



## MEMORANDUM

FROM: Miller Canfield Paddock and Stone, PLC  
 RE: **U.S. Government Financing Available to U.S. Subsidiaries of Foreign Investors**  
 DATE: **Updated** April 9, 2020

The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), recently enacted by the U.S. federal government, provides two major financial aid programs available to the U.S. subsidiaries (and branches) of foreign-owned companies: *Economic Injury Disaster Loans (EIDLs)* and *Paycheck Protection Program Loans (PPP loans)*. Importantly, a U.S. subsidiary of a foreign-owned or foreign-controlled is able to apply and receive this funding if it meets the eligibility criteria, as further explained below and it meets the other eligibility criteria. ***Funding programs for larger businesses are still under development and will be addressed in a separate memorandum.***

	Economic Injury Disaster Loans	Paycheck Protection Program Loans
<b>Eligibility Requirements</b>	<ul style="list-style-type: none"> <li>• U.S. subsidiaries (wholly or partially owned by foreign owners) with principal place of business in U.S.</li> <li>• 500 or fewer employees, including employees of affiliates*</li> <li>• In operation by Jan 31, 2020</li> <li>• Not eligible if credit available elsewhere</li> <li>• Located in “eligible area”, listed <a href="#">here</a> (currently the entire U.S.)</li> </ul>	<ul style="list-style-type: none"> <li>• U.S. subsidiaries (wholly or partially owned by foreign owners) with principal place of business in U.S.</li> <li>• In operation before Feb 15, 2020</li> <li>• Paid (i) employee salaries and payroll taxes or (ii) independent contractors reported on 1099-MISC</li> <li>• Any of the following (including affiliates):*               <ul style="list-style-type: none"> <li>• 500 or fewer employees [in the U.S.]*</li> <li>• meeting applicable size standards (number of employees or annual revenue) based on NAICS Code</li> <li>• tangible net worth less than \$15 million and average net income after U.S. federal income taxes over 2 full fiscal years before application not more than \$5 million</li> </ul> </li> <li>• Not required to show inability to borrow elsewhere</li> </ul>
<b>Disqualifiers</b>	<ul style="list-style-type: none"> <li>• Certain applicants listed on Small Business Administration (“SBA”) site: <a href="#">here</a></li> </ul>	<ul style="list-style-type: none"> <li>• The U.S. subsidiary or any owner is ineligible or excluded from participation by any U.S. federal department or agency</li> <li>• The U.S. subsidiary or any owner, or any business owned by any of them has been in default on a direct or guaranteed loan from the SBA or other U.S. agency in past 7 years</li> <li>• Any 20% or greater individual owner is incarcerated, on probation or parole or subject to indictment, criminal information, arraignment or formal criminal charges in any jurisdiction</li> <li>• Any owner has, within the last 5 years, for any felony, been convicted, pleaded guilty or nolo contendere, placed on pretrial diversion or on parole or probation</li> <li>• Business engaged in illegal activity under any U.S. law</li> <li>• Business is ineligible under 13 CFR 121.100 and described in SBA SOP 50 10, subpart B chapter 2</li> </ul>
<b>Amount Available</b>	<ul style="list-style-type: none"> <li>• Up to \$2 million</li> </ul>	<ul style="list-style-type: none"> <li>• 250% of the amount of the average monthly Payroll Costs (over 12 month period prior to application)</li> </ul>

