environment is making it difficult for potential borrowers to avail themselves of the program with certainty as to their eligibility and scope of available benefits. This alert (I) summarizes the key terms of the PPP, (II) addresses certain frequently asked questions that Proskauer attorneys have been assessing, and (III) provides an overview of the Federal Reserve’s new Paycheck Protection Program Lending Facility, which is aimed at helping participating lenders originate more loans under the PPP loan for the many businesses, non-profits and other eligible organizations in need of financial relief as a result of COVID-19.

The SBA announced on April 16, 2020 that the \$349 billion authorized for the PPP had been exhausted. On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act (the “PPHCEA”) was signed into law, which increased the funding available for the PPP by \$310 billion, bringing the total funding amount to \$659 billion.ⁱⁱ Based on numbers released by the SBA, as of May 8, 2020, there were \$120 billion left for disbursement.

KEY UPDATES

- Late Friday, May 22, 2020, the SBA and Treasury published the [Interim Final Rules](#) on loan forgiveness, the lender review process for forgiveness and the SBA review process generally. These rules, which build on the forgiveness application (Form 3508) released a week earlier, provide further clarity as to some of the lingering questions about PPP loan forgiveness, but do not address all the important questions many are asking. This client alert has been updated to cover the rules governing PPP loan forgiveness as of this latest interim final rule.
 - **Forgiveness Amount:** Under the PPP Rules, up to the entire principal amount and any accrued interest on a PPP loan is eligible for forgiveness if applied toward forgiveness-eligible uses. Form 3508 provides that a borrower is eligible for a forgiveness amount that is the lesser of (i) its full PPP loan amount (no mention of interest), (ii) the sum of all forgiveness-eligible costs as reduced for employee compensation and FTE headcount reductions (discussed below), and (iii) payroll costs during the covered period divided by .75 (such that the amount forgiven is not less than 75% payroll costs).
 - **Covered Period and Alternative Covered Period:** A borrower may select as its covered period either the 8-week (56-day) period from the first disbursement date of the PPP loan (identified as the “covered period”) or, if more convenient to align with a borrower’s payroll schedule, an alternative 8-week period that begins on the first day of the borrower’s first pay period following the loan disbursement (identified as the “alternative covered period”). Whichever period the borrower selects must be used consistently through the application but note that while borrower may choose to use the Alternative Covered Period for payroll, it may not do so for nonpayroll costs. If there are multiple loan disbursement dates, the covered period begins on the date of the first disbursement (a difficult issue for partnerships with general operating partners and seasonal employers who were informed by the Interim Final Rule published on May 13, 2020 that they may be entitled to upsize their PPP loan in certain instances).

- **Forgiveness-Eligible Costs:** Forgiveness-eligible costs include payroll costs, interest payments on mortgages existing before 2/15/20, rent under leases in place before 2/15/20, and payments for utilities for which service began before 2/15/20, in each case **incurred or paid** during an 8 week “covered period”. Not more than 25% of the forgiven amount can be attributable to nonpayroll costs.
 - **Eligible Payroll Costs** – Payroll costs are considered paid on the day that paychecks are distributed or the borrower originates an ACH credit transaction. Payroll costs are considered incurred on the day that the employee’s pay is earned. Payroll costs incurred but not paid during the borrower’s last pay period of the covered period or alternative payroll period are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, payroll costs must be paid during the covered period or alternative payroll period. Payroll costs for employees not performing work but still on the borrower’s payroll are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work). The Forgiveness Rules also clarify that:
 - **Costs of Furloughed Employees** – If a borrower pays furloughed employees salary, wages, or commissions during the covered period (subject to annualized cap of \$100,000), those payments are eligible for forgiveness (however, the reduced hours for such furloughed employees will impact the forgiveness amount under the current rules and Form 3508);
 - **Increased Compensation/Bonuses** – An employee’s hazard pay and bonuses are eligible for loan forgiveness (as a supplement to salary or wages) so long as the employee’s total compensation does not exceed \$100,000 on an annualized basis; and
 - **Owner Employees/Self-Employed Individuals** – Payroll costs for owner-employees and self-employed individuals is capped at the lesser of 8/53 of 2019 compensation or \$15,385 per individual **across all businesses**. The inclusion of “across all businesses” suggests that an owner-employee/self-employed individual is capped at \$15,385 on an aggregated basis for all of such individual’s businesses that receive PPP loans, which is a problematic change if owner compensation was included in the calculation of the loan amount for each borrower business (particularly if those loan proceeds have already been used to pay owner compensation).
 - **Eligible Nonpayroll Costs** – An eligible nonpayroll cost must be paid or incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period. As explained in the Forgiveness Rules, eligible nonpayroll costs include any amounts paid during the covered period (regardless of when incurred if incurred *prior to* the covered period) and costs incurred during the covered period even if paid following the covered period. Other than in the case of mortgage interest, which the Forgiveness Rules expressly state cannot be prepaid, there is no express exclusion from eligible nonpayroll costs for prepayments of utility or rental expenses.
- **Reduction in Forgiveness Amount:** The loan amount eligible for forgiveness will be reduced (i) **first**, dollar-for-dollar by the amount of any salary cut for any employee employed by the company during the covered period or alternative covered period that is in excess of 25% of such employee’s total salary or wages for the January 1, 2020 to March 31, 2020 period and either (i) did not receive annualized compensation of \$100,000 or more in any pay period in 2019; or (ii) was not employed by employer in 2019; and (ii) **second**, proportionally for reductions in the average number of full-time equivalent (FTE) employees during the 8-week covered period compared to the average number of FTE employees per month during a reference period selected by the borrower. The borrower can select, one of the following reference periods: 2/15/19 – 6/30/19, 1/1/20 – 2/29/20, or, in the case of seasonal employers, average number of FTE employees per month between 2/15/19 – 6/30/19. Form 3508 contains a worksheet that provides step-by-step instructions for calculating such reductions.

employee's compensation by more than 25% in the period beginning 2/15/20 and ending 4/26/20; and (2) the *average* annual salary or hourly wages of that employee as of 6/30/20 is equal to or greater than that employee's annual salary or hourly wages as of 2/15/20.

- It appears that in order to benefit from the safe harbor, the employee needs to be fully restored (not just to 75% of pre-reduction compensation levels).
 - **What does “average” mean?** – The implication of “average” in this context is unclear. Is it sufficient for compensation to be restored by 6/30/20 to the same annualized salary amount or hourly wages that an employee was receiving on 2/15/20 (*for example, if an employee was making \$5,000 per month (\$60,000 annualized salary) as of 2/15 and is reduced to \$3,000 per month on 3/1, does that employee simply need to be restored to \$5,000 per month going-forward as of 6/30?*)? Does “average” imply that an employee needs to be “caught up” so the average salary or hourly wages for year-to-date as of 6/30/20 is equal to or greater than annual salary or hourly wages as of 2/15/20 (*for example, would the employee need to receive \$8,000 to make up for \$2,000 less in monthly compensation for March – June, so that the employee's average annualized salary at 6/30 is the same as on 2/15 (\$60,000)*)? This is a critical question as being required to deliver make-up payments will likely prove untenable for many employers.
- **FTE Reduction Safe Harbor** – Borrower is exempt from the reduction in loan forgiveness for reduction of the number of FTE employees if both of the following conditions are met: (1) the borrower reduced its average FTE employee levels in the period beginning 2/15/20 and ending 4/26/20; and (2) the borrower restored by **not later 6/30/20** its total FTE employee levels to its total FTE employee levels for the pay period inclusive of 2/15/20. Borrower is instructed to calculate FTE for each relevant period (2/15–4/26/20, the pay period inclusive of 2/15/20, and total FTE as of 6/30/20) using the same calculation methods required for determining Average FTE during the covered period or alternative covered period (described above).
 - It appears this is an “all or nothing” test and that a ny partial restoration in total FTE as of 6/30/20 below the total FTE for the pay period inclusive of 2/15/20 is insufficient for the safe harbor.
 - As written in Form 3508 and the Forgiveness Rules, the condition that the borrower must have reduced average FTE employees during the 2/15–4/26/20 period seems to imply that so long as the borrower had any reduction during that period *all reductions* (whether during that period or after) can be cured by 6/30/20. **This conflicts with prior guidance that suggested that reductions occurring after 4/26 are incurable.**
 - **Additional FTE Reduction Safe Harbor?** – Form 3508 appears to include an additional FTE reduction safe harbor (PPP Schedule A) such that if a borrower has not reduced either (i) the number of its employees or (ii) the average paid hours of its employees between 1/1/20 and the end of the covered period or alternative covered period, then there is no reduction in the forgiveness amount. Note that this language references employees generally (not FTE employees or employees with annual compensation below a specified level).
 - It is unclear if this safe harbor is conditioned on (i) no reductions *on average* between 1/1/20 and the end of the covered period as compared to the numbers of employees or average paid hours as of 1/1/20 (such that reductions restored during the covered period or alternative covered period would not affect the availability of this safe harbor), or (ii) no reductions at all, at any time during such period (even if restored).
 - **Application Review Flag:** Borrowers that, **together with their affiliates**, received PPP Loans **in excess of \$2 million** are required to check a box on the application indicating as such. This will be used to flag applications required to be reviewed by the SBA.

