

**MEMORANDUM**

**To:** National Association of Specialty Pharmacy

**From:** Julie Allen, Senior Director of Government Affairs

**Date:** April 5, 2020

**Re:** **Summary of Small Business Loan Provisions in the Coronavirus Aid, Relief, and Economic Security (CARES) Act**

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On March 6, 2020, the President signed an emergency supplemental appropriations bill, marking the first major effort to address the coronavirus pandemic. The full text of the Coronavirus Preparedness and Response Supplemental Appropriations Act can be found [here](#), and a memo summarizing the major provisions can be found [here](#).

On March 18, the second package (the Families First Coronavirus Response Act) was signed into law. The full text of the legislation can be found [here](#), and a memo on the bill can be found [here](#).

On March 27, Congress passed the third and largest stimulus measure known as the “CARES Act.” The following is a summary of key provisions providing for small business loans. The full text of the legislation can be found [here](#).

The first major small business program in the new law is the Paycheck Protection Program (PPP). The second is the [Economic Injury Disaster Loan Program](#) (EIDL), which includes a \$10,000 grant that businesses can apply for and which they do not need to pay back. The rest of the EIDL loan, which caps out at \$2 million, is not forgivable but can be more flexible than PPP in the types of expenses it covers.

**On April 3, the administration released [The Interim Final Rule](#) implementing the Paycheck Protection Program. The rule clarifies that the SBA will not allow an employer to include independent contractors in payroll costs, which differs from the law’s original intent. The other notable change is that the SBA set the term of the loan at two years, rather than the up to 10 years provided in the CARES Act. The agency also posted an updated “find the lender” link: <https://www.sba.gov/paycheckprotection/find>.**

**The Coronavirus Aid, Relief, and Economic Security (CARES) Act**

**Title I — Keeping American Workers Paid and Employed**

- *Paycheck Protection Program*

Sec. 1102 of the new law focuses intently on efforts to maintain employment across the nation, particularly in small businesses. The law authorizes \$349 billion in loans to cover the payroll costs of small businesses under the Paycheck Protection Program (PPP). The purpose of the program is to help employers retain employees at their current pay. **The loans can be forgiven if employers devote certain portions of the loan amounts to keeping the employees on the payroll for at least eight weeks after the loan origination date. *If the employer maintains the employees at their same base pay, the entirety of the loan can be forgiven at the end of the eight-week period.*** The eight weeks can be applied to any time frame between February 15, 2020 and June 30, 2020, the final day on which applicants may apply for the PPP loan.

- *Where to apply*

Unlike some other Small Business Administration (SBA) programs, employers seeking PPP loans need not submit a loan application directly to the SBA, but may apply at any lending institution approved to participate through the existing SBA's 7(a) lending program, as well as through other lenders approved by the Treasury Department. Further guidance on the mechanics of application for the loans are provided by congressional sources [here](#) and [here](#).

- *Eligibility*

Eligible entities include small businesses, 501(c)(3) nonprofits, 501(c)(19) veteran's organizations,<sup>1</sup> and certain tribal business concerns.<sup>2</sup> Small businesses are further defined as those that employ no more than 500 employees, or are in an industry that has an [employee-based size standard provided by SBA](#) that is greater than 500 employees.

In evaluating the eligibility of a borrower for a loan, the lender is required to consider whether the business was in operation as of February 15, 2020, and had employees for whom the borrower paid salaries and payroll taxes.<sup>3</sup> The law recommends that the SBA issue guidance to lenders to prioritize small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals, women, and businesses in operation for less than two years.

- *Terms*

The program provides these loans to small businesses at an interest rate no higher than 4%. No personal guarantee or collateral is required for the loan, and lenders are expected to defer fees,

<sup>1</sup> The term 'veterans organization' is defined by the new law to mean "an organization that is described in section 501(c)(19) of the Internal Revenue Code that is exempt from taxation under section 501(a) of such Code."

<sup>2</sup> Described in Section 31(b)(2)(C) of the Small Business Act.

<sup>3</sup> Employers are also eligible who paid independent contractors as reported on IRS Form 1099-MISC.

principal and interest for no less than six months and no more than one year. The maximum term of a loan is 10 years, though the agency can lessen that duration. The law sets the maximum loan amount at \$10 million through December 31, 2020, and provides a formula by which the loan amount is tied to the payroll costs incurred by the business.

- *Payroll Costs*

Payroll costs to which the loan amount may be applied must be incurred during the “covered period,” meaning between February 15 and June 30, 2020. Amounts spent on the employer’s payroll costs, mortgage interest, rent, and utility costs can be forgiven, so long as the borrower continues to pay employees for eight weeks after the loan origination date. Should the borrower not seek forgiveness, yet fail to repay the loan, the law states that the SBA “shall have no recourse against an individual shareholder, member or partner of an eligible recipient” of the loan, unless they use the proceeds for an unauthorized purpose.

