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Gill Ragon Owen stands ready to assist you through these trying times.

Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) was signed into law by the President on March 27, 2020. The CARES Act creates multiple avenues of economic relief to eligible small businesses through multiple programs the Small Business Administration (SBA) will administer. The CARES Act changed the definition of a “small business concern,” which makes many more entities eligible for assistance through various programs the SBA will administer under the CARES Act. Due to high demand, the funds were quickly exhausted. The Senate has approved an additional \$310 billion for the program, and the House is expected to approve the additional funding this week.

Each small business is different, and every business should consider whether the business qualifies and which of the various programs might be available, to determine which program best applies to the business, including the programs available under the Family First Coronavirus Response Act and the CARES Act. In addition, some states may have their own loan, grant and incentive programs. Please check with your local banker and economic development office for availability of these programs.

PAYCHECK PROTECTION PROGRAM

The CARES Act expanded the existing SBA 7(a) Loan Guaranty Program by creating the Paycheck Protection Program that authorizes the SBA to provide a 100% loan guaranty to SBA approved lenders that make qualified loans of up to \$10 million to eligible small businesses. Congress appropriated \$349 billion for this program. The Paycheck Protection Loans are intended to be forgivable to the extent that a borrower maintains the number of its employees and otherwise uses the loan proceeds in compliance with the CARES Act. We have created a [checklist](#) for your convenience to assist you with this process.

Important Updates:

- On April 23, 2020, the SBA issued revised FAQs which address whether large companies with adequate liquidity are eligible for a PPP loan.
 - All borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and regulations at the time of the application.
 - While the CARES Act suspends the SBA requirement that borrowers are unable to obtain credit elsewhere, borrowers must certify in good faith that the loan request is necessary.
 - The borrower must certify that “current economic uncertainty makes this loan request necessary to support the ongoing operations” of the applicant.
 - If a borrower applied for a loan prior to this guidance and repays the loan in full by May 7, 2020, the borrower will be deemed to have made the certification in good faith.
- On April 14, 2020, the SBA issued a revised interim rule with important revisions:

- Partnerships qualify as small businesses, but individual partners may not seek individual loans as “self-employed,” persons, but may include their self-employment earnings in the partnership’s PPP loan request, to the extent that the annualized wages of the individual do not exceed \$100,000.
- Rent, mortgage interest, utilities, and other debt services are to be included in the loan request for the partnership, rather than loan requests made by individual partners.
- The SBA has determined that it will limit the forgiveness of owner compensation replacement for individuals with self-employment income who file a Form 1040 Schedule C to eight weeks’ worth (8/52) of 2019 net profit as shown on the 2019 Form 1040 Schedule C.
- The SBA stated that it intends to provide additional guidance for self-employed individuals who were not in operation in 2019 but who were in operation on February 15, 2020 and will file a Form 1040 Schedule C for 2020.
- The SBA clarified that businesses owned by directors or shareholders of a PPP lender are permitted to apply for a PPP loan through the lender with which they are associated, provided that the individual is an outside director or holder of less than 30% equity interest in the PPP lender. Favoritism by the lender in processing time or prioritization is prohibited.

Your Business may be a “qualified small business” if it:

- Was in business prior to February 15, 2020;
- Had or has employees for whom it paid salaries and payroll taxes or had independent contractors;
- Does not have more than 500 employees (including part-time employees and independent contractors) or the maximum number of employees specified in the current SBA size standards for the businesses primary NAICS code, whichever is greater; or
- Has more than one location and has more than 500 employees, but does not have more than 500 employees at any one location **and** the business’ primary NAICS code starts with “72” (Accommodation and Food Service); or
- Is a franchisee holding a franchise listed on the SBA’s registry of approved franchise agreements; or
- Has received financing from a Small Business Investment Corporation.
- **It is the responsibility of the borrower to determine which entities (if any) are its affiliates and determine the employee headcount of the borrower and its affiliates. Lenders are permitted to rely on borrowers’ certifications.**

NOTE: “Qualified Small Business” includes sole proprietorships and self-employed individuals. Additionally, the CARES Act makes certain nonprofit organizations (must be tax-exempt under Section 501(c)(3) of the Internal Revenue Code), qualified veterans’ organizations, and certain Tribal business concerns eligible. If you are an independent contractor, sole proprietor, or self-employed individual, lenders will also be looking for certain documents (final requirements will be announced by the government) such as payroll tax filings, Forms 1099-MISC, and income and expenses from the sole proprietorship. Partnerships are also eligible for PPP loans. However, partners may not apply for separate loans as self-employed individuals. Partners may list their

income as a payroll cost up to \$100,000 annualized.

