



RAINESFELDMAN

# **FORGIVE OR FORGET:**

***Whether to Get a PPP Loan &  
What to Do When You Get It***

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*Whether to Get a PPP Loan and What to Do When You Get It*

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- Information is current as of May 27, 2020

# ROADMAP

- Whether to and Why Apply
- Application Overview and Documentation
- Covered Period for Use of Funds - Rules
- Rehiring Best Practices
- Forgiveness
- Other Loan Programs: EIDL and MSL
- A Look into Our Crystal Ball

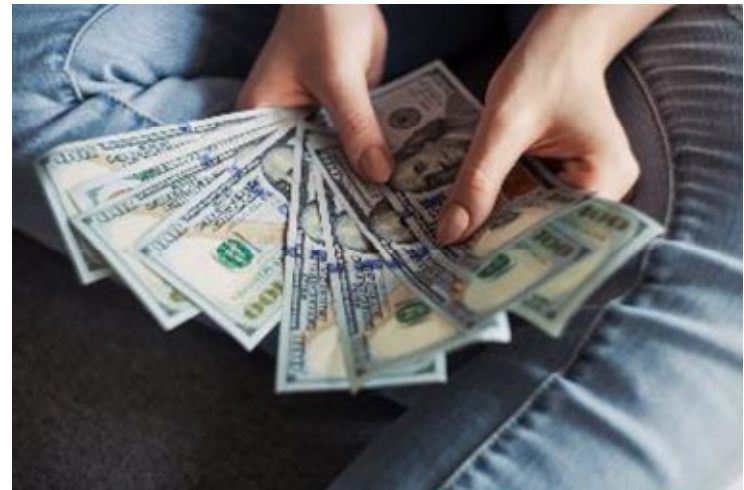


# WHY APPLY?

# WHY APPLY?

It may not be the “free money” it first seemed, but remember, assuming no knowing misrepresentations:

- It's a 1% LOAN
- With a 6-Month Deferral
- 2-Year Term
- No Origination Fees
- No Prepayment Penalties
- No Collateral
- Guaranteed by the SBA
- Possibility of Loan Forgiveness
- Lots of strings attached, but still, pretty cheap money...



# BUT CAN I STILL APPLY?

- You have until **June 30** to apply
- As of May 27th, approx. \$148 billion left in the program
- Congress might extend the application deadline





# AM I ELIGIBLE?

Yes, if you were in operation as of February 15, 2020 AND...

- A small business with < 500 employees
- Qualify as a “small business concern” under Small Business Act
- A restaurant, hotel or NAICS Code 72 business – may apply per each location with < 500, capped at \$20MM
- A non-profit 501(c)(3), 501(c)(19) Veterans Organization or 501(c)(12) Electric Cooperative, and hospitals with < 50% of funding from state or local government if otherwise operates as 501(c)(3)
- An SBA 31(b)(2)(c) Tribal Business Concern
- Independent Contractor, Sole Proprietor or Self-Employed
- Standard Affiliation Rules mostly apply (NAICS 72, SBA-approved franchise, SBIC-backed exemptions)

# INELIGIBLE

- Cannabis and other federally illegal businesses
- Household employers
- Private equity or hedge fund
- 20% owner is incarcerated or indicted
- Defaulted on an SBA or government loan within last 7 years
- 13 CFR 120.110 prohibited businesses including
  - Prurient Interest\*
    - E.D. Mich. determined a strip club was eligible
  - Banks
  - Political Lobbying Firms
  - Private Clubs with restrictive admissions practices





# HOW TO APPLY

# HOW TO APPLY

- Through an approved SBA lender
  - Banks
  - Credit Unions
  - Fintech firms like PayPal, Square, Intuit QuickBooks
- Submit Lender's application based on SBA form
- Submit payroll documentation
- May apply for up to 2.5 times average monthly 2019 or last 12 months' payroll costs excluding individual employee compensation >\$100k, plus the amount of any EIDL advance
- List of PPP approved lenders available on SBA website



# WHAT'S IN THE LOAN APPLICATION?

- Average monthly payroll
- Number of jobs
- Purpose of loan (check all authorized uses)
- Ownership information, including owners >20%
- Qualifying background info, including criminal status, loan default, bankruptcy, US-based employees
- Factual info, including EIDL amount, affiliated businesses and qualified franchises
- **Certifications**

# LOAN APPLICATION CERTIFICATIONS

Borrower AND Authorized Representative must make Certifications (**liability for falsity**) regarding

- Eligibility for Loan
- Authorized uses only, especially retain workers and maintain payroll
- Economic uncertainty makes loan request necessary
  - The validity of this certification **WILL BE REVIEWED BY SBA** if a PPP loan is > \$2 Million!!
- In operation and had payroll on 2/15/2020
- SBA and Lender may review any PPP loan of any size for any reason and will be looking at application and forgiveness application certifications for veracity and accuracy





