

Paycheck Protection Program

Where Are We Now?

An Up-to-Date Guide to the Paycheck Protection Program



Coronavirus Resource Center

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, related rules and regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

DISCLAIMER: This publication will be updated regularly to reflect any further changes in the key terms of the PPP resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed the principal criteria of the program and will endeavor to add updates, it is not possible to cover all of the (ever-changing) rules and guidance published by the SBA and Treasury. THIS PUBLICATION IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION.

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PAYCHECK PROTECTION PROGRAM – WHERE ARE WE NOW?
An up-to-date guide to the Paycheck Protection Program

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Since the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the “[CARES Act](#)”) on March 27, 2020, the U.S. Small Business Administration (the “[SBA](#)”) and the U.S Treasury Department (“[Treasury](#)”) have issued a sizable number of rules and additional guidance to implement the CARES Act’s marquee small business loan component – the Paycheck Protection Program (the “[PPP](#)”).

To date, the SBA and Treasury have issued a number of Interim Final Rules governing the PPP (collectively, the “[PPP Rules](#)”).ⁱ In addition, the SBA and Treasury have also published: borrower (SBA Form 2483) and lender (SBA Form 2484) application forms; program “fact sheets” for borrowers and lenders; a summary of the applicable affiliation rules; a forgiveness application form (SBA Form 3508) and simplified forgiveness application (SBA Form 3508EZ) for certain borrowers; and responses to certain Frequently Asked Questions (“FAQ”) (which the SBA has updated numerous times). This rapidly changing regulatory environment is making it difficult for potential borrowers to avail themselves of the program with certainty as to their eligibility and scope of available benefits. This alert (I) summarizes the key terms of the PPP, (II) addresses certain frequently asked questions that Proskauer attorneys have been assessing, and (III) provides an overview of the Federal Reserve’s new Paycheck Protection Program Lending Facility, which is aimed at helping participating lenders originate more loans under the PPP loan for the many businesses, non-profits and other eligible organizations in need of financial relief as a result of COVID-19.

On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act (the “[PPPHCEA](#)”) was signed into law, which increased the funding available for the PPP by \$310 billion, bringing the total funding amount to \$659 billion.ⁱⁱ On June 5, 2020, [HR 7010](#) (Paycheck Protection Program Flexibility Act of 2020 (the “[PPPFA](#)”)) was signed into law, which amends various aspects of the CARES Act regarding PPP loan forgiveness, payroll tax deferral, and loan maturity dates. Based on numbers [released by the SBA](#), as of June 12, 2020, approximately \$130 billion were left for disbursement.

KEY UPDATES. On June 17, 2020, the SBA and Treasury released an updated version of [SBA Form 3508](#) (and related [instructions](#)), which implements the changes to the PPP contemplated by the PPPFA. In addition, the SBA and Treasury produced a new simplified forgiveness application, [SBA Form 3508EZ](#) (and related [instructions](#)). Certain eligible borrowers (discussed below) now have the option to choose from the longer Form 3508 or 3508EZ.

- **Revised SBA Form 3508** – The revisions to Form 3508 encompass the following. For reference purposes, a “redline” showing the changes in the revised application can be downloaded [\[here\]](#) and the revised instructions can be downloaded [\[here\]](#).
 - **24-week Covered Period** – Revised Form 3508 implements the 24-week covered forgiveness period set forth in the PPPFA (in addition to the option for borrowers who received a PPP loan prior to 6/5/20 to continue to use the pre-existing 8-week covered period). Revised Form 3508 retains the concept of an Alternative Covered Payroll Period, which permits a borrower in calculating forgiveness-eligible payroll costs (and compensation-based or FTE-based forgiveness amount reductions) to utilize an Alternative Payroll Covered Period (whether 24-week or 8-week) that begins on the first day of the borrower’s first pay period following their PPP loan disbursement date. If the Alternative Payroll Covered Period is selected, a borrower must utilize it consistently in their forgiveness application wherever the option is given. If no option is given, then the standard Covered Period (beginning on the loan origination date) applies. The Alternative Payroll Covered Period cannot extend beyond 12/31/20.
 - **60% Payroll Cost Requirement** – Revised Form 3508 updates the requirement that the forgiveness amount be composed of 75% payroll cost to 60% (per the PPPFA and related revised PPP Rules).
 - **FTE Reductions Safe Harbors** – Revised Form 3508 provides that *either* of the following safe harbors insulate a borrower from reductions in the forgiveness amount attributable to a reduction in FTE employee levels:

- **FTE Reduction Safe Harbor 1** – Revised Form 3508 adds the new FTE-reduction safe harbor contemplated in the PPPFA (referred to as “FTE Reduction Safe Harbor 1”) for borrowers who, in good faith, can document and expressly certify that they were unable to operate between 2/15/20, and the end of the covered period at the same level of business activity as before 2/15/20, due to compliance with requirements established or guidance issued between 3/1/20 and 12/31/20, by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19. **As written, SBA Form 3508 positions FTE Reduction Safe Harbor 1 as a blanket protection from any FTE-based-reduction to the forgiveness amount.** However, clarifying questions remain:
 - Does this safe harbor provide complete coverage from an FTE-based reduction to the forgiveness amount regardless of the duration or the extent of the reduction in the level of business activity? For example, if a borrower was required to operate at half capacity for only 3 weeks of the period between 2/15/20 and the end of the covered period, does this safe harbor nonetheless provide complete protection? The answer appears to be yes.
 - How is “same level of business activity” defined? Is this purely a measure of physical operations (*e.g.*, a business was required to close, operate at less than full capacity, or provide curb-side pickup/delivery/take-away services), or can it be measured in terms of economic reductions (*e.g.*, if a business remained completely open, but due to COVID-19 and related federal guidelines/requirements suffered a decline in demand for its services)?
 - While the intent of this safe harbor would seem to encompass state or municipally-mandated business reductions or closures to fight the spread of COVID-19, the language of the safe harbor speaks only to the requirements or guidance issued by the U.S. federal government. The SBA will need to issue rules clarifying that such state/local requirements are inherently in accordance with federal requirements or guidance, and therefore businesses that complied with state/local directives are within the scope of this safe harbor.
- **FTE Reduction Safe Harbor 2** – Revised SBA Form 3508 updates the original FTE-reduction safe harbor contemplated under the CARES Act (referred to now as “FTE Reduction Safe Harbor 2”), which now provides that any reductions in total average FTE occurring between 2/15 and 4/26/20 restored by *not later than* 12/31/20 will not require a reduction in the borrower’s forgiveness amount. Form 3508 (PPP Schedule A Worksheet) indicates that FTE Reduction Safe Harbor 2 applies if the reduction is restored as of **the earlier of** 12/31/20 and the date on which the forgiveness application is submitted.
- **Simplified Option** – Form 3508 (PPP Schedule A Worksheet) provides a simplified option for determining if an FTE-based reduction in the forgiveness amount is required. If a borrower “has not reduced the number of [its] employees or the average paid hours of [its] employees between January 1, 2020 and the end of the Covered Period,” then the borrower is not subject to an FTE-based reduction. While not a “safe harbor”, this provision serves as a short-cut around the morass of calculating a borrower’s FTE-based reduction to the forgiveness amount.
- **Salary/Hourly Wage Reduction Safe Harbor** –A borrower is relieved of reductions to the forgiveness amount in respect of reductions below 75% of the compensation of an employee (who did not make more than \$100,000 annualized at any point in 2019) that occurred between 2/16 and 4/26/20 if the borrower has restored the average annual salary or hourly wages of such an employee as of **the earlier of** 12/31/20 and the date on which the forgiveness application is submitted.
 - As implemented by the revised Form 3508, FTE Reduction Safe Harbor 1 **does not** provide borrowers a safe harbor from reductions in the forgiveness amount attributable to cuts in employee compensation precipitated by a decline in the level of business activity due to federal requirements/guidance. For example, if an employer did not reduce an employee’s hours but

instead reduced that employee's compensation by 30% *prior to* April 26 because the business could operate only at half capacity in order to comply with federal requirements, then in order to avoid a reduction in the forgiveness amount the employer must restore that employee's compensation levels. The fact that the root-cause of the compensation reduction was COVID-19-related federal requirements is irrelevant. Further, where FTE Reduction Safe Harbor 1 provides coverage for FTE reductions occurring *after* April 26, compensation reductions in excess of 25% occurring after April 26 cannot be cured (again, even if the root cause for the reduction is COVID-19-related federal requirements).