Small business concerns can be eligible borrowers even if they have more than 500 employees, as long as they satisfy the existing statutory and regulatory definition of a “small business concern” under section 3 of the Small Business Act, 15 U.S.C. 632. A business can qualify if it meets the SBA employee-based or revenue-based size standard corresponding to its primary industry. Go to www.sba.gov/size for the industry size standards.

Additionally, a business can qualify for the Paycheck Protection Program as a small business concern if it met both tests in SBA’s “alternative size standard” as of March 27, 2020: (1) maximum tangible net worth of the business is not more than \$15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million.

A business that qualifies as a small business concern under section 3 of the Small Business Act, 15 U.S.C. 632, may truthfully attest to its eligibility for PPP loans on the Borrower Application Form, unless otherwise ineligible.

Maximum Loan Amount is the lesser of \$10,000,000 and an amount based on a multiple of your past average monthly payroll amounts, calculated as follows:

- **For Most Businesses:** an amount equal to 2.5 times* your business’s average monthly payments for payroll costs for the twelve months prior to the loan being originated **plus** the amount of any other debt approved for refinancing, including any debt incurred as a result of COVID-19 under the EIDL Program).
- **If your Business is a “seasonal employer” (as determined by SBA):** an amount equal to 2.5 times the average total monthly payments by your business for payroll costs incurred during the 12-week period beginning February 15, 2019, or at the election of the borrower, March 1, 2019, and ending June 30, 2019, **plus** the amount of any eligible EIDL to be refinanced into the covered loan
- **If your Business was not in business during the period beginning February 20, 2019 and ending June 30, 2019:** an amount equal to 2.5 times the average total monthly payments by your business for payroll costs incurred during the period beginning on January 1, 2020 and ending on February 29, 2020, **plus** the amount of any eligible EIDL to be refinanced into the covered loan.
- **If your business is a partnership:** The partnership may apply for a PPP loan at the partnership level, rather than the partner level. The loan amount may include partnership income. Partners may not submit separate loan requests for self-employment income.
- **If you are a self-employed individual:** Loan proceeds for self-employed individuals are limited to the uses for which the borrower made expenditures in 2019. The proceeds may only be used for expenditures that the individual claimed or would be entitled to claim a deduction on Form 2040 Schedule C. The loan forgiveness amount is limited to a

* The US Treasury Department described this calculation as follows, “Loans can be for up to two months of your average monthly payroll costs from the last year plus an additional 25% of that amount.” See, [U.S. Treasury Information for Borrowers](#)

proportionate eight-week share (8/52) of 2019 net profit, as reflected in the individual's 2019 Form 1040 Schedule C.

- **Providing an accurate calculation of payroll costs is the responsibility of the borrower**, and the borrower attests to the accuracy of those calculations on the Borrower Application Form. Lenders are expected to perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning average monthly payroll cost. For example, minimal review of calculations based on a payroll report by a recognized third-party payroll processor would be reasonable. In addition, as the PPP Interim Final Rule indicates, lenders may rely on borrower representations, including with respect to amounts required to be excluded from payroll costs. If the lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue.

“Payroll costs” mean:

- **If your business has employees** — payroll means the sum of payments of any compensation with respect to employees that is a:
 - salary, wage, commission or similar compensation;
 - payment of cash tips or equivalent;
 - payment for vacation, parental, family, medical or sick leave;
 - allowance for dismissal or separation;
 - payment required for the provision of group health care benefits, including insurance premiums;
 - payment of any retirement benefit; or
 - payment of state or local tax assessed on the compensation of employees.
- Payroll costs are calculated on a gross basis without regard to federal taxes imposed or withheld, such as the employees and employer's share of FICA and income taxes.
- **If you are self-employed or your business is organized as a sole proprietor** — payroll means the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment or similar compensation and that is in an amount not more than \$100,000 in one year, as prorated for the covered period.

“Payroll cost” do NOT include the following:

- The **compensation** of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period
 - The exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, not to non-cash benefits, including: (1) employer contributions to defined-benefit or defined-contribution retirement plans; (2) payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and (3) payment of state and local taxes assessed on compensation of employees.