- **Certifications and Materials:** Borrower must certify (among other certifications) that the forgiveness amount was used only for eligible expenses, has been appropriately reduced (for compensation or average FTE reductions), does not include non-payroll costs in excess of 25%, and does not exceed 8-weeks' worth of 2019 compensation for any owner-employee or self-employed individual/general partner (capped at \$15,385 per individual). The application also reinforces that there are potential criminal charges for false claims in connection with the information provided in the application or supporting documents or if funds were knowingly used for unauthorized purposes. Form 3508 includes a full list of materials that a borrower must submit and/or prepare and maintain with respect to its application for forgiveness (see **Question 8** below), and Forgiveness Rules and Form 3508 make clear that the borrower must retain all such materials for 6 years and provide SBA authorized representatives.
- **Forgiveness Review Process and Timeline:** To receive loan forgiveness, a borrower must submit its Form 3508 together with the other materials required under Form 3508 or requested by the lender (see **Question 8** below). Lenders must make a determination as to loan forgiveness and report that decision to the SBA in not less than **60 days** from receipt of a complete application from which point (assuming forgiveness is approved) the SBA has **90 days** to remit the forgiveness amount to the lender, plus any interest accrued through the date of payment, less any EIDL advance amounts -- **in total a 150 day timeframe** (absent other delays, *e.g.*, due to additional information requests from the SBA or the lender or SBA review of the PPP loan/borrower's eligibility). If the lender denies forgiveness it must notify the SBA and the borrower, and the borrower has **30 days** to request that the SBA review the lender's determination. (See below for a summary of the "**Forgiveness Review Processes**" and "**SBA Review Process**" detailed in the Review Rules).
- **Taxes:** Amounts forgiven are not taxable income to the borrower. However, the IRS has held that a borrower whose PPP loan is forgiven may not deduct the expenses that relate to the forgiven amount (*i.e.*, the eight weeks of wages, employee benefits, interest, rent, and utilities that determined the forgiven amount).ⁱⁱⁱ Disallowing the deduction of such expenses significantly reduces the tax benefit of PPP loans. There are some bipartisan efforts to reverse that decision but it is not yet clear if they will be successful.
- **Many Questions Remain:** Form 3508, the Forgiveness Rules and the Review Rules leave many important questions unanswered, including:
 - It remains unclear how a fully-furloughed employee who is not receiving compensation, but continues to receive benefits from the borrower is to be treated for purposes of calculating (and reducing) the forgiveness amount. While the Forgiveness Rules indicate that a reduction in an employee's wages/salary that is the result of a reduction in hours does not create a "double penalty" for purposes of reducing the forgiveness amount (such that only the FTE-based reduction applies), what about a fully-furloughed employee who has had their hours eliminated (and as a result their compensation reduced to \$0)? Is it indeed the case that if a borrower was forced to fully-furlough 50% of its workforce, in part to ensure sufficient funds to continue to pay for the healthcare benefits for such employees, that the borrower may suffer a 50% reduction in its forgiveness amount?
 - If the forgiveness review process is not completed prior to the expiration of the 6 month payment deferral, will (or at a lender's election can) the deferral period be extended until a forgiveness decision is rendered?
 - Underscoring the unaddressed complications raised by dates hard-wired into the CARES Act and PPP Rules, it is unclear what borrowers should do if June 30th falls within their covered period (or alternative covered period)? Are they required to restore compensation to the 2/15/20 levels *during* their covered period (or alternative covered period)?
 - There is no guidance related to if and what a borrower is required to do after June 30 or the end of the covered period (or alternative covered period). Would there be any consequences to

borrower reducing its FTE count and/or reducing compensation to employees at that point in time? Form 3508 does require the borrower to provide the number of its employees as of the date it applied for the loan and as of the date it applied for forgiveness. Is that meaningful in any way? Given that the loan forgiveness process is likely to last several months after the end of the covered period (or alternative covered period) this could be an important issue.

- Secretary Mnuchin indicated on May 11, 2020 that Treasury and the SBA are looking into “technical fixes” for the restaurant industry. Those “fixes” are not addressed in the either Form 3508 or the Forgiveness Rules, and it remains to be seen whether Treasury and the SBA will provide some accommodations for hotels, restaurants and other service businesses (gyms, salons, etc.) required to shutter or substantially reduce working hours as a result of COVID-19 (e.g., adjusting FTE requirements for such businesses so that they are not unfairly subject to forgiveness amount reductions).
- **Proposed Congressional Action:** As has been widely [publicized](#) in recent days, there is increased bipartisan momentum towards amending some of the most problematic components of the PPP. **Notable proposed legislation pending in each chamber of Congress includes:**
 - In the House of Representatives, [H.R. 6886 \(Paycheck Protection Program Flexibility Act of 2020\)](#) which proposes to (i) change the covered forgiveness period from 8 weeks to the earlier of 24 weeks from loan origination or 12/31/20, (ii) for the safe harbors from reduction to the forgiveness amount due to salary/wage or FTE employee reductions, extend the restoration deadline from 6/30 to 12/31/20; (iii) add a new safe harbor from forgiveness reduction if a borrower is (A) unable to rehire an individual who was an employee on or before 2/15/20, or (B) is able to demonstrate an inability to hire a similarly qualified employees on or before 12/31/20; (iv) prohibit the SBA from limiting the nonpayroll portion of the forgiveness amount (which is presently limited to 25% of the forgiveness amount); and (v) remove the exclusion from payroll tax deferral for borrowers that receive PPP loan forgiveness. A companion bill to H.R. 6886 has been introduced in the Senate.
 - In the Senate, [S. 3883 \(Paycheck Protection Program Extension Act\)](#) which would (i) change the covered forgiveness period from 8 weeks to 16 weeks from loan origination; (ii) permit the use of loan proceeds to pay for personal protective equipment for employees and to pay for other “adaptive investments” needed to reopen safely; and (iii) make an important revision to section 1002 of the Cares Act to extend the deadline to apply for a PPP loan from 6/30 to 12/31/20.

Going forward, this client alert will be updated to reflect any further changes in the key terms of the PPP resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed below the principal criteria of the program and will endeavor to update this alert regularly, it is not possible to cover all of the (ever-changing) rules and guidance published by the SBA and Treasury. THIS ALERT IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION. THIS ALERT IS UPDATED AS OF MAY 25, 2020.

I. Key Terms Of The Paycheck Protection Program

- **Maximum Loan Amount:** Equal to the lesser of: (i) 2.5x trailing 12 month average monthly payroll costs;^{iv} and (ii) \$10 million. The SBA has published a step-by-step guide for calculating the maximum loan amounts based on the business type of an applicant.
- **Single Corporate Group Cap:** The Interim Final Rule published on April 30, 2020 implements a maximum cap of \$20 million on the total amount of PPP loans that a “single corporate group” can receive. Businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent. This rule applies to all loans not fully disbursed by a lender – as opposed to those spent by a borrower – as of April 30, 2020 (and to the undisbursed portion of any partially disbursed loans). SBA affiliation rules are disregarded and “[b]usinesses are subject to this limitation even if the businesses are eligible for the waiver-of-affiliation provision under the CARES Act or are otherwise not considered to be affiliates under SBA’s affiliation rules.” Consequently, this cap applies to businesses that otherwise benefit from the affiliation waivers (including those in the accommodations and food services sector (NAICS 72)).

An applicant must (i) notify a lender if it has applied for or received PPP loans in excess of the \$20 million cap and (ii) withdraw or request cancellation of any pending PPP loan application or approved PPP loan that would cause the applicant to exceed such cap. Failure to deliver such notice and to withdraw/request cancellation is deemed as use of PPP funds for an unauthorized purpose and the PPP loan would be ineligible for forgiveness. While not expressly stated in the Interim Final Rule, additional penalties (criminal and civil) may apply to applicants who fail to comply with such requirements and retain or receive PPP loan proceeds in excess of the cap.

- **Interest Rate:** 1.00%.
- **Payment Deferral:** Interest and principal payments are deferred for 6 months (during which time interest accrues).
- **Loan Maturity:** 2 years.
- **Collateral/Personal Guarantee:** No collateral or personal guarantee is required.
- **Eligibility:**
 - **Generally:** Eligible applicants (assuming they meet applicable size and other eligibility requirements listed below) include business concerns, 501(c)(3) non-profit organizations, tax-exempt veterans organizations (501(c)(19)), tribal business concerns (described in §31(b)(2)(C) of the Small Business Act), sole proprietors, independent contractors and other self-employed individuals. On May 14, 2020, the SBA added electric cooperatives exempt from federal income taxation under 501(c)(12) of the Internal Revenue Code as eligible as “a business entity organized for profit.”

An applicant must have been in operation on 2/15/20 and either (A) had employees for whom salaries and payroll taxes were paid, or (B) paid independent contractors. An individual applicant with self-employment income (such as an independent contractor or sole proprietor) is also eligible if such applicant was in operation on 2/15/20 and filed or will file a Form 1040 Schedule C for 2019. A seasonal business will be considered to have been in operation as of 2/15/20, if the business was in operation for any 8-week period between 5/1/19 and 9/15/19.^v

Further, if a business was in operation on 2/15/20, but has since changed ownership, it may apply for a PPP loan (assuming it is otherwise eligible). Similarly, if a change in ownership is effectuated through a sale of substantially all assets of a business that was in operation on 2/15/20, the business acquiring the assets may apply for a PPP loan, even if the change in ownership results in a new TIN and even if the acquiring business was not in operation on 2/15/20.

- **Ineligible Industries:** An applicant is not eligible if its business is in an ineligible industry or otherwise described as ineligible under 13 C.F.R. § 120.110, except where there is an express exception under the CARES Act (such as for certain non-profits) or the PPP Rules. Key ineligible industries include businesses primarily engaged in lending or investment and passive investment in real estate. An applicant that is a debtor in a bankruptcy proceeding (either at the time of application or at any time before a PPP loan is disbursed) is ineligible to receive a PPP loan and must cancel any pending application.

In the Interim Final Rule published on April 24, 2020, the SBA made notable changes and provided significant clarifications as to the scope of ineligible industries:

- ***Hedge Funds and Private Equity Firms are Not Eligible*** – Hedge funds and private equity firms are ineligible to receive PPP loans as they are “engaged in investment or speculation.” Portfolio companies of private equity funds *may* still be eligible if they meet applicable size standards after application of the affiliation rules and can make (after careful consideration) the “necessity” certification (each discussed below).
- ***Legal Gambling Businesses are Eligible*** – Businesses that derive revenue from legal gambling activities are now eligible for PPP loans regardless of the amount of the business’s revenue that is derived from gambling activities (as 13 C.F.R. § 120.110(g) no longer applies to the PPP).

with any affiliation analysis, they are narrow and will not benefit most businesses (unless owned or controlled by certain tribal organizations or small business investment companies).