- **Timing of FTE Reduction Safe Harbor 2 and salary/Hourly Wage Reduction Safe Harbor** – Revised Form 3508 appears to clarify that borrowers need not wait until year-end to restore compensation/FTE levels and submit a forgiveness application. If the borrower undertakes a restoration at an earlier time, it can then submit its forgiveness application and utilize such safe harbors. Key questions remain:
 - For how long must such restored total FTE levels or compensation be preserved? Can a borrower restore and preserve total FTE until forgiveness is approved, and then again reduce its workforce or slash compensation? Can a borrower restore as of the application date and then reduce again the day after? Do those levels need to be retained through 12/31?
 - In the case of reduced compensation, it remains an open question as to the meaning of “average” and whether a catch-up payment is required or if an employee need only be restored as of the pay period preceding the forgiveness application to the amount that the employee received in the last pay period prior to the reduction.
- **FTE Reduction Exceptions** -- Revised Form 3508 updates the list of exceptions to the FTE-reductions attributable to individual employees to align with the PPPFA. As revised, no reductions are required for the following categories of employees and the borrower can include the FTE of such employees in its calculation of average FTE for the covered period (*as if* such employee were still employed), and so long as a replacement employee has not been hired.
 - (1) any positions for which the borrower made a good-faith, written offer to rehire an individual who was an employee on 2/15/20 and the borrower was unable to hire similarly qualified employees for unfilled positions **on or before** 12/31/20;
 - (2) any positions for which the borrower made a good-faith, written offer to restore any reduction in hours, at the same salary or wages, during the covered period and the employee rejected the offer; and
 - (3) any employee who during the covered period (a) was fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of hours.
- **SBA Form 3508EZ** – SBA Form 3508EZ is a simplified forgiveness application that can be utilized by a borrower that certifies that it falls into one of the below categories. Form 3508EZ generally tracks Form 3508, but eliminates steps that address the reduction in the forgiveness-amount due to reductions in employee compensation in or FTE employee levels.
 - **Category 1:** Borrower is a self-employed individual, independent contractor, or sole proprietor who had no employees at the time of the PPP loan application and did not include any employee salaries in the computation of average monthly payroll in the Borrower Application Form (SBA Form 2483); **OR**
 - **Category 2:** Borrower did not reduce:
 - (1) annual salary or hourly wages of any employee (that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) by more than 25% during the Covered Period (or Alternative Payroll Covered Period) compared to the period between 1/1/20 and 3/31/20; **AND**
 - (2) Borrower did not reduce the number of employees or the average paid hours of employees between 1/1/20 and the end of the Covered Period.

- Form 3508EZ expressly states that in assessing eligibility under this second prong, borrowers should ignore reductions that arose from (i) an inability to rehire individuals who were employees on 2/15/20 if the borrower was unable to hire similarly qualified employees for unfilled positions on or before 12/31/20, and (ii) hours that the borrower offered to restore and the employee refused.
- **Category 3:**
 - (1) Borrower did not reduce annual salary or hourly wages of any employee (that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) by more than 25% during the Covered Period (or Alternative Payroll Covered Period) compared to the period between 1/1/20 and 3/31/20; **AND**
 - (2) Borrower was unable to operate during the Covered Period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.
- If the borrower selects the second or third category, the borrower is required to provide documentation supporting its certification as to that category.
- **Payroll Costs for Self-Employed Individuals** – An [Interim Final Rule](#) (amending the third Interim Final Rule) published on June 17, 2020, the revised Form 3508 and Form 3508EZ provide that the maximum forgivable amount of payroll costs for owners (*i.e.* owner-employees, a self-employed individual, or general partners) is capped at **\$20,833 for a 24-week covered period** and **\$15,385 for an 8-week covered period across all businesses**. This reflects a disproportionately small increase in the forgivable amount of payroll costs for owners given the additional 16-weeks of covered period implemented by the PPPFA. It would seem such a borrower can pay themselves up to \$42,857 (24/56 x \$100,000) as a payroll cost and permitted use of a PPP loan, but less than half of that amount is forgivable. Further, it remains the case (as set forth in the PPP Rules in effect prior to the PPPLF) that this cap on forgiveness amount applies “across all businesses” of which the self-employed individual is an owner. It is important to note that neither Form 3508 nor Form 3508EZ include a mechanism to ensure borrowers take into account this aggregating concept, and self-employed borrowers should be careful to track the aggregate amount for which they seek forgiveness that is attributable to payroll costs paid to themselves.
- **It is expected that the SBA will continue to issue revisions to its interim final rules on loan forgiveness and loan review procedures to address amendments in the PPPFA.**