- *Loan Forgiveness*

Sec. 1106 includes the particulars of how the loans can be forgiven. The loan amount forgiven must be equal to the sum of costs incurred and payment made during the eight weeks after the origination date of the loan with respect to, again: 1) payroll costs (excluding costs for any employee compensation above \$100,000 annually), mortgage interest payments (not including the prepayment or payment of principal), plus any rent and utility payments incurred or paid by the loan recipient. The borrower’s mortgage interest, rent, and utility costs must all have been in existence prior to February 15, 2020. The amount of the loan forgiven will be excluded from the borrower’s taxable income, and, if the full principal of the loan is forgiven, the borrower will not be responsible for any interest accrued during the eight-week covered period. The opportunity for forgiveness reflects the purpose of the law: to encourage employers to continue to pay their employees at their base pay for eight weeks once the loan is originated, in return for forgiveness of amounts spent on payroll costs, mortgage interest, rent and utility costs.

However, the loan forgiveness amount will be *reduced* if the recipient reduces the average number of full-time equivalent employees per month employed either: 1) between February 15 and June 30, 2019 or between January 1 and February 29, 2020;<sup>4</sup> or (2) reduces the salaries or wages of any employee by more than 25% during the most recent quarter in which the employee was employed before the covered period. The law states that there is no reduction if a borrower re-hires an employee who was terminated, so long as they are rehired between February 15 and 30 days from enactment of the law on March 27, 2020.

- *Costs covered by the loan*

Employers’ costs covered by the loan, incurred between February 15 and June 30, 2020, can include—more specifically—payment of employee salaries, wages, commissions, and tips;

<sup>4</sup> The period utilized to formulate the loan forgiveness reduction may be chosen by the employer.

vacation, parental, family, medical or sick leave; allowances for dismissal or separation; group healthcare benefits; retirement benefits; insurance premiums; state or local taxes assessed on employee compensation; and interest on other outstanding debt. Employees covered by the payments can be full-time, part-time, or “other.” Certain related expenses are even covered for those who are self-employed, sole proprietors, or independent contractors.<sup>5</sup>

Other eligible uses for the loan include payments of interest on any mortgage obligation (not including prepayment of or payment of principal on a mortgage obligation), rent (including rent under a lease agreement), utilities, and interest on any other debt obligations incurred before the covered period.

- *Affiliated businesses*

Generally speaking, SBA normally requires affiliated businesses (meaning those whose affiliation with another business is based on “power to control”) to aggregate their employees or receipts when determining the size of the business. However, the CARES Act waives such aggregation in particular circumstances, including with respect to three categories: certain entities working primarily in the hospitality and restaurant business, identified pursuant to the [North American Industry Classification System \(NAICS\) Code](#) beginning with 72; franchises; and certain recipients of Small Business Investment Company (SBIC) loans. Analysts assert that particular entities in these three categories with more than 500 employees nationwide may be eligible to seek loans for individual properties. However, circumstances of each situation must be assessed pursuant to SBA regulation [13 CFR 121.103](#) and [SBA Affiliation Guidance](#).

- *Certifications of No Duplication*

Under the Paycheck Protection Program, all eligible borrowers must provide a good faith certification that their loan is necessary to support ongoing operations due to the uncertainty of the current economic conditions; that the funds will be used to retain workers, maintain payroll and make mortgage payments, lease or rental payments, and utility payments; and that they do not have a duplicative loan application pending and will not have received duplicative amounts from the SBA under the PPP between February 15 and December 31, 2020.

- *Overlap with SBA EIDL Loans*

Relatedly, if a small business receives an SBA Economic Injury Disaster Loan (EIDL) under the SBA Act Sec. 7(b), that same small business may also apply for a loan here, under Sec. 7(a), but only for a purpose *other than paying payroll costs*. This is relevant because small businesses in all U.S. states and territories are currently eligible to apply for the SBA’s EIDL under Sec. 7(b) to cover costs incurred due to

<sup>5</sup> Wages, commissions, income, net earnings from self-employment, or similar compensation in an amount that is not more than \$100,000 in one year, as prorated for the covered period.

COVID-19. (Under Sec. 7(b), though, applicants submit their applications directly to SBA – not their banks - to obtain EIDL loans that provide working capital up to \$2 million.)

The PPP does, however, allow a borrower who has an EIDL loan *unrelated to COVID-19* to apply for a PPP loan, with an option to refinance that loan *into* the PPP loan.

