

CARES Act Paycheck Protection Program

As of April 3, 2020 Summary of Indicative Terms

This “Term Sheet” sets forth some of the primary terms and conditions that we know from CARES Act and recently released fact sheets from the [Treasury](#) and the [SBA](#), as well as the updated form of [application](#) published on April 3, and is qualified by reference to the CARES Act, the interim final rules (“IFR”) issued by SBA on April 2, 2020, and any further rules.

Eligible Borrowers; Headcount Limitations:	<p>An eligible recipient is any business or nonprofit in operation on Feb 15, 2020 (other than “ineligible businesses” which have been excluded by the IFR and are described below), had employees¹ for whom the borrower paid salaries and payroll taxes and which:</p> <ul style="list-style-type: none"> • Has (presumably at the time of application) together with its affiliates (see below) fewer than 500 employees whose principal place of residence is in the US, including full time, part time and other employees; • Meet the applicable employee-based SBA size standard (if any) based on the borrower’s industry NAICS code (measured based on the average for the prior 12 months);² or • Operates in NAICS Code 72 (e.g., food and hospitality) and employs not more than 500 employees per physical location of the business (without applying affiliation rules).
Lenders:	<p>Any current SBA 7(a) lender. All federally insured depository institutions, federally insured credit unions, and Farm Credit System institutions are also eligible to participate as lenders. The SBA notes that a “broad set of additional” lenders may participate as soon as they are authorized by the SBA, which we expect to happen on an expedited basis due to demand.</p> <p>NOTE: Due to expected volume, we have been advised by several leading SBA bank lenders that they intend to make PPP loans only to their existing lending customers. Potential borrowers are advised to contact their existing banks as soon as possible to discuss PPP loans.</p>
Loan Amount:	<p>Up to the lesser of (i) 2.5x average monthly “Payroll Costs” (defined below) for the prior 12 months³ plus the amount of any SBA disaster loan obtained by the borrower or (ii) \$10 million, but:</p> <ul style="list-style-type: none"> • “Payroll Costs” excludes compensation (wages, salary, tips, bonuses or other similar compensation) in excess of an annual salary of \$100,000 paid to any employee; and • “Payroll Costs” calculation subject to adjustment for seasonal and recently-formed businesses. <p>The IFR clarifies that independent contractors are excluded from all PPP loan calculations, including “Payroll Costs” because they can apply for their own PPP.</p>
Interest:	<p>1.00% per annum. Interest is deferred, but accrues, for 6 months and is forgivable.</p>

¹ Or independent contractors, although amounts paid to such contractors are not includable in the “borrowing base.”

² The IFR apparently eliminates the availability of a PPP loan to a company with more than 500 employees but which otherwise would be eligible for an SBA 7(a) loan under an industry standard based on annual receipts.

³ Although the IFR and CARES Act refer to a TTM calculation, the application says that most borrowers will use “monthly payroll for **2019**” (emphasis added).

<p>Forgiveness:</p>	<p>The principal amount of PPP loans, and interest thereon, will be forgiven to the extent of the borrower’s documented expenses for the following amounts, in each case incurred and paid during the 8-week period beginning on the date the loan is originated (the “forgiveness period”):</p> <ul style="list-style-type: none"> • Payroll Costs; • Interest (but not principal) payments on mortgages in existence as of Feb. 15, 2020; • Rent; and • Utilities (such total, the “Forgiven Amount”). <p>The IFR clarifies that not more than 25% of the Forgiven Amount may be used for non-payroll costs, because the 8 week forgiveness period is roughly equal to 75% of a 2.5 month period, which is used to calculate the available loan amount.</p> <p>The Forgiven Amount is subject to reduction as follows:</p> <ul style="list-style-type: none"> • On a pro rata basis, based on the amount by which average monthly FTE headcount during the forgiveness period is less than such average during, at the borrower’s election, either <ul style="list-style-type: none"> ○ January 1 - Feb 29, 2020; or ○ February 15, 2019 - June 30, 2019 (seasonal employers must use this period). • The reduction of salary or wages of any employee (making less than \$100,000 per year) that exceeds of 25% of such employee’s salary or wages for the most recent full quarter in which they were employed (because of a disconnect between the length of the two measuring periods, the ultimate calculation will need to be clarified in the regs) <p>A borrower may request forgiveness by:</p> <ul style="list-style-type: none"> • submitting documents that verify (a) the number of FTE employees and pay rates, and (b) payments on eligible mortgage, lease, and utility obligations; and • certifying that it used the forgiveness amount to keep employees and make eligible mortgage interest, rent, and utility payments. <p>Lenders are required to make decisions on calculations of the Forgiven Amount within 60 days after borrower submission of the required documentation.</p> <p>To the extent that any reductions in pay or headcount during the period from February 15, 2020 through April 26, 2020 are restored through rehiring or wage increases by June 30, 2020, such reductions will be disregarded in calculating the Forgiven Amount.</p> <p>Amounts forgiven will not be treated as income (CODI) for tax purposes.</p>
<p>Lender Fees:</p>	<p>The SBA will reimburse Lenders for processing fees up to:</p> <ul style="list-style-type: none"> • 5% of the loan amount for loans of not more than \$350,000 • 3% of the loan amount for loans of more than \$350,000 and less than \$2,000,000 • 1% of the loan amount for loans of not less than \$2,000,000. <p>SBA Administration fees are waived.</p>
<p>Collateral:</p>	<p>None. Unsecured.</p>
<p>Guarantors:</p>	<p>No owner personal guarantee is required. It is unclear whether lenders will require guarantees from corporate parents and/or subsidiaries.</p>
<p>Maturity; Amortization:</p>	<p>Two years, for any loan amount in excess of the Forgiven Amount. No amortization is required during the six-month interest deferral period.</p> <p>Amounts not forgiven are prepayable without premium.</p>