Going forward, this client alert will be updated to reflect any further changes in the key terms of the PPP resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed below the principal criteria of the program and will endeavor to update this alert regularly, it is not possible to cover all of the (ever-changing) rules and guidance published by the SBA and Treasury. **THIS ALERT IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION. THIS ALERT IS UPDATED AS OF JUNE 18, 2020.**

I. Key Terms Of The Paycheck Protection Program

- **Maximum Loan Amount:** Equal to the lesser of: (i) 2.5x trailing 12 month average monthly payroll costs;ⁱⁱⁱ and (ii) \$10 million. The SBA has published a step-by-step guide for calculating the maximum loan amounts based on the business type of an applicant.
- **Single Corporate Group Cap:** The Interim Final Rule published on April 30, 2020 implements a maximum cap of \$20 million on the total amount of PPP loans that a “single corporate group” can receive. Businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent. This rule

applies to all loans not fully disbursed by a lender – as opposed to those spent by a borrower – as of April 30, 2020 (and to the undisbursed portion of any partially disbursed loans). SBA affiliation rules are disregarded and “[b]usinesses are subject to this limitation even if the businesses are eligible for the waiver-of-affiliation provision under the CARES Act or are otherwise not considered to be affiliates under SBA’s affiliation rules.” Consequently, this cap applies to businesses that otherwise benefit from the affiliation waivers (including those in the accommodations and food services sector (NAICS 72)).

An applicant must (i) notify a lender if it has applied for or received PPP loans in excess of the \$20 million cap and (ii) withdraw or request cancellation of any pending PPP loan application or approved PPP loan that would cause the applicant to exceed such cap. Failure to deliver such notice and to withdraw/request cancellation is deemed as use of PPP funds for an unauthorized purpose and the PPP loan would be ineligible for forgiveness. While not expressly stated in the Interim Final Rule, additional penalties (criminal and civil) may apply to applicants who fail to comply with such requirements and retain or receive PPP loan proceeds in excess of the cap.

- **Interest Rate:** 1.00%.
- **Payment Deferral:** All principal, interest, and fees on the PPP loan may be deferred until the date on which the determined forgiveness amount is remitted to the lender so long as the borrower submits a loan forgiveness application within 10 months of the end of its forgiveness covered period. If borrower fails to apply for forgiveness of a covered loan within 10 months after the last day of the covered period, such borrower must make payments of principal, interest, and fee beginning no earlier than 10 months after expiration of the covered period.^{iv}
- **Loan Maturity:** 5 years, if the loan was made on or after the enactment of the PPPFA (June 5, 2020), or 2 years, if the loan was made prior to the enactment of the PPPFA. The borrower and the lender to existing pre-PPPFA PPP Loans may amend the terms of existing PPP loans to reflect the longer maturity date. Under the PPPFA Revision Rules, the date a PPP loan is made (at least, for purposes of determining the maturity date) is deemed to be the date on which the SBA assigned a loan number to that loan.
- **Collateral/Personal Guarantee:** No collateral or personal guarantee is required.
- **Eligibility:**
 - **Generally:** Eligible applicants (assuming they meet applicable size and other eligibility requirements listed below) include business concerns, 501(c)(3) non-profit organizations, tax-exempt veterans organizations (501(c)(19)), tribal business concerns (described in §31(b)(2)(C) of the Small Business Act), sole proprietors, independent contractors and other self-employed individuals. On May 14, 2020, the SBA added electric cooperatives exempt from federal income taxation under 501(c)(12) of the Internal Revenue Code as eligible as “a business entity organized for profit.”