- **Calculating Employee Headcount** – The SBA confirmed that borrowers *should* use either of the following methods for purposes of determining employee headcount: (i) average employment over the same time periods as used for payroll costs (previous 12 months, calendar year 2019 or applicable period for seasonal businesses) to determine number of employees, for the purposes of applying an employee-based size standard; or (ii) average number of employees per pay period in the 12 *completed* calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if less than 12 months).
 - **Inclusion of Foreign Employees** – On **May 6, 2020** the SBA published Question 44 of its FAQ, which affirms that, in accordance with 13 C.F.R. § 121.301(f)(6), for both the PPP’s 500 or fewer employee size standard and businesses otherwise seeking to qualify as a “small business concern” on the basis of the employee-based size standard an applicant **must count all of its employees and the employees of its U.S. and foreign affiliates**, absent a waiver of or an exception to the affiliation rules. In an Interim Final Rule published on **May 18, 2020** (which codifies Question 44), the SBA, recognizing the ambiguity as to the inclusion or exclusion of foreign employees in its prior guidance, provided that it will not find any borrower that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the borrower’s exclusion of non-U.S. employees from its employee headcount if the borrower (together with its affiliates) had no more than 500 employees whose principal place of residence is in the United States. Such borrowers shall not be deemed to have made an inaccurate certification of eligibility solely on that basis. Under no circumstances may PPP funds be used to support non-U.S. workers or operations.
- **Necessity:** Applicants are required to certify that the “*current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.*” All applicants (but especially **larger companies, public companies and portfolio companies of private equity sponsors**) should carefully review and be thoughtful about the implications of making this certification (including how it speaks to the applicant’s economic viability and the message it communicates to investors and the market). **When making a “necessity” assessment, applicants should create a thoughtful and detailed record supporting its determination and the process employed in that assessment.**
 - **Other Sources of Liquidity:** The SBA has clarified (in Questions 31 and 37 of the SBA FAQs) that while the CARES Act waives the “credit elsewhere” requirement, borrowers must nonetheless carefully review and make the “necessity” certification in good faith. In so doing, **borrowers must take “into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”** This applies to both publicly traded and private companies.
 - **Large/Public Companies:** As a response to the much-reported receipt of PPP loans by certain publicly traded companies, the SBA further clarified that it is **unlikely** that a company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to the SBA, upon request, the basis for its certification.
 - **Retraction and Safe Harbor:** Any borrower (whether publicly-traded or privately-owned) that applied for a PPP loan *prior* to April 24, 2020 and repaid the loan in full by **May 18, 2020** is deemed to have made the required certification in good faith.
 - **Review of the Necessity Certification:**
 - **Borrowers of Less than \$2 million** – As announced in Question 46 of the FAQ (published on May 13, 2020), a borrower that, together with its affiliates, received PPP loans with an original principal amount of **less than \$2 million** will be deemed to have made the necessity certification in good faith.
 - **Borrowers of \$2 million or Greater** – Question 39 of the FAQ (published on April 29, 2020) provides that the SBA will review all loans in excess of \$2 million, *in addition to other loans as appropriate,*

following the lender's submission of the borrower's loan forgiveness application. Question 46 of the FAQ clarifies that a borrower's "necessity" certification will be assessed as part of such review, and if the SBA determines in the course of its review that the borrower lacked an adequate basis for the necessity certification, the SBA will (i) seek repayment of the outstanding PPP loan balance and (ii) inform the lender that the borrower is not eligible for loan forgiveness. So long as the borrower repays the loan following such notification, the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the necessity certification (though the SBA may of course refer any other issues identified).^{vii}

Notwithstanding the important clarifications in Question 46 of the FAQ about the potential repercussions relating to a necessity certification that is found to have been made on an inadequate basis, significant uncertainty remains around whether a borrower can make the certification of need when it may have access to other sources of liquidity.^{viii} What constitutes "liquidity" or when would the use of such liquidity be "significantly detrimental"? What about a case where a borrower's business has no cash or other readily available sources of liquidity, but the borrower's owners, such as private equity or other funds, may have or be able to access such liquidity? This ambiguity is particularly problematic for hotels, restaurants, and other 72-code businesses that have faced severe reduction or even elimination of all revenues and that are owned by private equity sponsors, but are exempted from the affiliation rules, and are thus eligible to receive PPP loans if they are able to make the "necessity" certification.

The SBA has offered little in the way of guidance (other than with regard to public companies (described above)), and it remains the case that a borrower will need to make a good faith assessment of need based on its individual facts and circumstances (with the factors and processes involved contemporaneously documented). Even though the May 18th safe harbor has now passed, existing borrowers that have borrowed (or have borrowed together with their affiliates) more than \$2 million that remain concerned about the necessity certification must consider whether the necessity certification was validly made at the time of application and whether it would be most prudent to (i) repay loan proceeds received now and minimize future exposure, (ii) retain (and potentially not spend) loan proceeds while waiting to see if further guidance around "necessity" is produced in the near term (recognizing that delayed use of funds may put forgiveness eligibility at risk), or (iii) retain and utilize the funds and address issues arising out of the forgiveness review. When considering retaining the loan proceeds, such a borrower must also assess its appetite for the SBA's eventual audit, related expenses, and the potential scrutiny that may accompany an audit given the focus that the PPP has received (and is expected to continue to receive) in the press and by government officials who have committed to pursue abuse of the program.

Both the legal and the public relations "judgments" will be made in hindsight, which leaves borrowers and their sponsors facing difficult choices in a crisis without any clear end.

- **Eligible Uses:** PPP loan proceeds may be used for: (i) payroll costs (as further described below), (ii) costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; (iii) employee salaries, commissions, or similar compensations; (iv) payments of interest on any mortgage (but not prepayment of or payment of principal); (v) rent (including under a lease agreement); (vi) utilities; and (vii) interest on any other debt obligations incurred before 2/15/20. **Borrowers are required to use at least 75% of PPP loan proceeds for payroll costs.** The CARES Act provides that loan proceeds can also be used for any allowable use for which a 7(a) loan can be applied under the Small Business Act, which uses are set forth in 13 C.F.R. § 120.120 and include, *e.g.*, inventory, supplies, working capital. However, the PPP Rules list as permitted only those uses detailed in (i) through (vii) (and refinancing of certain EIDLs), and only generally reference that the CARES Act permits PPP loans to be applied toward other allowable uses for a 7(a) loan under the Small Business Act in a paragraph explaining the SBA's decision to require 75% of loan proceeds to be applied to payroll costs. Consequently, it remains unclear whether the SBA is restricting permitted uses to *only* those that are expressly listed in items (i) through (vii). Note further that some of the items listed in (i) through (vii) are not forgiveness-eligible, and any additional allowable uses not specifically listed in the CARES Act or the PPP Rules are not forgiveness-eligible.

- **Independent Contractors:** A business **cannot** include independent contractors as “employees” either for purposes of calculating the loan amount (i.e., with payroll cost calculations) or a amount of loan forgiveness. Independent contractors can themselves apply for a PPP loan.
- **Required EIDL Refinancing:** A borrower who has received an economic injury disaster loan between 1/31/20 and 4/3/20 and who used such EIDL funds for payroll costs is **required** to refinance any outstanding amounts under such EIDL with the proceeds of a PPP loan and such amounts count towards the \$10m maximum that a borrower is allowed to borrow under the PPP.
- **Self Employed Applicants:** Self-employed applicants who filed (or are eligible to file) a Form 1040 Schedule C for 2019 may use loan proceeds for: (i) owner compensation equal to 8 weeks of 2019 net profit up to a maximum annualized amount of \$100,000; (ii) payroll costs to employees with a principal place of residence in the US (if any); (iii) mortgage interest, rent or utility payments that can be claimed as a business expense deduction on Form 1040 Schedule C; (iv) interest payments on any loan incurred prior to 2/15/20; and (v) refinancing of any EIDL obtained between 1/3/20 and 4/3/20. Further, the PPP Rules indicate that an applicant that did not claim (or was not entitled to claim) such mortgage interest, rent or utility payments on its 2019 Form 1040 Schedule C **cannot** use the loan proceeds for such expenses during the initial 8-week period following the first disbursement of the loan. The 25% limitation on non-payroll cost uses applies to self-employed applicants as well.
- **Payroll Costs:**
 - **Included:** “Payroll Costs” generally include:
 - **For Applicants (other than Self-Employed Applicants)** – Includes the following compensation for employees (and not any independent contractors) whose principal place of residence is in the US: (i) salary, wage, commission, or similar compensation; (ii) cash tips or equivalents; (iii) payment for vacation, parental, family, medical, or sick leave; (iv) allowance for dismissal or separation; (v) payment required for the provision of group health care benefits, including insurance premiums; (vi) payment of any retirement benefit; and (vii) payment of state or local taxes assessed on employee compensation. The SBA has indicated that payroll costs are calculated on a gross basis without regard to federal taxes imposed or withheld.
 - **For Self-Employed Applicants**^{ix} – Includes the sum of payments of any compensation that is a wage, commission, income, net earnings from self-employment, or similar compensation up to a maximum annualized amount of \$100,000. When calculating payroll costs, such compensation for self-employed applicants that filed (or will file) a Form 1040 Schedule C for 2019 will be equal to the net profit amount computed therein (subject to a \$100,000 annualized cap). For self-employed applicants that also have employees, payroll costs for such employees are calculated using:
 - 2019 gross wages and tips paid to such employees with a principal place of residence in the US (using 2019 IRS Form 941 Taxable Medicare wages & tips from each quarter) *plus* any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips (net of any amounts paid to any individual employee in excess of \$100,000 annualized); and
 - 2019 employer health insurance contributions and retirement contributions listed on the 2019 Form 1040 Schedule C and state and local taxes assessed on employee compensation.
 - **For Partnerships with General Operating Partners** – Partners in a partnership may **not** submit a separate PPP loan application as a self-employed individual. Self-employment income of general active partners may be reported as a payroll cost on a PPP loan application filed by or on behalf of the partnership. The SBA’s step-by-step maximum loan amount calculation guide confirms that payroll costs for self-employment income for individual U.S.-based general partners is calculated using 2019 Schedule K-1 (IRS Form 1065) net earnings from self-employment (reduced by any section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties) multiplied by 0.9235^x, subject to a \$100,000 annualized cap.