	An SBA 7(a) lender must provide “complete payment deferral relief” during the interest deferral period to each PPP Loan borrower not only on its PPP Loan to such borrower but also on any other SBA loans made by that lender to such borrower (though there is a bit of an ambiguity in the statute, and we will need to see the full regs to confirm this intent).
SBA Guaranty; Repurchase;	Loan amounts in excess of the Forgiven Amount will be 100% guaranteed by the SBA. PPP loans will be eligible for repurchase by the SBA 90 days after the Forgiven Amount is finally determined. The CARES Act also contemplates that lenders may also request that the SBA repurchase such loan earlier based on an estimated Forgiven Amount.
Use of Proceeds:	Proceeds of PPP loans may be used to pay the following. <ul style="list-style-type: none"> • Payroll Costs; • Interest (but not principal) payments on mortgages in existence as of February 15, 2020; • Rent; • Utilities; and • The following amounts, but which are not included in the Forgiveness Amount: <ul style="list-style-type: none"> ○ Interest payments on other debt incurred before February 15, 2020; and ○ Refinancing an SBA EIDL made between January 31, 2020 and April 3, 2020.
Other Debt; Intercreditor Arrangements:	The SBA 7(a) “no credit elsewhere” requirement is waived for PPP loans. It is unclear whether lenders’ form PPP Loan documents will contemplate express subordination to existing debt. Note: Borrowers with existing debt should review those loan documents and the new PPP Loan documents to ensure compliance with both, which may require modifications to form PPP Loan documents and/or consents from existing lenders.
Application Timing and Process; Financing Documents:	Small businesses may apply for PPP Loans beginning April 3, 2020, ⁴ by submitting this application to a participating lender. The applications must be accompanied by “payroll documentation” sufficient to establish eligibility and “Payroll Costs”, such as payroll processor records and payroll tax filings. Lenders must comply with applicable Bank Secrecy Act requirements, so it is recommended that borrowers also gather and be prepared to submit “corporate” or other entity organizational documents, and possibly financial statements and tax returns. The revised application form removes the requirement for signatures from 20% owners. Loan documents TBD and may be promulgated by SBA or produced individually by each lender.

⁴ Although SBA stated that applications would be accepted beginning April 3, many lending institutions have indicated that they will not be able to accept applications until the week of April 6, **and may only be accepting applications from existing bank customers for some period of time.**

MORE DETAILED INFORMATION	
Affiliation: ⁵	<p>Affiliates are generally aggregated for purposes of determining 7(a) loan eligibility or the separate size requirement for PPP loans. Affiliation rules are waived for companies that:</p> <ul style="list-style-type: none"> • Receive financial assistance from an SBIC (<i>see our separate analysis on this</i>); • Have less than 500 employees and are assigned NAICS Code starting with 72 (food and hospitality); or • Operate as a franchise under an SBA-recognized franchisor. <p>Affiliation (where not waived) is determined on a case by case basis looking at the totality of the circumstances, considering, among other things:</p> <ul style="list-style-type: none"> • Common ownership (generally control of 50% of voting equity or board seats); • Negative control via charter or contractual vetoes, covenants or protective provisions; • Common management, either at the officer or board level; and • Other factors, such as economic dependence, common investments, franchise agreements or an identity of interest.
Payroll Cost Calculation:	<p><u>Payroll Costs include:</u></p> <ul style="list-style-type: none"> • Salaries, wages, commissions, or similar compensation; • Payment of cash tip or equivalent • Vacation, parental, family medical, or sick leave; • Severance payment; • Health care benefits, including insurance premiums; • Retirement benefits; and • State or local tax assessed on said compensation. <p><u>Payroll costs do not include:</u></p> <ul style="list-style-type: none"> • Federal income tax and payroll tax contributions (including FICA) withheld during the period from February 15, 2020 through June 30, 2020;⁶ • Compensation in excess of an annual salary of \$100,000 paid to any employee; • Compensation of any employee whose principal residence is outside the US; or • Qualified sick and family leave wages covered by tax credits under the Families First Coronavirus Response Act (FFCRA).
Ineligible Businesses	<p><u>“Ineligible”</u> businesses include, among others:</p> <ul style="list-style-type: none"> • Lenders, factors, life insurance companies; • Certain “sin” businesses (but alcohol-related companies are generally eligible); • Passive businesses (including developers, etc.); • Businesses teaching or indoctrinating religious beliefs; • Political or lobbying business; and • Speculative businesses (such as “oil wildcatting”).

⁵ The IFR indicates that SBA “intends to promptly issue additional guidance” on affiliation.

⁶ It appears that borrowers include FICA in calculating the loan amount (to the extent paid prior to the covered period above), but that FICA payments during the forgiveness period are not includable in the Forgiven Amount.