# HOW TO USE

# AUTHORIZED USES OF LOAN FUNDS

PPP Loan proceeds may be used ONLY for:

- Payroll Costs
- Non-Payroll Costs
- “Paid or Incurred” during the 8-week “covered period”



# AUTHORIZED USES OF LOAN FUNDS

## *Payroll Costs – Cash Compensation*

Payroll costs include:

- Cash compensation up to \$15,385 per employee
  - Salaries, wages, including hazard pay, bonuses, separation, commissions, premiums
  - Tips (employer is permitted to estimate)
  - Vacation, parental, family, medical and sick leave
    - Does NOT include FFCRA leave
  - Housing stipend or allowance
  - Owner compensation replacement (\$15,385 cap)
    - 8/52 of 2019 1040 Schedule C Line 31
  - Independent contractors excluded

# AUTHORIZED USES OF LOAN FUNDS

## *Payroll Costs – Non-Cash Compensation*

Non-cash payroll compensation costs include:

- Employee benefits including group health care coverage and insurance premiums
- State and local payroll taxes
  - Federal payroll taxes excluded
- Employer contributions to retirement plans
- Monetary value of employee benefits do NOT count towards the \$15,385 per employee but are ADDITIONAL

# AUTHORIZED USES OF LOAN FUNDS

## COVERED PERIOD

Forgivable PPP Loan proceeds may be used ONLY during the 8-week “covered period”:

- “Covered period” for Payroll Costs begins, at borrower’s election:
  - Date of disbursement of loan proceeds; or
  - First regular payroll *after* loan proceeds disbursement
- “Covered period” for Non-Payroll Costs begins on the date of loan proceeds disbursement.
- Yes, you could have 2 different 8-week clocks running!



# AUTHORIZED USES OF LOAN FUNDS

*Non-Payroll Costs – “Paid or Incurred during Covered Period”*

A portion of non-payroll costs MAY be forgiven IF...

- Must have been in place before 2/15/20
- Interest ONLY (no prepayment, no principal) on mortgages (forgivable) and “other debt obligations” (NOT forgivable)
- Real or Personal Property
- Rent or lease payments
- Utilities on accounts “for the distribution of electricity, gas, water, transportation, telephone, or internet access”
  - No official guidance as to meaning of “distribution of...transportation.” Possibly same as usual transportation deductions on tax returns
  - Internet access only, not apps or cloud-based services

# TAX IMPLICATIONS

**\*Borrowers are advised to consult their accountants or tax advisors regarding taxation and the PPP loan!!!**

➤ Employee Retention Credit

- CARES Act offers refundable payroll tax credit generally equal to 50% of qualified wages paid to certain employees from 3/13/2020 through 12/31/2020 (max. credit \$5K/employee)
- *Borrowers CANNOT claim credit and also obtain a PPP loan*

➤ IRS Notice 2020-32

- On 4/30/2020, IRS declared that covered expenses paid with PPP proceeds that are forgiven and excluded from taxable income under CARES Act are NOT deductible
- Certain members of Congress believe the notice to be contrary to intent of CARES Act – change could be forthcoming



# FORGIVENESS

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*How Can I Get 100% of the Loan Forgiven*

- Unlikely 100% of loan will be forgiven
- CARES Act says only principal of loan is forgivable.



- SBA Forgiveness Application says only principal of loan is forgivable
- HOWEVER – some SBA guidance says interest is forgivable

# FORGIVENESS

*How Can I Get 100% of the Loan Forgiven*

- Spend 100% of the proceeds on Payroll Costs
  - Costs must be paid or incurred during the covered period
  - Bi-Weekly payroll costs incurred during covered period but paid upon first regular payroll after is forgivable
  - Deferred payroll costs incurred before covered period but paid during covered period MAY be forgivable
- Do NOT reduce any employee's pay by >25% or lay off / furlough any employees, BUT if you did, restore the headcount and salary reduction by June 30, probably



# FORGIVENESS

## *Headcount Reduction Safe Harbors*

- POTENTIAL NEW SAFE HARBOR: if no reduction in number of FTEs between 1/1/2020 and end of covered period
- If the FTEs were reduced between 2/15 and 4/26/20, restore FTEs on or before 6/30/2020 to FTE amount on 2/15/20
- Safe harbor for employees refusing to return

# FORGIVENESS

## *Headcount Reduction*

- 8-week covered period FTE minus reference period FTE
- Calculate FTE during 8-week period
  - 1 FTE = 40 hours
  - Employee working > 40 hours still counts as 1 FTE
  - May use exact FTE amounts or count all P/Ts as 0.5
  - Tip: Calculate both methods to see which benefits you more, but may use only one method for forgiveness.
- Choose your reference period
  - 02/15/2019 – 06/30/2019; or
  - 01/01/2020 – 02/29/2020.
  - Seasonal employers: alternative, consecutive 12-week period between 05/01/2019 & 09/15/2019

# FORGIVENESS

## *Headcount Reduction*

- Divide FTEs during covered period by FTEs during reference period
- If quotient is 1.0, no reduction
- If quotient  $< 1.0$ , multiply it by the total eligible forgiveness amount and reduce forgiveness eligibility

# FORGIVENESS

## *Headcount Reduction Safe Harbors (Documentation and Requirements)*

What if employee refuses to return?