An applicant must have been in operation on 2/15/20 and either (A) had employees for whom salaries and payroll taxes were paid, or (B) paid independent contractors. An individual applicant with self-employment income (such as an independent contractor or sole proprietor) is also eligible if such applicant was in operation on 2/15/20 and filed or will file a Form 1040 Schedule C for 2019. A seasonal business will be considered to have been in operation as of 2/15/20, if the business was in operation for any 8-week period between 5/1/19 and 9/15/19.^v

Further, if a business was in operation on 2/15/20, but has since changed ownership, it may apply for a PPP loan (assuming it is otherwise eligible). Similarly, if a change in ownership is effectuated through a sale of substantially all assets of a business that was in operation on 2/15/20, the business acquiring the assets may apply for a PPP loan, even if the change in ownership results in a new TIN and even if the acquiring business was not in operation on 2/15/20.

 - **Ineligible Industries:** An applicant is not eligible if its business is in an ineligible industry or otherwise described as ineligible under 13 C.F.R. § 120.110, except where there is an express exception under the CARES Act (such as for certain non-profits) or the PPP Rules. Key ineligible industries include businesses

primarily engaged in lending or investment and passive investment in real estate. An applicant that is a debtor in a bankruptcy proceeding (either at the time of application or at any time before a PPP loan is disbursed) is ineligible to receive a PPP loan and must cancel any pending application.

In the Interim Final Rule published on April 24, 2020, the SBA made notable changes and provided significant clarifications as to the scope of ineligible industries:

- ***Hedge Funds and Private Equity Firms are Not Eligible*** – Hedge funds and private equity firms are ineligible to receive PPP loans as they are “engaged in investment or speculation.” Portfolio companies of private equity funds *may* still be eligible if they meet applicable size standards after application of the affiliation rules and can make (after careful consideration) the “necessity” certification (each discussed below).
- ***Legal Gambling Businesses are Eligible*** – Businesses that derive revenue from legal gambling activities are now eligible for PPP loans regardless of the amount of the business’s revenue that is derived from gambling activities (as 13 C.F.R. § 120.110(g) no longer applies to the PPP).
- ***Certain Government-Owned Hospitals are Eligible*** – A state or local government-owned hospital that would otherwise be ineligible (under 13 C.F.R. § 120.110(j)) as a government-owned entity, is now eligible for a PPP loan if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.
- **Size Standard:** An applicant (taking into account its affiliates) must either:
 - ***Existing Size Standards*** – qualify as a “small business concern” by meeting the SBA’s existing SBA size standards for the applicable North American Industry Classification System (NAICS) code, which are based on either employee headcount (full-time, part-time or other basis) or 3-year average annual gross receipts;
 - ***Alternative Size Standard*** – qualify as a “small business concern” by meeting the SBA’s “alternative size standard,” which requires that the applicant (together with its affiliates) have not more than **\$15m** in tangible net worth *and* not more than **\$5m** in average net income after Federal income taxes (excluding any carry-over losses) for the 2 full fiscal years before the date of the application (13 C.F.R. § 121.301(b)(2) is instructive as to how to calculate net income after Federal income taxes for pass-through entities);
 - ***Employee Headcount Standard*** – have (together with its affiliates) not more than 500 employees (on a full-time, part-time or other basis); or
 - ***Accommodations and Food Services*** – be a business assigned to the “accommodation and food services” sector (NAICS code beginning with 72) having not more than 500 employees per physical location.
- **Affiliation:** When determining whether any of the above size standards are met, the SBA’s existing affiliation rules require a business to aggregate the number of its employees, receipts, or other applicable metric with that of its foreign and domestic affiliates. Applicants and entities are affiliates when one controls or has the power to control the other or such entities are under common control. Control is broadly defined in the SBA’s regulations, and encompasses affirmative and negative control rights, as well as equity-based and contractual control rights (including affiliation based on a management agreement). The SBA has confirmed that the pre-2020 version of 13 C.F.R. § 121.301(f), the affiliation rule for 7(a) loans, applies to the PPP. Relatedly, the SBA and Treasury have issued Affiliation Guidance with respect to the affiliation rules that apply to the PPP. There are some exceptions to the application of the SBA’s existing affiliation rules that are specific to the Paycheck Protection Program:
 - ***CARES Act Exceptions*** – Under the CARES Act, the SBA’s affiliation rules are waived for businesses in the accommodation and food service sector with a NAICS code beginning with 72, franchises assigned a franchise identifier code by the SBA, and businesses that receive assistance from an approved small business investment company under § 301 of the Small Business Investment Act of 1958 (*e.g.*, SBIC

