

# **SMALL BUSINESS ADMINISTRATION'S PAYCHECK PROTECTION PROGRAM**

***As Updated by the Economic Aid Act***

DOUG KANTOR | KATE JENSEN  
STEPTOE & JOHNSON LLP

January 12, 2021

# WHAT'S NEW UNDER THE ECONOMIC AID ACT?

AVAILABLE JAN. 11 (PPLs) AND JAN. 13 (SDPPLs) FROM COMMUNITY FINANCIAL INSTITUTIONS; "SHORTLY THEREAFTER" FROM OTHER LENDERS

## SECOND DRAW PROGRAM

Same general program structure with different eligibility requirements and loan amounts; PPP loan terms and rules/FAQs, unless otherwise noted

## FORGIVENESS PERIOD FLEXIBILITY

Borrower elects covered period ending 8 to 24 weeks after loan disbursement.

## NEW FORGIVABLE USES

- Software/cloud services operations expenses;
  - Costs of certain property damage;
  - Supplier costs
- Worker protection expenses (e.g., PPE, space modifications)

Retains 60% payroll cost spending requirement for full forgiveness.

## EXTENDS AUTHORIZATION

March 31, 2021 for PPLs and SDPPLs.

## TAX CHANGES

Forgiven business expenses are deductible; forgiven indebtedness not included in gross income; PPP borrowers are eligible for the ERTC

## NEW ELIGIBLE ENTITIES

News organizations, 501(c)(6) organizations with limited lobbying activities, housing cooperatives.

## SIMPLIFIED FORGIVENESS FOR LOANS \$150K OR LESS

Maximum one page; certifications and attestations.

# ELIGIBILITY FOR SDPPLs

## PPL-Eligible Entities That:

- Received a PPL and have used or will use the full PPL amount before the expected date of SDPPL disbursement;
- Employs 300 or fewer employees (no reference to alternative size tests or SBA “small business” thresholds); and
- Had at least a 25% reduction in gross receipts in one quarter of 2020 compared to the same quarter in 2019 (count gross receipts of affiliates, but not forgiven PPLs).

## Other Eligibility Notes:

- Same affiliation rule waivers apply for employee size count (but no reference to waiver for revenue reduction requirement):
  - NAICS Code 72
  - SBA-registered franchises
  - Faith-based organizations
  - Certain news organizations (majority-owned or controlled by 511110 or 5151 NAICS code businesses)
- Expanded list of ineligible entities: publicly traded companies; “think tanks;” businesses with ties to China or Hong Kong; FARA-registered entities; entities in which federal officials have a significant interest; and Shuttered Venue Operator Grant recipients

# REMINDER ON INELIGIBLE ENTITIES

**UNLESS PROVIDED AN EXCEPTION UNDER PPP/SDPPP LAWS, BUSINESSES THAT NORMALLY ARE EXCLUDED FROM SBA BUSINESS LOANS ARE INELIGIBLE. EXAMPLES INCLUDE —**

- ✖ Household employers of nannies, housekeepers, etc. (not a normal SBA exclusion, but excluded under SBA rules).
- ✖ Financial businesses primarily engaged in the business of lending.
- ✖ Passive businesses owned by developers/landlords that do not actively use or occupy the assets acquired or improved by the loan proceeds.
- ✖ Life insurance companies.
- ✖ Businesses located in a foreign country.
- ✖ Private membership clubs and businesses.
- ✖ Businesses primarily engaged in political or lobbying activities.

# SDPPP MAXIMUM LOAN AMOUNT

LOANS ARE CAPPED AT THE LESSER OF—

**\$2 MILLION**

(NOTE \$4 MILLION CAP FOR  
CORPORATE FAMILIES)

**OR**

250% OF AVERAGE MONTHLY  
"PAYROLL COSTS" DURING 2019 OR  
2020 (OR THE LAST 12 MOS FOR  
NON-SELF-EMPLOYED BORROWERS)

OR

350% OF AVERAGE MONTHLY  
"PAYROLL COSTS" DURING 2019 OR  
2020 (OR THE LAST 12 MOS FOR  
NON-SELF-EMPLOYED BORROWERS)  
FOR NAICS CODE 72 BUSINESSES

(ALTERNATIVE LOOK-BACK PERIODS FOR NEW &  
SEASONAL BUSINESSES)

# SDPPP APPLICATION PROCESS

- ✓ SBA Form 2483-SD – similar to original PPP:
  - Average payroll calculation
  - Gross receipts reduction calculation
  - Information on 20%+ owners
  - Certifications
- ✓ Payroll documentation (generally same as PPP), unless borrower uses same lender and calendar year 2019 as payroll look-back period for PPL and SDPPL;
- ✓ Same certifications, including “need” certification, plus eligibility-based statements;
- ✓ For loans over \$150K, revenue reduction documentation (smaller loans must provide at time of forgiveness application);
- ✓ **Borrowers STILL Beware** – responsible for all calculations and eligibility determinations; lenders may rely in good faith on borrower representations and documents

# USES FOR LOANS – PPP & SDPPP

## GROUP BENEFITS & INSURANCE PREMIUMS

Group health care benefits during periods of paid sick, medical, or family leave.

Any insurance premiums.

## MORTGAGE INTEREST

Payments of interest on mortgage obligations.

## RENT & UTILITIES

Rent (including rent under a lease agreement) and utilities.

## PAYROLL COSTS

Includes employee compensation (e.g., salary, wages, commissions, cash tips, etc.) up to annualized compensation of \$100,00; paid leave; severance payments; payment for group benefits (health, vision, dental, life disability), including insurance premiums; retirement benefits; and state and local payroll taxes.