- Under the Interim Final Rule published on May 13, 2020, if a partnership received a PPP loan that did not include any partner compensation (*i.e.*, because the partnership's PPP loan preceded rules clarifying inclusion partner compensation), a lender may submit a request to the SBA to upsize and make an additional disbursement in respect of such PPP loan to include partner compensation so long as the lender's initial 1502 report to the SBA^{xi} has not yet been submitted. A borrower must supply the lender with the required documentation to support the increase. All caps and limitations on PPP loan amounts apply to such an increased loan.
 - **Excluded:** Payroll costs **do not** include: (i) cash compensation (*i.e.*, exclusive of non-cash benefits) of any individual employee in excess of an annual salary of \$100,000, as prorated for the covered period; (ii) federal income taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period (includes Federal Insurance Contributions Act and Railroad Retirement Act taxes and income taxes required to be withheld from employees); and (iii) qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act.
 - Please note that the language in the PPP Rules for self-employed applicants largely tracks the employee payroll cost categories and exclusions for applicants generally. While the PPP Rules direct self-employed applicants as to the sources of information to be used to calculate payroll costs, it is somewhat unclear whether such direction is also intended to narrow the scope of included payroll costs for such applicants.
 - **Period for Calculating Payroll Costs:** SBA guidance indicates that borrowers (other than self-employed applicants) can calculate their aggregate payroll costs using data either from the trailing 12 months or calendar year 2019. Seasonal businesses may use average monthly payroll for the period between 2/16-6/30/19 or 3/1-6/30/19. Note that language in the PPP Rules and CARES Act, which reference a TTM calculation, and in the PPP application, which references a calendar year 2019 calculation, is somewhat inconsistent and consequently some lenders have not accepted both calculation methods.
- **[Key Updates] Loan Forgiveness:**
 - Following on the **May 15, 2020** publication of the PPP Loan Forgiveness Application (SBA Form 3508), the SBA published late **Friday night, May 22, 2020** an [Interim Final Rule](#) on loan forgiveness (the "[Forgiveness Rules](#)") and an [Interim Final Rule](#) on SBA loan review procedures and related borrower and lender responsibilities ("[Review Rules](#)"). While Form 3508 and the Forgiveness Rules addresses some of the questions that borrowers have been grappling with, they leave unresolved many of the more fundamental issues raised with the PPP. The following is a summary of the current rules regarding loan forgiveness in light of Form 3508 and these rules.
 - **Forgiveness Amount:** Under the PPP Rules, up to the entire principal amount and any accrued interest on a PPP loan is eligible for forgiveness if applied toward forgiveness-eligible uses. Form 3508 provides that a borrower is **eligible** for a forgiveness amount that is the lesser of (i) its full PPP loan amount (no mention of interest), (ii) the sum of all forgiveness-eligible costs as reduced for employee compensation and FTE headcount reductions (discussed below), and (iii) payroll costs during the covered period divided by .75 (such that the amount forgiven is not less than 75% payroll costs).
 - **Covered Period and Alternative Covered Period:** A borrower may select as its covered period either the **8-week** (56-day) period from the first disbursement date of the PPP loan (identified as the "covered period") or, if more convenient to align with a borrower's payroll schedule, an alternative 8-week period that begins on the first day of the borrower's first pay period following the loan disbursement (identified as the "alternative covered period"). Whichever period the borrower selects must be used consistently through the application but note that while borrower may choose to use the Alternative Covered Period for payroll, it may not do so for nonpayroll costs. If there are multiple loan disbursement dates, the covered period begins on the date of the first disbursement (a difficult issue for partnerships with general operating partners and seasonal employers who were informed by the Interim Final Rule published on May 13, 2020 that they may be entitled to upsize their PPP loan in certain instances).

- **Forgiveness-Eligible Costs:** Forgiveness-eligible costs include payroll costs, interest payments on mortgages existing before 2/15/20, rent under leases in place before 2/15/20, and payments for utilities **for** which service began before 2/15/20, in each case **incurred or paid** during an 8 week “covered period”. Not more than 25% of the forgiven amount can be attributable to nonpayroll costs.
 - **Eligible Payroll Costs** – Payroll costs are considered paid on the day that paychecks are distributed or the borrower *originates* an ACH credit transaction. Payroll costs are considered incurred on the day that the employee’s pay is earned. Payroll costs incurred but not paid during the borrower’s last pay period of the covered period are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, payroll costs must be paid during the covered period. Payroll costs for employees not performing work but still on the borrower’s payroll are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work). The Forgiveness Rules also clarify that:
 - **Costs of Furloughed Employees** – if a borrower pays furloughed employees their salary, wages, or commissions during the covered period, those payments are eligible for forgiveness as long as they do not exceed an annual salary of \$100,000, as prorated for the covered period (however, the reduced hours for such furloughed employees will impact the forgiveness amount under the current rules and Form 3508);
 - **Increased Compensation/Bonuses** – an employee’s hazard pay and bonuses are eligible for loan forgiveness (as a supplement to salary or wages) so long as the employee’s total compensation does not exceed \$100,000 on an annualized basis; and
 - **Owner Employees/Self-Employed Individuals** – payroll costs for owner-employees and self-employed individuals is capped at the lesser of 8/53 of 2019 compensation or \$15,385 per individual **across all businesses**. The inclusion of “across all businesses” suggests that an owner-employee/self-employed individual is capped at \$15,385 on an aggregated basis for all of such individual’s businesses that receive PPP loans, which is a problematic change if owner compensation was included in the calculation of the loan amount for each borrower business (particularly if those loan proceeds have already been used to pay owner compensation).
 - **Eligible Nonpayroll Costs** – An eligible nonpayroll cost must be paid or incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period. As explained in the Forgiveness Rules, eligible nonpayroll costs include any amounts paid during the covered period (regardless of when incurred if incurred *prior to* the covered period) and costs incurred during the covered period even if paid following the covered period. Other than in the case of mortgage interest, which the Forgiveness Rules expressly state cannot be prepaid, there is no express exclusion from eligible nonpayroll costs for prepayments of utility or rental expenses.
- **Reduction in Forgiveness Amount:** The loan amount eligible for forgiveness will be reduced (i) **first**, dollar-for-dollar by the amount of any salary cut for any employee employed by the company during the covered period or alternative **covered** period that is in excess of 25% of such employee’s total salary or wages for the January 1, 2020 to March 31, 2020 period and either (i) did not receive annualized compensation of \$100,000 or more in **any** pay period in 2019; or (ii) was not employed by employer in 2019; and (ii) **second**, proportionally for reductions in the average number of full-time equivalent (FTE) employees during the 8-week covered period compared to the average number of FTE employees per month during a reference period selected by the borrower. The borrower can select, one of the following reference periods: 2/15/19 – 6/30/19, 1/1/20 – 2/29/20, or, in the case of seasonal employers, average number of FTE employees per month between 2/15/19 – 6/30/19. Form 3508 contains a worksheet that provides step-by-step instructions for calculating such reductions.
 - **FTE Reduction Exceptions** – No reductions are required for the following categories of employees and the borrower can include the FTE of such employees in its calculation of average FTE for the covered **period** (it appears that borrower can calculate *as if* such employee were still employed):

- Any positions for which borrower made a good-faith, written offer to rehire an employee or (as added in the Forgiveness Rules) restore reduced hours at the same salary or wages during the covered period which offer was rejected by the employee. Per the Forgiveness Rules, to utilize this exception: (i) the borrower must have made a good faith, written offer to rehire/restore the reduced hours of an employee during the covered period (or alternative payroll covered period); (ii) the offer was for the same salary or wages/same number of hours as earned by such employee in the last pay period prior to the separation/reduction in hours; (iii) the offer was rejected; (iv) the borrower maintained records documenting the offer and its rejection; and (v) **the borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the rejection.**
 - Any employee who during the covered period (a) was fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of hours.
 - A borrower cannot include the FTE for such employees if the position was filled by a new employee (*i.e.*, borrower cannot double-count such former and replacement employee for the same position). *For example, if during the selected covered period a borrower fired for cause an employee with an average of 20 hours paid per week, the borrower can include 0.5 FTE in its average FTE calculations even though that employee is no longer employed. However, if the borrower filled the position of the fired employee with a new employee and that new employee has an average of 30 hours paid per week, the borrower can include only the 0.75 FTE for the new employee.*
- **Average FTE** – Average FTE during the covered period or alternative covered period is determined using the average number of hours paid per week, divided by 40, and rounded to the nearest tenth. This calculation is done on an employee-by-employee basis and the maximum FTE for each employee is **capped** at 1.0 (*for example: (i) if the average number of hours paid per week for an employee is 45, that employee counts as 1 FTE, (ii) if the average number of hours paid per work for an employee is 30, that employee would count as 0.75 FTE*). Borrowers can use a simplified method that assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for those who work fewer, but should note that doing so may understate FTEs if a borrower's employees are working less than 40 but more than 20 hours per week. New employees not employed during the reference period can be included in the calculation of average FTE for the covered period.
 - **No Double Penalty for Salary Decline Due to FTE Reduction** – Under the Forgiveness Rules, to ensure that borrowers are not doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction. (*The SBA provides the following example: "An hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE of 1.0) and the borrower reduced the employee's hours to 20 hours per week during the covered period (FTE of 0.5). There was no change to the employee's hourly wage during the covered period. Because the hourly wage did not change, the reduction in the employee's total wages is entirely attributable to the FTE employee reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee."*)
- **Safe Harbors to Forgiveness Reduction:**
 - **Salary/Hourly Wage Reduction Safe Harbor** – The safe harbor for reductions in salary/wages of applicable employees must be assessed on an employee-by-employee basis. The borrower is **exempt** from a reduction with respect to an employee if both: (1) the borrower reduced that employee's compensation by more than 25% in the period beginning 2/15/20 and ending 4/26/20; and (2) the *average* annual salary or hourly wages of that employee as of 6/30/20 is equal to or greater than that employee's annual salary or hourly wages as of 2/15/20.
 - It appears that in order to benefit from the safe harbor, the employee needs to be fully restored (not just to 75% of pre-reduction compensation levels).