portfolio companies).^{vi} As a result, each hotel or restaurant location owned by a parent business (held within a separate legal entity) that employs not more than 500 employees can apply for a separate PPP loan, provided it uses a unique EIN. However, this waiver applies only when determining eligibility for an applicant business with an NAICS code beginning with 72. The affiliation exemption does not apply when determining eligibility of an applicant that is not in such sector. Such applicant would be required to take into account the employees, receipts, or other applicable metric of all of its affiliates, *including* those operating in the accommodations or food service sector.

- **PPP Rules Exceptions** – Under the PPP Rules, affiliation rules are waived for faith-based organizations where the application of such rules would “substantially burden [such an] organization’s religious exercise.”
- **Statutory Exceptions** – Under the SBA’s existing regulations, the exceptions to the affiliation rules in 13 C.F.R. § 121.103(b) (but not the exception in 121.103(b)(5), which does not apply to 7(a) loans) continue to apply in the context of the PPP. While these exceptions should be reviewed in connection with any affiliation analysis, they are narrow and will not benefit most businesses (unless owned or controlled by certain tribal organizations or small business investment companies).
- **Calculating Employee Headcount** – The SBA confirmed that borrowers *should* use either of the following methods for purposes of determining employee headcount: (i) average employment over the same time periods as used for payroll costs (previous 12 months, calendar year 2019 or applicable period for seasonal businesses) to determine number of employees, for the purposes of applying an employee-based size standard; or (ii) average number of employees per pay period in the 12 *completed* calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if less than 12 months).
- **Inclusion of Foreign Employees** – On **May 6, 2020** the SBA published Question 44 of its FAQ, which affirms that, in accordance with 13 C.F.R. § 121.301(f)(6), for both the PPP’s 500 or fewer employee size standard and businesses otherwise seeking to qualify as a “small business concern” on the basis of the employee-based size standard an applicant **must count all of its employees and the employees of its U.S. and foreign affiliates**, absent a waiver of or an exception to the affiliation rules. In an Interim Final Rule published on **May 18, 2020** (which codifies Question 44), the SBA, recognizing the ambiguity as to the inclusion or exclusion of foreign employees in its prior guidance, provided that it will not find any borrower that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the borrower’s exclusion of non-U.S. employees from its employee headcount if the borrower (together with its affiliates) had no more than 500 employees whose principal place of residence is in the United States. Such borrowers shall not be deemed to have made an inaccurate certification of eligibility solely on that basis. Under no circumstances may PPP funds be used to support non-U.S. workers or operations.
- **Necessity:** Applicants are required to certify that the “*current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.*” All applicants (but especially **larger companies, public companies and portfolio companies of private equity sponsors**) should carefully review and be thoughtful about the implications of making this certification (including how it speaks to the applicant’s economic viability and the message it communicates to investors and the market). **When making a “necessity” assessment, applicants should create a thoughtful and detailed record supporting its determination and the process employed in that assessment.**
 - **Other Sources of Liquidity:** The SBA has clarified (in Questions 31 and 37 of the SBA FAQs) that while the CARES Act waives the “credit elsewhere” requirement, borrowers must nonetheless carefully review and make the “necessity” certification in good faith. In so doing, **borrowers must take “into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”** This applies to both publicly traded and private companies.