- taxes imposed or withheld under Chapters 21 (Social Security and Medicare taxes, employee and employer portion), 22 (railroad retirement tax), or 24 (withholding obligations from employees) of the Internal Revenue Code of 1986 during the period between February 15, 2020 and June 30, 2020
- any compensation of an employee whose principal place of residence is outside of the United States
- qualified sick leave wages and qualified family leave wages, in each case, for which a credit is allowed under the Families First Coronavirus Response Act.

Other Key Paycheck Protection Program loan provisions:

- The loan program will be offered at 1% interest rate percent per annum.
- Loan payments will be deferred for six months.
- Loans are made by SBA-approved lenders that have delegated authority to make the loans without approval from the SBA (no SBA Authorization required for each individual loan).
- In reviewing the application, a lender has to evaluate whether (1) the borrower was in business on February 15, 2020 and (2) had employees and paid salaries and taxes or had independent contractors and filed 1099-MISC.
- Guarantee fees are waived (these are typically 2 percent-3.75 percent of the loan amount, depending on the size of the loan, and would otherwise be paid by the borrower).
- Loans are non-recourse to the borrower. The CARES Act also specifically provides each loan is nonrecourse to the shareholders, members and partners of the borrower.
- The CARES Act removes the usual SBA “No ‘credit elsewhere test’ which otherwise requires a borrower to demonstrate it was unable to secure financing elsewhere before qualifying for SBA financing.
- A Paycheck Protection Loan:
 - requires no collateral;
 - contains no prepayment penalties; and
 - defers all payments for six to 12 months.
- Your business will have to certify as to the following:
 - Current uncertain economic times make the loan request necessary to support the business’s ongoing operations; and
 - The business will use the loan proceeds to keep workers and make payroll, mortgage payments, lease payments and utility payments; and
 - The business does not already have an application pending for other payroll assistance under the CARES Act.

NOTE: A loan under the Paycheck Protection Program makes the borrower ineligible for the Employee Retention Tax Credit made available under the CARES Act. This only applies to the Employee Retention Tax Credit in the CARES Act and does not apply to any credits available under the FFCRA (such as the paid sick leave tax credit) or other credits available under the CARES Act.

NOTE: For borrowers with existing 7(a) or microloan program loans, the SBA will pay principal, interest, and any associated loan fees for a six-month period starting on the loan's next payment due date. Payment on loans that are on deferment will begin with the first payment after the deferment period. Please note that this relief will not include loans made under the Paycheck Protection Program.

Loan Forgiveness Provisions of Paycheck Protection Program:

Under the CARES Act, small business loan borrowers will be eligible for loan forgiveness, both for new loans under the Paycheck Protection Program and for existing 7(a) loans.

For borrowers under the Paycheck Protection Program, the loan forgiveness may equal **the amount spent by the borrower in the eight-week period after the loan origination date on the following items[†] (not to exceed the original principal amount of the loan):**

- payroll costs (as described above) (not to exceed \$100,000 of annualized compensation per employee); and
- payments of interest on any mortgage loan incurred prior to February 15, 2020; and
- payment of rent on any lease in force prior to February 15, 2020; and
- payment on any utility for which service began before February 15, 2020.

The amount forgiven is **not** considered taxable income to the borrower.

The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.

Limits on Amount of Loan Forgiveness:

It is possible that the SBA will not forgive all of the principal of your PPP loan.

Improper use of Loan Proceeds. If you use loan proceeds for a purpose other than those listed above, those loan amounts will not be forgiven, and you will owe those amounts to your lender.

Reduction in number of employees or wages. You may also owe money to your lender if you do not maintain your staff and payroll. The amount forgiven will be reduced in two possible ways: reducing the number of full-time equivalent employees and/or reducing the salaries of employees by more than 25%.