		<ul style="list-style-type: none"> <li>• “Payroll Costs” means amounts paid to employees whose principal place of residence is in the U.S. for: <ul style="list-style-type: none"> <li>• wages, salaries, commissions, tips, similar comp (subject to \$100k cap per employee)</li> <li>• vacation, sick leave, parental or family leave</li> <li>• severance or dismissal payments</li> <li>• health care benefit costs, retirement benefits, state and local taxes assessed on employee compensation</li> </ul> </li> <li>• Amounts to be <u>excluded</u> from “Payroll Costs”: <ul style="list-style-type: none"> <li>• compensation of employees with principal residence outside the U.S.</li> <li>• U.S. federal payroll taxes, social security taxes</li> <li>• qualified sick leave wages or qualified family leave wages for which a credit is allowed under Families First Coronavirus Response Act</li> <li>• payments to independent contractors</li> </ul> </li> <li>• Outstanding amount of EIDL made between Jan 31, 2020 and Apr 3, 2020 to be refinanced, minus EIDL advance, increases loan amount</li> <li>• Maximum of \$10 million</li> </ul>
<b>Restrictions on Use of Loan Proceeds</b>	<ul style="list-style-type: none"> <li>• General working capital necessary until resumption of normal operations and to alleviate economic injury</li> <li>• Fixed debts, payroll, accounts payable or other bills that cannot be paid due to COVID-19 outbreak</li> <li>• Covered period is Jan 31, 2020 – Dec 31, 2020</li> </ul>	<ul style="list-style-type: none"> <li>• Payroll Costs from Feb 15, 2020 – June 30, 2020</li> <li>• Mortgage interest payments, rent on property or equipment leases and utility payments</li> <li>• Interest on debt incurred before Feb 15, 2020</li> <li>• Applicant must represent that to the extent feasible it will purchase only US-made equipment and products</li> <li>• At least 75% of loan proceeds must be used for Payroll Costs</li> </ul>
<b>Interest Rate</b>	<ul style="list-style-type: none"> <li>• 3.75% per annum</li> </ul>	<ul style="list-style-type: none"> <li>• 1.00% per annum fixed</li> </ul>
<b>Repayment</b>	<ul style="list-style-type: none"> <li>• Up to 30 years</li> <li>• No payments in 1<sup>st</sup> year</li> <li>• No prepayment fees or penalties</li> </ul>	<ul style="list-style-type: none"> <li>• 2 years</li> <li>• No payments for 6 months (but interest accrues)</li> <li>• No prepayment fees or penalties</li> </ul>
<b>Loan Forgiveness Possibilities</b>	<ul style="list-style-type: none"> <li>• No. Loan amounts not subject to forgiveness at this time</li> </ul>	<ul style="list-style-type: none"> <li>• Amount paid during the 8-week beginning on the date the first disbursement is made on the loan for Payroll Costs, mortgage interest, rent and utilities (per agreements in effect before Feb 15, 2020) eligible for forgiveness.</li> <li>• Forgivable amount reduced if: <ul style="list-style-type: none"> <li>• average monthly number of FTE employees from Feb 15, 2020 - June 30, 2020 is less than the average monthly number (at the borrower’s election) during either (i) the period from Feb 15, 2019 through June 30, 2019 or (ii) Jan 1, 2020 through Feb 29, 2020 (different rules if business not in operation at that time or if there are seasonal employees); or</li> <li>• total compensation for FTE employees earning less than \$100,000 reduced by more than 25% from the last full quarter in which employee was employed immediately prior to the date the loan is funded.</li> <li>• But these forgiveness reductions can be reduced by rehiring and restoring payroll by June 30, 2020</li> </ul> </li> <li>• Reduced by amount of any EIDL Advance Grant</li> <li>• Total forgiveness amount may not include more than 25% of non-Payroll Costs</li> </ul>
<b>Guarantees or Collateral</b>	<ul style="list-style-type: none"> <li>• None for loans less than \$200,000</li> <li>• Loans over \$200,000 must be guaranteed by each 20% owner</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>

<p><b><i>Expedited Advance of \$10,000 Grant</i></b></p>	<ul style="list-style-type: none"> <li>• Any business applying for an EIDL can also apply for an expedited grant of \$10,000 (available within three days)</li> <li>• Any business is eligible, but the SBA will approve the grant solely on basis of applicant’s credit score</li> <li>• No requirement to repay any advance payments, even if later denied an EIDL</li> <li>• Advance may only be used for (1) providing sick leave to employees due to COVID-19, (2) maintaining payroll, (3) meeting increased costs due to supply chain disruptions, (4) rent or mortgage payments, and (5) repaying obligations that cannot be met due to revenue losses</li> <li>• Advance reduces aggregate loan available for forgiveness under PPP loan</li> </ul>	<ul style="list-style-type: none"> <li>• No advances available</li> </ul>
<p><b><i>How to apply</i></b></p>	<ul style="list-style-type: none"> <li>• Online with Small Business Administration <a href="#">here</a></li> <li>• Or at local SPA district office</li> </ul>	<ul style="list-style-type: none"> <li>• Contact bank or lender that handles SBA 7(a) loans</li> <li>• Click <a href="#">here</a> to obtain the Paycheck Protection Program Application Form</li> <li>• Click <a href="#">here</a> to obtain the Paycheck Protection Program Information Sheet</li> <li>• Lenders to make available their applications shortly</li> </ul>

**IMPORTANT FAQs**

***\*How is the number of employees to be counted?***

Subject to the next FAQ below, in counting the number of employees for qualification as a small business, the summary of the SBA affiliation rules ([here](#)) require to include all employees of the applicant and its affiliates (foreign or domestic) who were employed on a full-time, part-time or other basis. (Special rules apply to seasonal employees and professional employer organization (PEO) workers.) However, these affiliation rules do not apply to accommodation and food service businesses (with NAICS codes starting with 72) with 500 or fewer employees and with multiple physical employment locations with 500 or fewer employees per location, SBA designated franchises, or businesses receiving assistance under section 301 of the Small Business Investment Act. Note that the SBA affiliation rules used for determining eligibility for EIDL and PPP loans are different than the affiliation rules used for purposes of having to pay for sick leave and FMLA requirements under the Families First Coronavirus Response Act (FFCRA). The SBA rules require that the number of employees for these purposes be determined by calculating (i) the average number of employees for each pay period in the preceding completed 12 months, or (ii) the average employment over the same time periods as apply to the calculation of average payroll.