- **Large/Public Companies:** As a response to the much-reported receipt of PPP loans by certain publicly traded companies, the SBA further clarified that it is **unlikely** that a company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to the SBA, upon request, the basis for its certification.
- **Retraction and Safe Harbor:** Any borrower (whether publicly-traded or privately-owned) that applied for a PPP loan *prior* to April 24, 2020 and repaid the loan in full by **May 18, 2020** is deemed to have made the required certification in good faith.
- **Review of the Necessity Certification:**
 - ***Borrowers of Less than \$2 million*** – As announced in Question 46 of the FAQ (published on May 13, 2020), a borrower that, together with its affiliates, received PPP loans with an original principal amount of **less than \$2 million** will be deemed to have made the necessity certification in good faith.
 - ***Borrowers of \$2 million or Greater*** – Question 39 of the FAQ (published on April 29, 2020) provides that the SBA will review all loans in excess of \$2 million, *in addition to other loans as appropriate*, following the lender’s submission of the borrower’s loan forgiveness application. Question 46 of the FAQ clarifies that a borrower’s “necessity” certification will be assessed as part of such review, and if the SBA determines in the course of its review that the borrower lacked an adequate basis for the necessity certification, the SBA will (i) seek repayment of the outstanding PPP loan balance and (ii) inform the lender that the borrower is not eligible for loan forgiveness. So long as the borrower repays the loan following such notification, the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the necessity certification (though the SBA may of course refer any other issues identified).^{vii}

Notwithstanding the important clarifications in Question 46 of the FAQ about the potential repercussions relating to a necessity certification that is found to have been made on an inadequate basis, significant uncertainty remains around whether a borrower can make the certification of need when it may have access to other sources of liquidity.^{viii} What constitutes “liquidity” or when would the use of such liquidity be “significantly detrimental”? What about a case where a borrower’s business has no cash or other readily available sources of liquidity, but the borrower’s owners, such as private equity or other funds, may have or be able to access such liquidity? This ambiguity is particularly problematic for hotels, restaurants, and other 72-code businesses that have faced severe reduction or even elimination of all revenues and that are owned by private equity sponsors, but are exempted from the affiliation rules, and are thus eligible to receive PPP loans if they are able to make the “necessity” certification.

The SBA has offered little in the way of guidance (other than with regard to public companies (described above)), and it remains the case that a borrower will need to make a good faith assessment of need based on its individual facts and circumstances (with the factors and processes involved contemporaneously documented). Even though the May 18th safe harbor has now passed, existing borrowers that have borrowed (or have borrowed together with their affiliates) more than \$2 million that remain concerned about the necessity certification must consider whether the necessity certification was validly made at the time of application and whether it would be most prudent to (i) repay loan proceeds received now and minimize future exposure, (ii) retain (and potentially not spend) loan proceeds while waiting to see if further guidance around “necessity” is produced in the near term (recognizing that delayed use of funds may put forgiveness eligibility at risk), or (iii) retain and utilize the funds and address issues arising out of the forgiveness review. When considering retaining the loan proceeds, such a borrower must also assess its appetite for the SBA’s eventual audit, related expenses, and the potential scrutiny that may accompany an audit given the focus that the PPP has received (and is expected to continue to receive) in the press and by government officials who have committed to pursue abuse of the program.

Both the legal and the public relations “judgments” will be made in hindsight, which leaves borrowers and their sponsors facing difficult choices in a crisis without any clear end.