These two possible reductions are described in more detail as follows:

Reduction Based on Reduction in Number of Employees. The amount otherwise forgivable will be reduced proportionally by multiplying the amount otherwise forgivable by a fraction,

- the numerator of which is the average number of full-time equivalent employees per month[‡] employed by the borrower during the 8-week period beginning on the date of the

[†] Although this is not mentioned in the statute, the US Treasury has informed potential borrowers that “Due to likely high subscription, it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs.” See, [U.S. Treasury Information for Borrowers](#)

[‡] “[T]he average number of full-time equivalent employees shall be determined by calculating the average number of full-time equivalent employees for each pay period falling within a month.” Section 1206(d)(2)(B).

origination of the PPP loan, and

- the denominator of which is the average number of full-time equivalent employees per month employed by the borrower during either (at the borrower's election):
 - “the period beginning on February 15, 2019 and ending on June 30, 2019” or
 - “the period beginning on January 1, 2020 and ending on February 29, 2020.”[§]

Reduction Relating to Salary and Wages. In addition to the proportionate reduction based on reduction in number of employees, the amount otherwise forgivable will also be reduced “by the amount of any reduction in total salary or wages of any employee^{**} [who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000] during the [8-week period after the date on which the loan originates] that is in excess of 25% of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the [8-week period beginning on the date on which the loan originates]. Section 1206(d)(3)(A)&(B).

Exemption from Limits on Amount of Loan Forgiven:

Reduction in Employees and Commensurate Re-Hiring. A borrower will not be penalized by a reduction of the amount otherwise forgivable forgiven for a reduction in the number of full-time equivalent employees between February 15, 2020 and April 26, 2020 (as compared to the number of full-time equivalent employees on February 15, 2020), if not later than June 30, 2020 the borrower has eliminated the reduction in the number of full-time equivalent employees. Section 1206(d)(5)(A)&(B)(i)(I)&(II).

Reduction in Salary and Commensurate Increase in Salary. A borrower will not be penalized by a reduction of the amount otherwise forgivable forgiven for a reduction in the salary or wages of 1 or more employees^{††} of the borrower between February 15, 2020 and April 26, 2020 (as compared to the number of full-time equivalent employees on February 15, 2020), if not later than June 30, 2020 the borrower has eliminated the reduction in salary or wages “of such employees”. Section 1206(d)(5)(A)&(B)(ii)(I)&(II).

The foregoing exemptions from the limits on the amounts otherwise forgivable also apply if a borrower eliminates a both a reduction in the number of full-time equivalent employees and a reduction in salary or wages of its employees. In addition, the SBA and the Secretary of the Treasury may prescribe regulations granting *de minimis* exemptions from these requirements.

Repayment obligation for Unforgiven Amounts:

Any amount outstanding after considering the amount forgiven will be repayable over a term not to exceed 10 years. The U.S. Treasury has stated that the repayment term for PPP loans will be 2 years. See, [U.S. Treasury Information for Borrowers](#).

[§] For seasonal employers (as determined by the SBA), the denominator will be the average number of full-time equivalent employees per month employed by the borrower during the period beginning on February 15, 2019 and ending on June 30, 2019.

^{**} NOTE: This exemption applies to all employees, not just full-time equivalent employees.

^{††} NOTE: This exemption applies to all employees, not just full-time equivalent employees.

Borrower must Apply for Forgiveness and Provide Documentation in Support:

A borrower must apply for loan forgiveness by submitting an application for forgiveness to the lender servicing the borrower's PPP loan. The borrower must support its forgiveness application with supporting documentation that includes:

Documentation for Number of Employees and Salaries and Wages. The documentation must verify the number of full-time equivalent employees on the borrower's payroll and pay rates for the periods described in subsection (d), and shall include (among possible other requested documentation):

- payroll tax filings reported to the Internal Revenue Service; and
- State income, payroll, and unemployment insurance filings.

Documentation for Other Payments. The documentation must verify payments and may include cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments.

Borrower Certification. The borrower must deliver a certification from a representative of the borrower authorized to make such certifications 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 a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments; and

Other Documentation. The borrower must also provide any other documentation the SBA determines necessary.

Decision on Forgiveness:

Not later than 60 days after the date on which a lender receives an application for loan forgiveness from a borrower, the lender shall issue a decision on the application.

MAJOR NOTE: The SBA has up to 30 days following the enactment of the CARES Act to issue regulations implementing and providing guidance under certain provisions of the CARES Act. In addition, the Treasury Department is required to issue regulations implementing and providing guidance under certain provisions of the CARES Act. Issuance of regulations and guidance may delay loan approval and disbursement or modify/waive certain loan requirements.

Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application. However, borrowers whose previously submitted loan applications have not yet been processed may revise their applications based on clarifications that are released later.

For more information on this loan program, please review our COVID-19 Resources page here: <https://www.gill-law.com/covid-19-resources/#>