- If employer made a written offer of re-hire and employee refused the offer, with proper documentation, the FTEs not replaced by the refusing employee are added back
- Make a good faith, written offer to rehire employee or restore reduced hours during covered period, and keep record of offer
- Offer must be for employee's same (or greater) salary or wages and same number of hours earned by employee in last pay period prior to separation or hours reduction
- Maintain record of employee's rejection of offer, and
- Inform applicable state unemployment insurance office of employee's rejected offer of reemployment within 30 days of the rejection

# FORGIVENESS

## *Headcount Reduction Safe Harbors*

Loan forgiveness will not be affected for reduction in headcount IF...

- If employee was fired for cause, voluntarily resigned or voluntarily requested a reduction in hours, with proper documentation, FTEs not replaced by the departing or reducing employee are added back
- Documentation and Procedures

# FORGIVENESS

*Salary Reduction > 25%*

- Applies only to employees who earned \$100k or less in 2019 (or were not employed by borrower in 2019)
- Loan forgiveness is reduced by the total dollar amount of each employee's wage reduction during the 8-week period which is in excess of 25% of average pay (salary or hourly wage) from 1/1 to 3/31/ 2020
- This is a dollar-for-dollar reduction across the entire 8 weeks of reduced pay
- *Per employee*, not aggregate like FTE calculation

# FORGIVENESS

## *Salary Reduction Mitigation*

- The first 25% of an employee's salary reduction is exempted
  - reducing a salary of \$1000 per week to \$700 results in forgiveness reduction of only \$50
- NO double penalty
  - wage reduction forgiveness limitation applies only to the decline in employee wages which are NOT attributable to FTE reduction

# FORGIVENESS

## *Salary Reduction Mitigation*

- Employers can cure >75% wage reductions made between 2/15/20 and 4/26/20 by restoring the employee's salary to 75% or more of pre-reduction wages on or before June 30, 2020
- Specifically, if the employee's annual salary or hourly wage on June 30, 2020 is equal to or greater than their annual salary or hourly wage on February 15, 2020, the borrower's loan forgiveness eligibility is not reduced



# FORGIVENESS

## *What Will Realistically Be Forgiven*

- 75/25 Rule makes it unlikely all Non-Payroll Costs will be forgiven
- Less Full-Time Equivalent Employee (FTE) Headcount reductions after application of all safe harbors
- Less forgiveness reductions for reducing pay by > 25% after application of all safe harbors
- Less the proceeds of the loan not used or forgivable purposes (such as interest on “other debt obligations”)
- Less unused proceeds of the loan
- Less interest accrued on the loan (including on the forgiven amount from disbursement through forgiveness date)
- Less EIDL advance amount

# FORGIVENESS

ANNOYED AND FRUSTRATED BY THIS?

Understandable, but keep perspective:

Interest on the unforgiven portions of the loan is only 1%, and you get a 6-month deferral before having to make any payments.



# FORGIVENESS

## *When To Apply*

- As soon as you know the amount you will be seeking forgiveness for, fill out the forgiveness application, which you can get from your lender or download from SBA.
- Within 60 days of your lender's receipt of your complete application (including all documentation), lender must give SBA an answer.
- Within 90 days of lender's determination, SBA must repay lender or review the forgiveness determination.

# FORGIVENESS

## *Forgiveness Determination - The 75/25 Rule*

- Add up all uses of the loan proceeds eligible for forgiveness during the 8-week covered period or periods.
- Determine reductions and safe harbors.
- Confirm that 75% of forgiveness-eligible uses of loan proceeds went towards Payroll Costs (after application of any reduced forgiveness due to headcount or salary reduction) by dividing the Payroll Costs by 0.75
- Subtract amount of EIDL Advance

# FORGIVENESS

FORGIVENESS WILL BE THE LOWEST OF:

1. Your PPP loan principal amount (**Congratulations!**)
2. Maximum forgiveness after reductions for headcount and salary shrinkage, and
3. Maximum forgiveness available after dividing total forgivable Payroll Costs by 0.75.