- **What does “average” mean?** – The implication of “average” in this context is unclear. Is it sufficient for compensation to be restored by 6/30/20 to the same annualized salary amount or hourly wages that an employee was receiving on 2/15/20 (*for example, if an employee was making \$5,000 per month (\$60,000 annualized salary) as of 2/15 and is reduced to \$3,000 per month on 3/1, does that employee simply need to be restored to \$5,000 per month going-forward as of 6/30*)? Does “average” imply that an employee needs to be “caught up” so the average salary or hourly wages for year-to-date as of 6/30/20 is equal to or greater than annual salary or hourly wages as of 2/15/20 (*for example, would the employee need to receive \$8,000 to make up for \$2,000 less in monthly compensation for March – June, so that the employee’s average annualized salary as 6/30 is the same as on 2/15 (\$60,000)*)? This is a critical question as being required to deliver make-up payments will likely prove untenable for many employers.
- **FTE Reduction Safe Harbor** – Borrower is exempt from the reduction in loan forgiveness for reduction of the number of FTE employees if both of the following conditions are met: (1) the borrower **reduced** its average FTE employee levels in the period beginning 2/15/20 and ending 4/26/20; and (2) the borrower restored by **not later 6/30/20** its total FTE employee levels to its total FTE employee levels for the pay period inclusive of 2/15/20. Borrower is instructed to calculate FTE for each relevant period (2/15—4/26/20, the pay period inclusive of 2/15/20, and total FTE as of 6/30/20) using the same calculation methods required for determining Average FTE during the covered period or alternative covered (described above).
 - It appears this is an “all or nothing” test and that any partial restoration in total FTE as of 6/30/20 below the total FTE for the pay period inclusive of 2/15/20 is insufficient for the safe harbor.
 - As written in Form 3508 and the Forgiveness Rules, the condition that the borrower must have reduced average FTE employees during the 2/15—4/26/20 period seems to imply that so long as the **borrower** had any reduction during that period *all reductions* (whether during that period or after) can be cured by 6/30/20. **This conflicts with prior guidance that suggested that reductions occurring after 4/26 are incurable.**
- **Additional FTE Reduction Safe Harbor?** – Form 3508 appears to include an additional FTE reduction safe harbor (PPP Schedule A) such that if a borrower has not reduced either (i) the number of its employees or (ii) the average paid hours of its employees between 1/1/20 and the end of the covered period or alternative covered, then there is no reduction in the forgiveness amount. Note that this language references employees generally (not FTE employees or employees with annual compensation below a specified level).
 - It is unclear if this safe harbor is conditioned on (i) no reductions *on average* between 1/1/20 and the end of the covered period as compared to the numbers of employees or average paid hours as of 1/1/20 (such that reductions restored during the covered period (or alternative covered) would not affect the availability of this safe harbor), or (ii) no reductions at all, at any time during such period (even if restored).
- **Application Review Flag:** Borrowers that, **together with their affiliates**, received PPP Loans **in excess of \$2 million** are required to check a box on Form 3508 indicating as much. This will be used to flag applications required to be reviewed by the SBA.
- **Certifications and Materials:** Borrower must certify (among other certifications) that the forgiveness amount was used only for eligible expenses, has been appropriately reduced (for compensation or average FTE reductions), does not include non-payroll costs in excess of 25%, and does not exceed **8-weeks'** worth of 2019 compensation for any owner-employee or self-employed individual/general partner (capped at \$15,385 per individual). The application also reinforces that there are potential criminal charges for false claims in connection with the information provided in the application or supporting documents or if funds were knowingly used for unauthorized purposes. Form 3508 includes a fulsome list of materials that a borrower must submit and/or prepare and maintain with respect to its application for forgiveness (see

Question 8 below), and makes clear that the borrower must retain all such materials for 6 years and provide SBA authorized representatives access upon request.

- **Taxes:** Amounts forgiven are not taxable income to the borrower. However, the IRS has held that a borrower whose PPP loan is forgiven may not deduct the expenses that relate to the forgiven amount (*i.e.*, the eight weeks of wages, employee benefits, interest, rent, and utilities that determined **the** forgiven amount).^{xii} Disallowing the deduction of such expenses significantly reduces the tax benefit of PPP loans. There are some bi-partisan efforts to reverse that decision but it is not yet clear if they will be successful.
- **Forgiveness Review Process:** To receive loan forgiveness, a borrower must submit its Form 3508 together with the other materials required under Form 3508 or requested by the lender (see **Question 8** below). While the Review Rules require the lender to confirm receipt of all requisite documentation and to use such materials to confirm certain of the borrower’s calculations as part of a “good-faith review,” the lender may rely on borrower representations/certifications and the onus remains on the borrower to provide an accurate calculation of the loan forgiveness amount and to supply accurate information and calculations in its forgiveness application.^{xiii} If lenders identify errors in a borrower’s calculation or material lack of substantiation in the supporting documents, lenders are directed to work with the borrower to remedy the issue (*i.e.*, as opposed to denying forgiveness without an opportunity to ameliorate such deficiencies).
 - Lenders must make a determination as to loan forgiveness in not less than **60 days** from receipt of a “complete application” and will report its decision to the SBA. The lender must also notify the borrower of its decision.
 - **Lender Approves Forgiveness (All or Part)** – If a lender determines a borrower is entitled to forgiveness of all or a portion of the amount requested, the lender must request payment from the SBA when it delivers its forgiveness determination to the SBA.^{xiv} The SBA will **not later than 90 days** after the lender issues its decision to the SBA will remit the forgiveness amount to the lender, plus any interest accrued through the date of payment, less any EIDL advance amounts. This timeframe is subject any SBA review of the loan/loan application, during which time a loan may not be forgiven (the **SBA Review Process** is discussed further below). **The forgiveness process may take as many as 150 days assuming no issues that create delays** (e.g., SBA/lender information requests, SBA undertakes a review of the loan/loan application).
 - Per the Review Rules, if the amount remitted by SBA exceeds the remaining principal balance because the borrower made scheduled payments on the loan after the 6 month payment deferral, the lender must pay the excess amount (including accrued interest) to the borrower. **This suggests that payments need not be further deferred while a forgiveness application is pending (though nothing precludes a bank from opting to provide further deferral).**
 - **Lender Denies Forgiveness (All or Part)** – If a lender issues its decision to the SBA that all or a portion of the requested forgiveness amount is to be denied, the lender must (i) provide the SBA a reason for such denial, and (ii) notify the borrower of such decision. The SBA has the right to review such determination in its sole discretion. **Within 30 days of notice from the lender, a borrower may request that the SBA review the lender’s decision.** While it appears that such review must be accomplished within the 90 day forgiveness-review period, the Review Rules are not clear and such review may exceed that time frame. If only a portion of the loan is forgiven or if the forgiveness request is denied, the balance must be repaid by the borrower on or before the 2-year maturity of the loan.
- **Many Questions Remain:** Form 3508, the Forgiveness Rules and the Review Rules leave many important questions unanswered, including:
 - It remains unclear how a fully-furloughed employee who is not receiving compensation, but continues to receive benefits from the borrower is to be treated for purposes of calculating (and reducing) the forgiveness amount. While the Forgiveness Rules indicate that a reduction in an employee’s wages/salary that is the result of a reduction in hours does not create a “double penalty”

for purposes of reducing the forgiveness amount (such that only the FTE-based reduction applies), what about a fully-furloughed employee who has had their hours eliminated (and as a result their compensation reduced to \$0)? Is it indeed the case that if a borrower was forced to fully-furlough 50% of its workforce, in part to ensure sufficient funds to continue to pay for the healthcare benefits for such employees, that the borrower may suffer a 50% reduction in its forgiveness amount?

