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Paycheck Protection Program and Economic Injury Disaster Loan Funds Exhausted

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A \$349 billion government loan fund designed to help small businesses and their employees weather the COVID-19 pandemic has run out of money, the Small Business Administration (“SBA”) announced Thursday.

The Paycheck Protection Program (“PPP”), a centerpiece of the \$2.2 trillion federal stimulus bill, provides low-interest, forgivable loans of up to \$10 million to businesses with 500 or fewer employees. The funds must be used to maintain payroll; for mortgage interest, rent, and utilities; and for certain other purposes. Businesses that use the loans solely to retain employees and pay other covered expenses are eligible for loan forgiveness, with the proceeds excluded from gross income.

The SBA also announced on Thursday that another critical lending program for small businesses, the Economic Injury Disaster Loan (“EIDL”) program, also had run out of money.

As a result, eligible businesses that have not yet applied for PPP or EIDL loans are shut out of the programs – at least until Congress appropriates more money. Businesses that had their PPP or EIDL loans approved by the SBA before the programs ran out of money should still be in line for loans, even if the loans have not yet been funded.

The SBA has been deluged with PPP applications since banks began accepting applications on April 3, and the program ran out of money in less than two weeks – despite eligible businesses ostensibly having until June 30, 2020 to apply. Soon after banks began accepting applications, the Treasury Department requested an additional \$250 billion for the PPP; however, Congress has not yet agreed to add additional funding to the program.

For businesses that were approved for PPP loans, the focus will soon shift to how the proceeds can be used, how to obtain the maximum amount of forgiveness, and what happens to amounts that are not forgiven. With that in mind, the following frequently asked questions and answers may be helpful to borrowers who have received, or soon expect to receive, PPP loans.

How can PPP loan funds be used?

PPP loan funds can be used only for the following purposes:

- Payroll costs;
- costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- mortgage interest payments (but not mortgage pre-payments or principal payments);
- rent payments;
- utility payments;
- interest payments on any other debt obligations that were incurred before February 15, 2020; and
- refinancing an SBA Economic Injury Disaster Loan (“EIDL”) made between January 31, 2020 and April 3, 2020. If an EIDL was used for payroll costs, the PPP loan must be used to refinance the EIDL loan, since the SBA does not allow borrowers to take out multiple loans for the same expenses.

The \$2.2 federal stimulus bill text suggested that PPP loan proceeds could be used for other purposes; however, an SBA Interim Final Rule and the Borrower Application Form provide that loan funds may be used only for the above purposes.

In addition, the SBA Interim Final Rule states that at least 75 percent of PPP loan proceeds must be used for payroll costs. Put another way, no more than 25 percent of PPP loan proceeds may be used for allowable non-payroll costs. Borrowers are subject to penalties for knowingly misusing PPP loan funds.

How much of my PPP loan is eligible for forgiveness?

The entire amount of a PPP loan and accrued interest is eligible for forgiveness, and the amount forgiven will be excluded from gross income (i.e., the borrower will not have taxable cancellation-of-debt income). The actual amount of forgiveness depends on how much the borrower spends during the 8-week period beginning on the date of the loan disbursement (the “covered period”). Payments made during the covered period for the following purposes are eligible for forgiveness:

- payroll costs;
- payments of mortgage interest on mortgage obligations incurred before February 15, 2020;
- rent payments under leases entered into before February 15, 2020; and
- utility payments under utility service agreements entered into before February 15, 2020.

Notably, the list of items that qualify for forgiveness is narrower than the list of permissible uses of PPP loan proceeds. For example, PPP loan proceeds may be used to pay rent with respect to a lease entered into *after* February 15, 2020 or to make interest payments on other debt; however, such uses of PPP loan proceeds are NOT eligible for forgiveness.

Not more than 25 percent of the forgiveness amount may be attributable to non-payroll costs. In other words, at least 75 percent of the forgiveness amount must consist of eligible payroll costs.

I have heard that I am not eligible for loan forgiveness if I laid off employees or cut employees' salaries. How does that work?

A borrower's forgiveness amount is reduced by multiplying the forgiveness amount by a fraction, the numerator of which is the borrower's average number of full-time equivalent ("FTE") employees during the covered period, and the denominator of which is the lesser of (i) the borrower's average number of FTE employees between February 15 and June 30, 2019, or (ii) the borrower's average number of FTE employees between January 1 and February 29, 2020 (the "testing period"). For example, if a borrower had 90 FTE employees during the covered period and 100 FTE employees during the testing period, the borrower's loan forgiveness amount would be reduced by 10 percent.

A borrower's loan forgiveness amount also is reduced by the amount of any reduction in salary or wages paid to any employee who earned \$100,000 or less, on an annualized basis, during each pay period of 2019, to the extent such reduction exceeds 25 percent. For example, if a borrower reduces the salary of an employee who earned \$100,000 in 2019 by \$40,000, the borrower's forgiveness amount would be reduced by \$15,000 (\$40,000 - \$25,000).

The amount of loan forgiveness due to a reduction in FTE employees or a reduction in payroll is *not reduced* in the following circumstance: The borrower (i) reduced its average number of FTE employees, or reduced the salaries of employees earning \$100,000 or less by more than 25 percent, between February 15 and April 26, 2020, and (ii) such reductions have been eliminated on or before June 30, 2020.

How do I apply for loan forgiveness?

A borrower seeking forgiveness of a PPP loan must submit an application to the lender that includes:

- documentation verifying the number of FTE employees on payroll and pay rates for the covered period, including (i) payroll tax filings reported to the IRS (i.e., Forms 941); and (ii) state income, payroll, and unemployment insurance filings.
- Documentation including canceled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, covered lease obligations, and covered utility payments;
- Certification from an authorized representative of the borrower that:
 - The documentation presented is true and correct; and
 - The amount for which forgiveness is requested was used to retain employees, make interest payments on covered mortgages, make payment on covered rent obligations, or make covered utility payments; and
- Any other documentation required by the SBA Administrator or the lender. Lenders who

receive an application for loan forgiveness must issue a decision within 60 days of receipt.

There is no statutory deadline for borrowers to submit a loan forgiveness application; however, borrowers generally should apply as soon as possible after the covered period to ensure the application is timely approved and that no necessary documentation is missing.

What happens to any loan balance that is not forgiven?

PPP loan proceeds that do not qualify for forgiveness must be repaid over two years at 1.0% interest. Borrowers are not required to make any payment of principal or interest for six months from the date of the loan disbursement; however, interest will continue to accrue on any loan balance that is not forgiven.

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If you have questions, please reach out to your primary contact at Hahn Loeser, or contact one of the attorneys listed below for more information.



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