# FORGIVENESS

## *Documentation*

- Keep copies of all documentation for 6 years after date of forgiveness application:
- PPP Loan Forgiveness Calculation Form
- PPP Schedule A
- PPP Schedule A Worksheet



# FORGIVENESS

## *Documentation*

- Borrowers must submit the following to document payroll costs:
  - Bank account statements/3<sup>rd</sup> party payroll service provider reports documenting cash compensation paid to employees during covered period or alternative payroll covered period
  - Tax forms for same periods (payroll tax filings for IRS and state quarterly wage reporting and unemployment insurance tax filings)
  - Documentation of employer contributions to employee health insurance and retirement plans
  - Documentation of average number of FTEs per application instructions

# FORGIVENESS

## *Documentation*

- Borrowers must submit the following to document nonpayroll costs:
  - Documentation verifying existence of obligations/services prior to 2/15/2020 and eligible payments from covered period
  - Business mortgage interest payments: lender amortization schedule and receipts or cancelled checks verifying eligible payments from covered period; or lender account statements from February 2020 and months of covered period through one month after the end of covered period verifying interest amounts and eligible payments



# FORGIVENESS

## *Documentation*

- Borrowers must submit the following to document nonpayroll costs:
  - Business rent or lease payments: current lease agreement and receipts or cancelled checks verifying eligible payments from covered period; or lessor account statements from February 2020 and from covered period through one month after the end of covered period verifying eligible payments
  - Business utility payments: invoices from February 2020 and those paid during covered period and receipts, cancelled checks, or account statements verifying those eligible payments



# PPP ALTERNATIVES

# OTHER COVID-19 LOAN OPTIONS

*EIDL = Economic Injury Disaster Loan*

EIDL = Economic Injury Disaster Loan

- Eligible borrowers with fewer than 500 employees may apply directly through SBA on their website; 12/31/2020 deadline to apply
- **SBA is currently only accepting new applications for agricultural businesses; SBA processing applications already submitted**
- Loan features:
  - Principal amount up to \$2 million
  - **Emergency \$10,000 forgivable advance**
  - Interest: 3.75% for small businesses; 2.75% for non-profits
  - Terms of up to 30 years
  - Repayment deferred for 12 months
  - Collateral required for loans of more than \$25,000; personal guarantee required for more than \$200,000

# OTHER COVID-19 LOAN OPTIONS

## *EIDL (Continued)*

- Uses: paying sick leave to employees due to COVID-19, maintaining payroll, payments for increased supply chain costs, rent or mortgage payments
- However, borrower cannot use both PPP loan and EIDL to pay payroll costs; any PPP loan obtained after an EIDL that was used for payroll costs must be used by borrower to refinance that EIDL
- NOTE: any forgivable advances made to borrower under an EIDL will be deducted from any amount of PPP loan forgiveness

# OTHER COVID-19 LOAN OPTIONS

## *Main Street Lending Program*

- Established by the Federal Reserve; anticipated to be operational by end of May
- Comprised of the following loan program options:
  - Main Street New Loan Facility;
  - Main Street Priority Loan Facility; and
  - Main Street Expanded Loan Facility
- As of 04/30/2020, the Federal Reserve has released tentative term sheets for each facility, subject to change as the program becomes operational (<https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm>).



# LOOKING AHEAD

# A LOOK INTO OUR CRYSTAL BALL

## CONGRESSIONAL ACTION

- House and Senate each have their own bills for PPP changes
- House bill could pass today and proposes:
  - Eliminate 75%/25% rule concerning loan forgiveness
  - Extend covered period to 24 weeks (from 8 weeks) or to 12/31/2020, whichever is sooner, and
  - Extend loan terms from 2 to 5 years
- Senate bill proposes:
  - Extend application period from 06/30/2020 to 12/31/2020, and
  - Extend covered period to 16 weeks.
- Reconciled bill ready for enactment into law not expected until at least June 1

# OUR CRYSTAL BALL (CONT.)

## SBA RULES:

- SBA has indicated further guidance (possibly new interim final rules) on loan forgiveness process is forthcoming
- SBA has also indicated that more information on rejected re-hires of a borrower's employees will be available on its website





# Key Takeaways

# KEY TAKEAWAYS

- Money is still available but it's only cheap, not free
- 1% Loan
- Limited Forgiveness
- Difficult compliance
- Consider tax implications
- Relaxation of some restrictions is likely if not certain

# RAINES FELDMAN RESOURCES

## CORPORATE

- ☐ Business Advice
- ☐ Loans and Financing

## EMPLOYMENT

- ☐ Counseling & Guidance
- ☐ Reopening Protocols

## LITIGATION

- ☐ Business Disputes
- ☐ Insurance Litigation

## BANKRUPTCY

- ☐ Filing for Chapter 11
- ☐ Creditor Negotiation

# WE ARE HERE TO HELP



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**THANK YOU FOR ATTENDING!**