- If the forgiveness review process is not completed prior to the expiration of the 6 month payment deferral, will (or at a lender's election can) the deferral period be extended until a forgiveness decision is rendered?
 - Underscoring the unaaddressed complications raised by dates hard-wired into the CARES Act and PPP Rules, it is unclear what borrowers should do if June 30th falls within their covered period (or alternative covered period)? Are they required to restore compensation to the 2/15/20 levels during their covered period (or alternative covered period)?
 - There is no guidance related to if and what a borrower is required to do after June 30 or the end of the covered period (or alternative covered period). Would there be any consequences to borrower reducing its FTE count and/or reducing compensation to employees at that point in time? Form 3508 does require the borrower to provide the number of its employees as of the date it applied for the loan and as of the date it applied for forgiveness. Is that meaningful in any way? Given that the loan forgiveness process is likely to last several months after the end of the covered period (or alternative covered period) this could be an important issue.
 - Secretary Mnuchin indicated on [May 11, 2020 that Treasury and the SBA are looking into "technical fixes"](#) for the restaurant industry. Those "fixes" are not addressed in the application, and it remains to be seen whether Treasury and the SBA will provide some accommodations for hotels, restaurants and other service businesses (gyms, salons, etc.) required to shutter or substantially reduce working hours as a result of COVID-19 (e.g., adjusting FTE requirements for such businesses so that they are not unfairly subject to forgiveness amount reductions).
- **Credit Elsewhere:** The SBA has waived the requirement that borrower not be able to obtain financing elsewhere (but see discussion of the "necessity" certification above).
 - **Disbursements:** Lenders must make a one-time, full disbursement of a PPP loan within 10 calendar days of approval (the date on which the SBA assigns a loan number). Loans that have not been disbursed because a borrower fails to submit required loan documentation within 20 days of loan approval are cancelled.
 - **Other Economic Considerations:** PPP loans are non-recourse obligations provided that the loan proceeds are used for permitted purposes. No yearly or guarantee SBA fees will be charged.
 - **Employee Retention Tax Credit:** Borrowers under the PPP are **ineligible** for the Employee Retention Tax Credit made available under the CARES Act. However, borrowers that return PPP loan proceeds before the expiration of the limited safe harbor are again eligible for the Employee Retention Tax Credit.
 - **Social Security Tax Deferral:** The CARES Act permits employers to delay payment of the 6.2% employer share of the Social Security tax (but not the 1.45% employer share of the Medicare tax) from the date of enactment through 12/31/20. The tax is payable over the following 2 years with half paid by 12/31/21 and the other half by 12/31/22. However, such deferral is **not** available for an employer who has a PPP loan forgiven.
 - **First Come, First Served:** The PPP Rules expressly state that the PPP is "first-come, first-served". As noted above, should additional funding become available, potential borrowers should be prepared to apply quickly.
 - **Lender Fee Limits:** Processing fees paid to lenders will be based on the balance of the loan outstanding at the time of final disbursement. A lender will receive a fee equal to a percentage of such final disbursement as follows: (i) 5.00% for loans \$350,000 and under; (ii) 3.00% for loans of more than \$350,000 and less than \$2 million; and (iii) 1.00% for loans of at least \$2 million. Lenders may not collect any fees from the applicant.

- **[KEY UPDATE]** The Review Rules provide that if the SBA conducts a review of a PPP loan and determines that a borrower is ineligible, then the lender is not eligible for a processing fee. Lender fees are subject to clawback within 1 year of disbursement of a PPP-loan if the SBA determines that a borrower was ineligible.
- **Agent Fee Limits:** The CARES Act authorizes the SBA to establish limits on fees that can be collected by agents that assist applicants in applying for the PPP. The PPP Rules provide that the fees of such agents will be paid by the lender out of the fees the lender receives from the SBA (*i.e.*, the agent may not collect fees from the borrower or be paid out of PPP loan proceeds). The total amount an agent can collect from a lender for providing such assistance is capped at: (i) 1.00% for loans of not more than \$350,000 ($\leq \$3,500$); (ii) 0.50% for loans of more than \$350,000 and less than \$2 million ($\$1,750 - \sim \$9,999$); and (iii) 0.25% for loans of at least \$2 million ($\$5,000 +$).
- **Application:** Each applicant seeking a 7(a) loan under the PPP is required to submit a Paycheck Protection Program Borrower Application Form (SBA Form 2483) to a participating lender (together with any other documentation required by the lender as part of the application process (see **FAQ 4** below)).
- **Burden of Assessing Eligibility/Certifications:** PPP Rules and related SBA guidance place the burden on borrowers to confirm their own eligibility (including calculating payroll costs, assessing affiliation and determining employee headcount) and the accuracy of the information it supplies to the lender, and permit lenders to rely on borrower certifications in determining loan eligibility and provide that the SBA will hold lenders harmless for a borrower's failures to comply with the PPP's criteria.
- **[KEY UPDATE] SBA Review Process:** Under the [Review Rules](#), the SBA has broad authority to review any PPP loan at any time, in its discretion (including after a loan is forgiven).
 - **Scope of Review** – The SBA may review: (i) **borrower eligibility** (based on the CARES Act, rules and guidance in effect at the time of its application and its Form 2483), including the application of the SBA's affiliation rules (see **Size Standard** and **Affiliation** above) and list of ineligible industries (as modified for the PPP) (see **Ineligible Industries** below); (ii) **loan amount calculation and use of proceeds**; and (iii) **loan forgiveness amount claimed by the borrower**. If the SBA undertakes a review of a PPP loan, it will notify the lender and the lender must notify the borrower in **writing within 5 business days**. A lender **cannot** approve any application for loan forgiveness until the SBA notifies the lender in writing that it has completed its review.
 - **SBA Requests** – If loan documentation submitted to the SBA or any other information indicates that a borrower may be ineligible for a PPP loan or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower, the SBA will (directly or via the lender) request additional information from the borrower and the SBA will consider all information provided in response. Failure to respond may result in a finding of ineligibility or that a borrower is ineligible for loan amount/forgiveness amount claim.
 - **SBA Determinations** – If the SBA determines that a borrower was ineligible for the PPP loan (*e.g.*, because the borrower lacked an adequate basis for the certifications made in its PPP loan application) the loan will **not** be eligible for loan forgiveness and the SBA will direct the lender to deny the forgiveness application. If the SBA determines that the borrower is ineligible for the loan amount or forgiveness amount claimed, the will direct the lender to deny the loan forgiveness application in whole or in part, as applicable. Such denial may be in addition to the SBA's exercise of other remedies (including, *e.g.*, repayment of the PPP loan) and many expose the borrower to penalties (discussed below "**Consequences of a False Filing**")
 - **Appeal** – A borrower may appeal such SBA determinations. The SBA intends to issue a separate interim final rule on the appeal process.
- **Consequences of a False Filing:** An applicant is required as part of both Form 2483 (Loan Application) and Form 3508 (Forgiveness Application) to certify that it understands that knowingly making a false statement in order to obtain a SBA-guaranteed loan is punishable by law (including by imprisonment and significant monetary fines). Penalties include:

- **Criminal Penalties** – Potential criminal penalties for false statements or fraud in connection with a PPP loan include (i) imprisonment of not more than 5 years and/or a fine of up to \$250,000 (18 USC §§ 1001 & 3571); (ii) imprisonment of not more than 2 years and/or a fine of not more than \$5,000 (15 USC § 645 (a)); and (iii) imprisonment of not more than 30 years and/or a fine of not \$1 million (18 USC § 1014).^{xv} Beyond the penalties expressly referenced in the PPP loan application, criminal penalties under other federal fraud statutes or SBA-specific criminal statutes (*e.g.*, regarding embezzlement or concealment) may apply. For further discussion on the subject of potential criminal risks see our client alert [Rear View Mirror: Criminal Exposure for Companies that Received PPP Loans under the CARES Act](#).
- **Civil Penalties** – In addition to criminal penalties, the government can pursue civil fraud remedies under the civil False Claims Act (31 U.S.C. 3729-3733) or the Program Fraud Civil Remedies Act (31 U.S.C. 3801-3812).

The threat of enforcement of such penalties is bolstered by the answer to Question 39 of the SBA’s FAQ (published on April 29, 2020) which was reiterated in the answer to Question 46 (published May 13, 2020) which states that the SBA “will review all loans in excess of \$2 million, *in addition to other loans as appropriate*, following the lender’s submission of the borrower’s loan forgiveness application.” (emphasis added). The SBA has indicated additional guidance implementing such review and audit procedures are forthcoming. Given the potential risks and heightened scrutiny from Treasury, the SBA, the U.S. Justice Department (nationally and regionally), and the public and press more broadly of the companies receiving PPP loans, it is imperative the applicants carefully read and consider all certifications being made in Form 2483, Form 3508, and in any other documentation submitted to the SBA or a PPP lender.

II. **Frequently Asked Questions**

- **Q1: What affiliation rules apply (for purposes of determining the number of employees of an applicant together with its affiliates)?**^{xvi}
 - **A:** According to the U.S. Treasury Department’s affiliation guidance, the four affiliation tests below are applicable to an affiliation assessment for purposes of determining eligibility under the PPP. The Treasury Department’s guidance (combined with language in the CARES Act rescinding the SBA’s February 2020 Interim Final Rule on affiliation standards) confirms that the pre-2020 SBA rules on affiliation (13 C.F.R. § 121.301(f)(1)–(4)) are the relevant affiliation rules for purposes of the PPP:
 - Affiliation based on ownership;
 - Affiliation arising under stock options, convertible securities, and agreements to merge;
 - Affiliation based on management; and
 - Affiliation based on identity of interest between “close relatives.”
- **Q2: When is a minority shareholder deemed to have control (and therefore affiliation)?**
 - **A:** The SBA distinguishes between rights in respect of ordinary business actions and “extraordinary” business actions necessary to protect the minority investor’s investment. In instances where supermajority consent is required for **ordinary business actions**, the minority investor’s ability to block such actions gives rise to negative control and the investor will be **deemed an affiliate**. In contrast, a minority investor’s ability to block “**extraordinary**” business actions should **not** give rise to affiliation between a minority investor and the applicant. **Please note that this distinction is derived from SBA case law, not all of which is specific to the affiliation rules for 7(a) loan programs (like the PPP). Applicants are strongly encouraged to carefully assess any minority protections before determining that such protections do not give rise to affiliation.**

Examples of minority rights that have been determined to establish **control** by the minority

Examples of minority rights that are with respect to “extraordinary” business actions and have been

investor and **result in affiliation** include the following:

- Making, declaring, or paying distributions or dividends other than tax distributions;
- Establishing a quorum at a meeting of stockholders (and likely, by extension, at a meeting of the board);
- Approving or making changes to the company's budget or approving capital expenditures outside the budget;
- Determining employee compensation;
- Hiring and firing officers and executives;
- Blocking changes in the company's strategic direction;
- Establishing or amending an incentive or employee stock ownership plan;
- Incurring or guaranteeing debts or obligations;
- Initiating or defending a lawsuit;
- Entering into contracts or joint ventures; and
- Amending or terminating leases.

determined **not to establish control** (and thus, **no affiliation**) include the following:

- Selling all or substantially all of the company's assets;
- Placing an encumbrance or lien on all or substantially all of the company's assets;
- Engaging in any action that could result in a change in the amount or character of a company's capital contributions;
- Changing the company's line of business;
- Engaging in a merger transaction (only applies to veteran-owned businesses);
- Issuing additional stock/equity;
- Amending the organizational documents of a company;
- Filing for bankruptcy;
- Amending the governing documents to materially alter the rights of the existing owners;
- Dissolving the company;
- Increasing, decreasing, or reclassifying the authorized capital of the company;
- Taking an action in contravention of a company's charter, bylaws, operating agreement or similar governing documents;
- Disposing of the company's goodwill;
- Committing any act that would make it impossible for the company to carry on its ordinary course of business;
- Submitting a company's claim to arbitration;
- Entering into a confession of a judgment;
- Adding new members; and
- Approving an increase or decrease in the size of the company's board of directors or other governing body.