***\*In counting number of employees, do I include foreign employees or just U.S. employees?***

The SBA has recently issued new guidance on **PPP loan program** ([here](#)) that indicates that an applicant can still be eligible for a PPP loan if it, combined with its affiliates, has “500 or fewer employees whose principal place of residence is in the United States”. Such guidance suggests that the foreign employees of an applicant and its affiliates might not need to be included in the employee count. It is to be noted that such guidance, which appears in both the Interim Final Rule and a SBA FAQ dated April 8, 2020, conflicts with the way employees are counted under the affiliation rules in 13 CFR Section 121.301, subject to certain statutory waivers. It is unclear whether the SBA will issue clarifying guidance on this issue.

***\* If the U.S. subsidiary and all affiliates have more than 500 employees, can it still qualify for a PPP loan?***

Yes, the U.S. subsidiary applicant can still be eligible if (including all its foreign and domestic affiliates) it satisfies at least one of these additional tests:

- Each U.S. company is assigned a North American Industrial Classification System (“NAICS”) code number, identifying its type of business. The SBA publishes a list ([here](#)) of each NAICS code that may allow either a higher number of employees (up to 1,500) or a maximum annual revenue amount to qualify as a small business; or
- An alternative size standard, i.e., it has a maximum tangible net worth of not more than \$15 million and average net income after Federal income taxes (excluding carry over losses) over the 2 full fiscal years before the application date of not more than \$5 million.

***Can I apply for both an EIDL and a PPP loan?***

A U.S. subsidiary can apply for a PPP loan if it received an EIDL between Jan 31, 2020 – Apr 3, 2020. If the EIDL loan was used for Payroll Costs, it must be refinanced with the PPP loan. If the EIDL was not used for Payroll Costs it does not affect your eligibility for a PPP loan. The CARES Act does not expressly address whether you may apply after April 3, 2020 for both an EIDL and a PPP loan. Further clarification on this issue is expected, but we currently anticipate that a business that has applied for an EIDL may be able to apply for a PPP loan ONLY if it will not duplicate its use of the EIDL.

***When should an application be submitted?***

Because demand will be great, and the applications are processed on a first-come, first-served basis, if the U.S. subsidiary’s operations will need funding, it should apply as soon as possible. There are no application fees, guarantee fees, servicing fee or prepayment fees, and no obligation to accept the loan. You can only apply for one PPP loan. Applications for EIDLs are available now and can be submitted online with the SBA. Applications for PPP loans are also available now and must be submitted to a qualified SBA lender by June 30, 2020, and can be submitted now for small businesses and sole proprietorships through exiting SBA lenders, and beginning April 10, 2020 for independent contractors and self-employed.

***Are there any additional specific certifications and acknowledgement my U.S. business will need to make?***

Yes, for the PPP loan program the U.S. subsidiary applicant will need to certify:

- it was in operation on Feb 15, 2020 and paid salaries and payroll taxes to employees or paid independent contractors as reported on Form 1099-MISC
- current economic uncertainty makes the loan request necessary to support ongoing operations
- loan proceeds will be used to retain workers and fund payroll, mortgage interest, lease and utility expenses, acknowledging that the U.S. government may pursue criminal fraud charges if loan funds are used for unauthorized purposes
- documentation will be provided to lender to verify number of employees, Payroll Costs, mortgage interest payments, rent and utility payments for the 8-week period following loan disbursement
- loan forgiveness will be provided for documented Payroll Costs and covered mortgage, lease and utility payments, and not more the 25% of the forgiven amount may be for non-Payroll Costs
- between Feb 15, 2020 - Dec 31, 2020 the U.S. subsidiary has not and will not receive another PPP loan
- all information and supporting documents are true and accurate
- acknowledgement that lender will confirm the loan amount on the basis of documents submitted and an affirmation that the tax documents provided to the lender are identical to those provided to the IRS and that the lender can share the tax information provided within the SBA

***What if the U.S. subsidiary already laid-off or furloughed some workers or reduced compensation?***

The U.S. subsidiary is still eligible for the loans under both programs, but it may affect how much of the PPP loan will be forgiven: the PPP loan amount subject to forgiveness will be reduced in proportion to the monthly average number of fewer FTE employees you employed during the 8-week period following the funding of the PPP loan as compared to the monthly average number of such workers employed (at your election) during either (i) the period from Feb 15, 2019 through June 30, 2019 or (ii) Jan 1, 2020 through Feb 29, 2020. Likewise, the amount of the PPP loan forgiven is reduced by any reduction in excess of 25% for any employee as compared to the first full quarter immediately prior to the loan funding date in which the employee was employed. However, if the U.S. subsidiary reduced its workforce or payroll between Feb 15, 2020, and Apr 26, 2020, the amount of

PPP loan forgiveness for which the applicant is eligible will not be reduced according to the formulas above if, not later than June 30, 2020, you eliminates the reduction (see below), as compared to Feb 15, 2020, in the number of full-time equivalent employees and/or wages of 1 or more employees.

***What does it mean to “eliminate the reduction” for purposes of PPP loan forgiveness?***

While not entirely clear, and additional guidance on this question is expected, current SBA guidance implies that, no later than June 30, 2020, the applicant must eliminate the reduction in the number of its full-time equivalent employees, as well as reverse salary reductions of its employees. Also note that employees brought back must be maintained on payroll for at least 8 weeks following their return to work date.

***What if I have more questions?***

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