\* For an independent contractor or sole proprietor, it includes wages, commissions, income, or net earnings from self-employment or similar compensation. **Independent contractors do not count as employees because they apply for their own loans under the program.**

Excludes excess compensation above the \$100,000 threshold; certain federal taxes; compensation to non-U.S. employees; and sick/family leave wages for which credit is allowed under the Families First Coronavirus Relief Act.

**AT LEAST 60% OF THE PPL PROCEEDS MUST BE USED FOR PAYROLL COSTS.**

## EXISTING SBA USES

Any uses already permitted for SBA Business Loans (e.g., inventory, supplies, building or land purchases, construction, site improvements, etc.).

## INTEREST ON OTHER OBLIGATIONS

Interest on any other debt obligations incurred before February 15, 2020.

## ECONOMIC INJURY DISASTER LOAN

Refinancing of an SBA Economic Injury Disaster Loan (EIDL) made between January 1, 2020 and April 3, 2020.

## OPERATIONS COSTS

Software and cloud computing services for business operations.

## PROPERTY DAMAGE

Uninsured and caused by 2020 protests.

## SUPPLIER COSTS

Made under contract/PO for goods essential to business operations.

## WORKER PROTECTION

Adaptation of business and PPE to comply with federal or state/local COVID-19 safety requirements.



# MAXIMUM FORGIVENESS AMOUNT: PPP & SDPP

## **THE SUM OF THE FOLLOWING INCURRED AND PAID WITHIN THE BORROWER'S ELECTED COVERED PERIOD (8-24 WEEKS FROM LOAN DISBURSEMENT) —**

- Payroll costs (minus qualified wages taken into account for the Employer Retention Tax Credit);
- Interest on mortgage obligations incurred before February 15, 2020;
- Rent obligations in place since before February 15, 2020;
- Utility payments for services that began before February 15, 2020;
- Covered operations expenditures (software, cloud services);
- Covered property damage costs;
- Covered supplier costs (contract in effect prior to covered period, or before or during covered period for perishable items); and
- Covered worker protection expenditures (in response to government guidance issued between March 1, 2020 and the end of the public health emergency).

**FOR FULL FORGIVENESS, YOU MUST SPEND AT LEAST 60% OF LOAN DOLLARS ON PAYROLL COSTS.**



# REDUCTIONS IN LOAN FORGIVENESS

## REDUCTIONS/PENALTIES

Maximum forgiveness amounts will be reduced:

- Proportionately for reductions in average full-time equivalent employees (FTEEs) between the covered period and either 2/15/19 – 6/30/19 or 1/1/20 – 2/29/20 (borrower elects look-back period); and
- Via a straight reduction for payroll reductions over 25% (compared to the last completed quarter of employment prior to loan disbursement) for workers making less than \$100,000 annually.

## SAFE HARBORS FROM FTEE REDUCTION PENALTIES

- Inability to rehire same employees or similarly qualified employees (must document)
- Inability to resume pre-Feb. 15, 2020 level of business activity due to government guidance or requirements
- Offers to restore hours at same wages refused by employees
- Employee dismissal for cause, resignations, voluntary reductions in hours

## REHIRE RELIEF

For loans made before December 27, 2020, the above penalties will not apply if an employer can demonstrate by December 31, 2020, elimination of:

- Reductions (compared to February 15, 2020) in the number of FTEES made between February 15, 2020 and April 26, 2020; and/or
- Salary reductions (compared to February 15, 2020) made between February 15, 2020 and April 26, 2020 for 1 or more employees.

For PPP and SDPPP loans made on or after December 27, 2020, rehire relief expires at end of covered period and SBA/Treasury may change look-back/comparison periods.

# BASICS ON THE EXPANDED ERTC & PPP

- ✓ PPP/SDPPP borrowers are eligible for ERTC (retroactive to the CARES Act), but qualified wages employers use to claim ERTC are not forgivable “payroll costs” (i.e., may not use the same wages to get both PPP forgiveness and ERTC – borrower may elect putting wages toward PPP forgiveness; otherwise, default rule goes to ERTC).
- ✓ ERTC extended for wages paid between January 1, 2021 and June 30, 2021
- ✓ For 2021, credit available for quarters in which the employer experiences:
  - Full or partial suspension of business due to COVID-19 government orders; or
  - 20% or more decline in gross receipts between relevant quarter (current quarter or immediately preceding calendar quarter) and same calendar quarter in 2019 (or in 2020 for newer businesses)
- ✓ “Large employer” for ERTC in 2021 = more than 500 full-time employees (up from 100 FTEs in 2020)
  - Large employer credit limit still applies: “qualified wages” limited to wages paid to employees who are not providing services due to the business suspension or decline in receipts
  - Smaller employers may advance credit based on wages already paid
- ✓ 2021 credit amount = 70% of qualified wages (wages/compensation and allocable health care costs; capped per employee at \$10K per quarter)
  - Maximum credit per quarter in 2021 = \$7K per employee
  - Compare to maximum credit for Mar. 12 – Dec. 31, 2020 = \$5K per employee

DISCLAIMER: NOTE INTENDED AS TAX ADVICE PLEASE CONSULT YOUR TAX PROFESSIONAL!

# LOAN FORGIVENESS PROCESS & SBA AUDITS

Per SBA rules, all forgiveness-related rules, guidance, and processes for the original PPP program still apply to SDPPP (except EIDL advances no longer deducted from forgiveness amounts; plus, make ERTC election for payroll expenses?)

Borrowers with loans of \$150,000 or less will not be required to submit a forgiveness application or documentation; must submit certifications and attestations, and retain records

Expect continued scrutiny by SBA of loans over \$2 million (see “need certification” questionnaires); SBA retains authority to audit even the smallest loans; Economic Aid Act requires SBA audit plan and regular reports to Congress

**QUESTIONS?**

Step toe