- The SBA has confirmed that a minority shareholder can eliminate such affiliation if such shareholder "irrevocably waives or relinquishes" such rights.

- **Q3: When does a management agreement create "control"?**

- **A:** Management agreements that give the management company sole discretion over the business operations with minimal oversight of the decision-making by the applicant, while not passive, create affiliation between the management company and applicant. However, affiliation is not created between the applicant and the management company if the management agreement includes "meaningful oversight" by the applicant over the management company's activities. A management agreement that provides for the applicant business to do all of the following inherently provides for "meaningful oversight": (i) approval of the annual operating budget; (ii) approval of any capital expenditures or operating expenses over a significant dollar threshold; (iii) control over bank accounts; and (iv) oversight over the employees operating the business.

- **Q4: In addition to the Form 2483, what other documentation are lenders asking for?**

- **A:** Lenders have been generally requesting the following, though they may request additional or alternative materials:
 - IRS 940, 941, or 944 payroll tax forms for 2019, and if available, Q1 2020;
 - Payroll processor records and other payroll reports/ledger for 2019 and YTD 2020 with corresponding bank statements (which should capture the following information: salary, wages, commission, or similar compensation; tips; vacation; parental, family, medical or sick leave; group healthcare benefits; retirement benefits; and state or local taxes on employee compensation);
 - 1099s for independent contractors for 2019;
 - Documentation evidencing health insurance premiums under a group health plan;
 - Documentation evidencing the sum of all retirement plan funding paid for by the applicant; and
 - Organizational documents (articles of incorporation/organization, bylaws, operating agreement, partnership agreement, owners' driver's licenses, etc.) and tax identification numbers (EINs or SSNs, as appropriate).
- **Q5: What non-profits are eligible for the PPP?**
 - **A:** The SBA's Interim Final Rule on the PPP states that tax-exempt nonprofit organizations described in section 501(c)(3) of the Internal Revenue Code (IRC) and tax-exempt veterans organizations described in section 501(c)(19) of the IRC are eligible for the PPP. The fact that the SBA specifically called out these two types of non-profits suggests that these are the only types of non-profits eligible for the PPP.
- **Q6: What information about PPP borrowers will become publicly available?**
 - **A:** Requests for information about a borrower may be denied unless the SBA has the written permission of the borrower or the information is subject to disclosure under the Freedom of Information Act (FOIA). FOIA requires the SBA to disclose, upon request, information supplied by borrowers as part of loan programs upon request, including:
 - Statistics on the PPP (individual borrowers are not identified in the statistics) and
 - Borrower information including: (i) names and commercial street and e-mail addresses; (ii) names of officers, directors, stockholders or partners; and (iii) loan amount.

Proprietary data on a borrower is not routinely made available to third parties, and commercial or financial information obtained from a person is exempt from FOIA requests. Further, according to the SBA, materials and information *generally* exempt from FOIA requests include: financial statements; credit reports; business plans; fiscal projections; pricing or payroll information; corporate structures; personal and business tax returns; non-statistical information on pending, declined, withdrawn or cancelled applications or on defaults or delinquencies; requests for size determinations; loan applications; and loan officer's reports (among other materials and information). Under the Privacy Act, the SBA is also authorized to make certain "routine uses" of information protected by that Act (*e.g.*, disclosure of information maintained in SBA's records when it indicates a violation or potential violation of law to the appropriate Federal, State, local or foreign enforcement agency).

- **Q7: What should a borrower do if a rule change (or FAQ) alters a Borrower's eligibility?**

While there is greater clarity now around the risks associated with the necessity certification, there remains a broader issue of what actions an existing borrower must take when a PPP Rule or FAQ that alters or clarifies PPP eligibility would result in that borrower being ineligible. Question 17 of the SBA FAQs provides that borrowers "may rely on the laws, rules, and guidance available at the time of the relevant application" and do not need to take action based on updated guidance. However, leaning on Question 17 comes with potentially serious pitfalls. First, FAQ is not law or part of an Interim Final Rule, so it is uncertain how much equal weight an FAQ carries. Second, it is unclear whether the SBA draws a meaningful distinction between a *new* law, rule, or guidance that is a true change in the PPP as compared to a clarification, or less, a reassertion of an existing rule. The government may also take the

position that the May 18th safe harbor period, while purportedly applying only to the necessity certification, allowed borrowers the opportunity to return funds and any borrower who choose not to do so, in effect, recertified that it is eligible for a PPP loan. A borrower whose eligibility is in question that retained its PPP loan after May 18th may ultimately have to repay loan proceeds in full (potentially immediately or on an expedited basis) and perhaps even criminal and civil penalties (*e.g.*, if a borrower has to re-certify as to eligibility in a forgiveness application) (see “**Consequences of a False Filing**” below).

- **Q8: In addition to the Form 3508, what other materials must be submitted as part of the loan forgiveness application and for how long must such materials be retained?**
 - **Payroll Cost Documentation** – Documentation verifying the eligible cash compensation and non-cash benefit payments from the eight-week covered period or alternative covered period, consisting of:
 - Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees;
 - Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the covered (payroll tax filings (*i.e.*, Form 941) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings).
 - Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the Borrower included in the forgiveness amount.
 - **Nonpayroll Costs** – Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the covered period.
 - **Business Mortgage Interest Payments** – Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the covered period; or lender account statements from February 2020 and the months of the covered period through one month after the end of the covered period verifying interest amounts and eligible payments.
 - **Business Rent or Lease Payments** – Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the covered period or lessor account statements from February 2020 and from the covered period through one month after the end of the covered period verifying eligible payments.
 - **Business Utility Payment** – Copy of invoices from February 2020 and those paid during the covered period and receipts, cancelled checks, or account statements verifying those eligible payments.
 - **FTE Reference Period Documentation** – Documentation showing the average number of FTE employees on payroll per month employed by the borrower during the selected reference period (see “**Reductions in Forgiveness Amount above**”). Such documentation may include payroll tax filings and state quarterly business and individual employee wage reporting and unemployment insurance tax filings.
 - **Borrower is not required to submit (but must retain) the PPP Schedule A Worksheet included in Form 3508** (which is used to calculate average FTE during the covered period or alternative covered period, list salary and compensation paid to employees during the covered period or alternative covered period, confirm whether any related reductions to the forgiveness amount are required, and confirm whether any such reductions fall within the safe harbor exceptions (if restored by June 30, 2020)) **and related documentation supporting the calculations in such worksheet.**
 - **The Borrower must retain all such documentation in its files for 6 years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.**
 - **Demographic Information** – Borrowers can complete an optional form on certain demographic information (including gender, race, ethnicity, and veteran status/relationship).

III. **Overview of the Paycheck Protection Program Liquidity Facility**

On April 9, 2020 the Board of Governors of the Federal Reserve System introduced the Paycheck Protection Program Liquidity Facility (the “PPPLF”) pursuant to section 13(3) of the Federal Reserve Act. The PPPLF came as part of a broader [announcement](#) by the Federal Reserve and [Treasury](#) regarding the implementation of new and expansion of existing Federal lending programs, including the Main Street Lending Program aimed at making new loans available to businesses with up to 10,000 employees. Notably, the guidance provides that a borrower under the PPP can also borrow under the Main Street Lending Program. (For more on the Main Street Lending Program, see our [client alert](#).)

The terms of the PPPLF are summarized in a [term sheet](#) released by the Federal Reserve in conjunction with its announcement, and further detailed in [frequently asked questions](#) published by the Federal Reserve. The purpose of the PPPLF is to increase liquidity for lenders participating in the PPP (a “PPP Lender”)^{xvii} so that they can engage in more expansive origination of PPP loans. Under the PPPLF, Federal Reserve Banks will extend credit to PPP Lenders in the form of non-recourse^{xviii} term loans (“PPPLF Loans”) at an interest rate of 0.35%. PPP loans will serve as collateral for a corresponding PPPLF Loan (with such collateral valued at the principal amount of the PPP loan). PPP Lenders can borrow from the PPPLF an amount up to the principal amount of PPP loan collateral that it can pledge to the Federal Reserve. On April 30, 2020, the Federal Reserve [confirmed](#) that a PPP Lenders will be able to pledge as collateral not only PPP loans that it originates, but also PPP loans acquired on the secondary market.

PPP Lenders seeking PPPLF Loans are required to pool all PPP Loans that have the same maturity date, and will receive a single extension of credit secured by such pooled PPP loans. PPP Lenders will need to ensure that they simultaneously pledge all PPP loans with the same maturity date. There will be a separate extension of PPPLF credit for each maturity date of PPP loans that are pledged as collateral. PPP loans cannot be pledged as collateral until the PPP loan has been originated, and cannot be pledged in advance for an extension of credit at a later date.