## **Title I — Other Economic Provisions**

- Section 1103 promotes entrepreneurial development by authorizing SBA to provide financial awards to the agency’s resource partners (Small Business Development Centers and Women’s Business Centers) to provide counseling, training, and education about SBA resources and business resiliency for small business owners affected by COVID-19.
- Section 1104 appropriates federal grants to support the State Trade Expansion Program (STEP) in FY 2018 and FY 2019 to be used through FY 2021, so STEP participants can be reimbursed for events cancelled due to COVID-19.
- Section 1107 appropriates funds for the following uses:
  - \$349 billion for loan guarantees,
  - \$675 million for Small Business Administration salaries and expenses,
  - \$25 million for the Office of Inspector General,
  - \$240 million for Small Business Development Centers and Women’s Business Centers for technical assistance for businesses,
  - \$25 million for resource partner associations to provide online information and training,
  - \$10 million for minority business centers for technical assistance for businesses,
  - \$10 billion for emergency EIDL grants,
  - \$17 billion for loan subsidies,
  - \$25 million for Department of Treasury salaries and expenses, and
  - \$100 billion for secondary market guarantee sales.
- Section 1109 establishes the authority of the U.S. Department of Treasury and other federal financial regulatory agencies to authorize *bank and nonbank lenders* to participate, including insured *credit unions*, in loans made under the PPP.
- Section 1110 establishes an Emergency Grant to allow an eligible entity who has applied for an EIDL loan due to COVID-19 to request an advance on that loan of not more than \$10,000, which the SBA must distribute within 3 days. It terminates the authority to carry out Emergency EIDL Grants on December 30, 2020 and also establishes that an emergency involving federal responsibility by FEMA under the Disaster Relief and Emergency Assistance Act qualifies as a new trigger for EIDL loans. In such circumstances, the SBA Administrator shall deem that each *State or subdivision* has sufficient economic damage to

small business concerns to qualify for assistance under this paragraph. The Administrator shall accept applications for such assistance immediately.

- Section 1111 provides \$25 million so the SBA can offer resources and services in the ten most commonly spoken languages, other than English.
- Section 1112 directs the Administration to encourage lenders to provide payment deferments, when appropriate, and to extend the maturity of covered loans and avoid balloon payments *or any requirement for increases in debt payments* resulting from deferments provided by lenders during the period of the COVID-19 national emergency.
- Section 1113 increases the eligibility threshold of bankrupt companies to file under the U.S. Bankruptcy Code with less than \$7,500,000 of debt for one year; excludes any coronavirus-related payments from “income” or “disposable income” for one year.

Permits individuals and families in chapter 13 to seek payment plan modifications if they experience material hardship due to the pandemic, and will extend their payments for up to seven years after their initial plan payment was due. This provision sunsets after one year.

- Section 1114 requires the SBA to establish regulations governing these provisions within 15 days of enactment.

### ***Subtitle C – Business Provisions***

- Section 2301 provides a refundable payroll tax credit for 50% of wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers (1) whose operations were fully or partially suspended due to a COVID-19 related shut-down order, or (2) whose gross receipts declined by more than 50% when compared to the same quarter in the prior year.

The credit is based on qualified wages paid to the employee. For employers with more than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above. For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order. The credit is provided for the first \$10,000 of compensation, including health benefits, paid to an eligible employee. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

- Section 2302 allows employers and self-employed individuals to defer payment of the employer’s share of the Social Security tax they otherwise must pay for their employees. The deferred employment tax must be paid over the following two years, with half of the amount to be paid by December 31, 2021, and the other half by December 31, 2022.

- Section 2303 relaxes the limitations on a company's use of losses. Net operating losses (NOL) are currently subject to a taxable-income limitation, and they cannot be carried back to reduce income in a prior tax year. The provision provides that an NOL arising in a tax year beginning in 2018, 2019, or 2020 can be carried back five years. It also temporarily removes the taxable income limitation to allow an NOL to fully offset income. These changes are to enable companies to utilize losses and amend prior year returns, and thereby experience increased cash flow and liquidity during the COVID-19 emergency.
- Section 2304 modifies the loss limitation applicable to pass-through businesses and sole proprietors, so they can utilize excess business losses and access cash flow to maintain operations and payroll for their employees.
- Section 2305 accelerates the ability of corporations to obtain Alternative Minimum Tax (AMT) credits. Corporate AMT credits are available as *refundable* credits *over several years*, ending in 2021. This provision permits companies to accelerate the process and claim a refund now to obtain additional cash during the COVID-19 emergency.
- Section 2306 temporarily increases the amount of interest expense that businesses are allowed to deduct on their tax returns by increasing the 30% limitation to 50% of taxable income (with adjustments) for 2019 and 2020.
- Section 2307 enables businesses, especially in the hospitality industry, to write off costs associated with improving their facilities immediately instead of having to depreciate those improvements over the 39-year life of the building.
- Section 2308 waives the federal excise tax on any distilled spirits used for or contained in hand sanitizer produced and distributed in a manner consistent with guidance by the Food and Drug Administration in calendar year 2020.

*For the latest news, information, and insights on COVID-19, please visit our resource hub at <https://www.powerslaw.com/covid-19/>.*