The terms of a PPPLF Loan will be closely aligned with the underlying PPP loans serving as collateral. The principal amount and maturity period of a PPPLF Loan will be the same as that of the underlying pool of PPP loans (generally 2 years). A PPP Lender is required to repay an extension of credit under the PPPLF whenever (i) the PPP Lender has been reimbursed by the SBA for a loan forgiveness (to the extent of the forgiveness), (ii) the PPP Lender has received payment from the SBA representing exercise of a loan guarantee, or (iii) the PPP Lender has received payment from the PPP borrower of an underlying PPP loan. In each such instance, the PPP Lender must promptly report to the lending Federal Reserve Bank any payments on pledged PPP loans so that the corresponding PPPLF Loan can be adjusted accordingly. The maturity of a PPPLF Loan will accelerate (i) in conjunction with the acceleration of an underlying PPP loan upon a default and resulting sale to the SBA by the PPP Lender of such PPP loan to realize on the 100% guarantee, and (ii) to the extent of any loan forgiveness reimbursement received by a PPP Lender from the SBA in respect of the underlying PPP loan.^{xix} PPP Lenders are not required to pay any fees to participate in the PPPLF and there are no prepayment penalties.

PPP Lenders seeking a PPPLF Loan must execute a [PPPLF Letter of Agreement](#) and make a [certification](#) that (i) it is not insolvent and (ii)^{xx} is unable to secure adequate credit accommodations from other banking institutions.^{xxi}

The Federal Reserve has indicated that it will publicly disclose certain information regarding the PPPLF. The Federal Reserve will report weekly (on an aggregate nationwide basis) balance sheet items related to the PPPLF. Further, the Federal Reserve has [indicated](#) that it will also produce a monthly report regarding the new CARES Act-related lending facilities, which would include PPPLF, detailing (i) names and details of participants in each facility, (ii) amounts borrowed and interest rate charged, and (iii) overall costs, revenues and fees for each facility. Similar information will also be publicized by the Federal Reserve one year after the termination of the PPPLF. On May 15, 2020, the [Federal Reserve reported](#) that as of May 6, 2020, nearly \$30 billion had been advanced under the PPPLF (the Federal Reserve also published a list of transaction-specific disclosures as of May 15, 2020, available [here](#)).

All depository institutions that originate PPP loans are eligible to borrow under the PPPLF. On April 30, 2020, the Federal Reserve [confirmed](#) that other SBA-qualified PPP Lenders, including depository institutions (*i.e.*, banks and credit unions) and non-depository institutions, such as community development financial institutions, small business lending companies licensed by the SBA, and some financial technology firms.

As with the other Federal programs implemented in connection with the CARES Act, it is reasonable to expect that the contours of the PPPLF will continue to evolve. The PPPLF is scheduled to remain in effect until September 30, 2020.

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, related rules and regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

ⁱ The “PPP Rules” include: (i) an [Interim Final Rule](#) governing the PPP generally (published April 2, 2020); (ii) an [Interim Final Rule](#) regarding the application of the SBA’s affiliation rules to the PPP (published April 2, 2020); (iii) an [Interim Final Rule](#) regarding additional eligibility criteria and requirements for certain pledges of loans (with a principal focus on certain self-employed applicants) (published April 14, 2020), (iv) an [Interim Final Rule](#) regarding certain requirements for promissory notes, authorizations, affiliation, and eligibility (published April 24, 2020); (v) an [Interim Final Rule](#) on additional criterion for seasonal employers; (vi) an [Interim Final Rule](#) on disbursements (published April 28, 2020); (vii) an [Interim Final Rule](#) on corporate groups and non-bank and non-insured depository institution lenders (published April 30, 2020); (viii) an [Interim Final Rule](#) on nondiscrimination and additional eligibility criteria (published May 5, 2020); (ix) an [Interim Final Rule](#) regarding extension of the limited safe harbor with respect to certification concerning need for PPP loan request (published May 8, 2020); (x) an [Interim Final Rule](#) on loan increases (published May 13, 2020); (xi) an [Interim Final Rule](#) on eligibility of certain electric cooperatives (published May 14, 2020); (xii) an [Interim Final Rule](#) on the treatment of entities with foreign employees; (xiii) an [Interim Final Rule](#) on the second extension of the limited safe harbor with respect to the necessity certification and lender reporting (published May 20, 2020); (xiv) an [Interim Final Rule](#) on Loan Forgiveness (published May 22, 2020), and (xv) an [Interim Final Rule](#) on SBA loan review procedures and related borrower and lender responsibilities (published May 22, 2020).

ⁱⁱ Of the newly appropriated \$310 billion, \$60 billion is expressly allocated for guarantees of loans made by smaller banks, smaller credit unions, and community financial institutions (which encompasses certain community development financial institutions, minority depository institutions and other institutions that provide financing to underserved and economically disadvantaged communities). The PPPHCEA also increased the funding available for the SBA’s economic injury disaster loan (“EIDL”) program (\$50 billion in new funding) and for the EIDL grant program introduced in the CARES Act (\$10 billion in new funding). Additionally, the PPPHCEA appropriated a total of \$100 billion to the Public Health and Social Services Emergency Fund, including \$75 billion to be distributed by the U.S. Department of Health and Human Services to certain eligible healthcare providers (e.g., hospitals) to reimburse expenses and lost profits attributable to coronavirus. Read more in our client alert on the health care funding under the PPPHCEA and the CARES Act (including grants from the Provider Relief Fund).

ⁱⁱⁱ Internal Revenue Service, Notice 2020-32.

^{iv} Plus any outstanding amount under a pre-existing EIDL made on or after January 31, 2020 and before April 3, 2020 net of any EIDL advance (as EIDL advances do not require repayment).

^v Under the Interim Final Rule published on May 13, 2020, if a seasonal employer received a PPP loan before the alternative criterion for determining its maximum loan amount (published on April 28, 2020) and would be eligible for a higher maximum loan amount under the alternative criterion, the lender may submit a request to the SBA to upsize and make an additional disbursement in respect of such PPP loan. The lender must have not yet submitted its initial SBA Form 1502 in respect of such PPP loan and the borrower must supply the lender with the required documentation to support the increase. All caps and limitations on PPP loan amounts apply to such an increased loan.

^{vi} The CARES Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount (including, per the PPP Rules, any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees). **The PPP Rules further clarify that affiliation rules are waived even if the borrower received investment from other non-SBIC investors.**

^{vii} The SBA’s determination concerning the certification regarding the necessity of the loan request will not affect SBA’s loan guarantee.

^{viii} For instance, must cash reserves be depleted and other investments or assets liquidated before a borrower can certify? Does access to other (non-forgivable) debt (e.g., undrawn lines of credit), which likely comes at a higher cost of capital, dictate that the borrower cannot make the certification of need? If such other sources of capital are available but can only carry the business for a limited period of time, what financial cushion makes it impossible to make the certification?

^{ix} The Interim Final Rule on Additional Eligibility Criteria and Requirements for Certain Pledges of Loans address in detail the process and requirements for PPP loan applications by self-employed applicants who filed or will file a Form 1040 Schedule C for 2019, including step-by-step instructions for calculating payroll costs depending on whether such applicant has or does not have employees.

^x SBA guidance clarifies that this treatment follows the computation of self-employment tax from IRS Form 1040 Schedule SE Section A line 4 and removes the “employer” share of self-employment tax, consistent with how payroll costs for employees in the partnership are determined.

^{xi} Initial Forms 1502 for PPP loans approved prior to April 28, 2020 are due on May 22, 2020. For all other PPP Loans, the initial Forms 1502 are due within 20 calendar days after the PPP loan is approved.

^{xii} Internal Revenue Service, Notice 2020-32.

^{xiii} Calculations to be confirmed by the lender (via review of supporting materials provided with the Form 3508) include (i) the amount of Cash Compensation, Non-Cash Compensation, and Compensation to Owners (claimed on Lines 1, 4, 6, 7, 8, and 9 of PPP Schedule A), (ii) the amount of Business Mortgage Interest Payments, Business Rent or Lease Payments, and Business Utility Payments (claimed on Lines 2, 3, and 4 of the PPP Loan Forgiveness Calculation Form), and (iii) the calculation of payroll costs divided by 0.75% (on Line 10 of the PPP Loan Forgiveness Calculation Form).

^{xiv} A lender must provide the SBA as part of its a forgiveness approval or denial determination: (1) the PPP Loan Forgiveness Calculation Form; (2) PPP Schedule A; and (3) the (optional) PPP Borrower Demographic Information Form

^{xv} EIDL borrowers may also be subject to fraud charges (and resulting fines and imprisonment) under 18 USC § 1040, which addresses fraud in connection with major disaster or emergency benefits.

^{xvi} The SBA has confirmed that, for purposes of the PPP, an applicant’s participation in an employee stock ownership plan (ESOP) does not trigger application of the affiliation rules.

^{xvii} While referred to here as PPP Lenders (as these are the institutions that ultimately lend to the end-recipients of PPP loans), the term sheet and FAQ refer to such institutions in the context of the PPPLF as PPPLF borrowers.

^{xviii} Non-recourse status of the PPPLF Loan may change if the PPP Lender breaches any of the representations, warranties, or covenants in the PPPLF documentation, or engages in fraud/misrepresentation in connection with participation in the PPPLF.

^{xix} As described in [Interim Final Rule](#) published collectively by the Federal bank regulatory agencies (Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC)), for participating eligible financial institutions: (i) the PPPLF is considered to be zero percent risk for purposes of risk-based and leverage-based capital requirements because PPP loans are 100% guaranteed by the SBA; and (ii) loans extended by the PPPLF to participating eligible financial institutions will not increase the regulatory capital requirements for those institutions. The Interim Final Rules take effect immediately, but are subject to a 30-day public comment period.

^{xx} However, the Federal Reserve has clarified that this certification may be based on economic conditions in the market or markets intended to be addressed by the PPPLF facility. The certifying PPP Lender may consider current economic or market conditions as compared to usual economic or market conditions, including the availability and price of credit for small businesses with diminished revenue streams. For purposes of certifying that it is unable to secure adequate credit accommodations elsewhere, such PPP Lender does not need to establish that credit is unavailable, rather that credit accommodations may be available, but at prices or on conditions that are inconsistent with a normal, well-functioning market.

^{xxi} Certain additional documentation requirements apply for depository institutions that have not already established access to the Federal Reserve’s lending programs for depository institutions (“discount window” programs).