- **Eligible Uses:** PPP loan proceeds may be used for: (i) payroll costs (as further described below), (ii) costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and

insurance premiums; (iii) employee salaries, commissions, or similar compensations; (iv) payments of interest on any mortgage (but not prepayment of or payment of principal); (v) rent (including under a lease agreement); (vi) utilities; and (vii) interest on any other debt obligations incurred before 2/15/20. The CARES Act provides that loan proceeds can also be used for any allowable use for which a 7(a) loan can be applied under the Small Business Act, which uses are set forth in 13 C.F.R. § 120.120 and include, *e.g.*, inventory, supplies, working capital. However, the PPP Rules list as permitted only those uses detailed in (i) through (vii) (and refinancing of certain EIDLs), and it remains unclear whether the SBA is restricting permitted uses to *only* those that are expressly listed in items (i) through (vii). Note further that some of the items listed in (i) through (vii) are not forgiveness-eligible, and any additional allowable uses not specifically listed in the CARES Act or the PPP Rules are not forgiveness-eligible. **As amended by the PPPFA, the CARES Act provides that so long as the proceeds are used (for the purposes described above) prior to December 31, 2020, such uses are eligible uses.**

- **60% Payroll Cost Threshold:** The PPP Rules, as amended by the Interim Final Rules published June 11, 12 and 17 (the “PPPFA Revision Rules”), require borrowers to use at least 60% of PPP loan proceeds for payroll costs (the CARES Act itself does not impose such a requirement). Previously, the PPP Rules required 75% of the PPP loan proceeds be used for payroll costs.
- **Independent Contractors:** A business **cannot** include independent contractors as “employees” either for purposes of calculating the loan amount (i.e., with payroll cost calculations) or amount of loan forgiveness. Independent contractors can themselves apply for a PPP loan.
- **Required EIDL Refinancing:** A borrower who has received an economic injury disaster loan between 1/31/20 and 4/3/20 and who used such EIDL funds for payroll costs is **required** to refinance any outstanding amounts under such EIDL with the proceeds of a PPP loan and such amounts count towards the \$10m maximum that a borrower is allowed to borrow under the PPP.
- **Self-Employed Applicants:** Self-employed applicants who filed (or are eligible to file) a Form 1040 Schedule C for 2019 may use loan proceeds for: (i) owner compensation equal to 24 weeks (or 8 weeks) of 2019 net profit up to a maximum annualized amount of \$100,000; (ii) payroll costs to employees with a principal place of residence in the US (if any); (iii) mortgage interest, rent or utility payments that can be claimed as a business expense deduction on Form 1040 Schedule C; (iv) interest payments on any loan incurred prior to 2/15/20; and (v) refinancing of any EIDL obtained between 1/3/20 and 4/3/20. Further, the PPP Rules indicate that an applicant that did not claim (or was not entitled to claim) such mortgage interest, rent or utility payments on its 2019 Form 1040 Schedule C **cannot** use the loan proceeds for such expenses during the initial 24-week period (or 8-week period) following the first disbursement of the loan. The 40% limitation on non-payroll cost uses applies to self-employed applicants as well.
 - **[Key Update]** As discussed further below, under the PPPFA Revision Rules and revised SBA Form 3508 the maximum amount of total payroll costs of a self-employed borrower that is forgivable with respect to 24-week covered period is \$20,833 and for an 8-week covered period is \$15,385, even if the self-employed borrowers can pay themselves more from the PPP loan and remain under the \$100,000 annualized cap.
- **Payroll Costs:**
 - **Included:** “Payroll Costs” generally include:
 - **For Applicants (other than Self-Employed Applicants)** – Includes the following compensation for employees (and not any independent contractors) whose principal place of residence is in the US: (i) salary, wage, commission, or similar compensation; (ii) cash tips or equivalents; (iii) payment for vacation, parental, family, medical, or sick leave; (iv) allowance for dismissal or separation; (v) payment required for the provision of group health care benefits, including insurance premiums; (vi) payment of any retirement benefit; and (vii) payment of state or local taxes assessed on employee compensation. The SBA has indicated that payroll costs are calculated on a gross basis without regard to federal taxes imposed or withheld.

- **For Self-Employed Applicants^{ix}** – Includes the sum of payments of any compensation that is a wage, commission, income, net earnings from self-employment, or similar compensation up to a maximum annualized amount of \$100,000. When calculating payroll costs, such compensation for self-employed applicants that filed (or will file) a Form 1040 Schedule C for 2019 will be equal to the net profit amount computed therein (subject to a \$100,000 annualized cap). For self-employed applicants that also have employees, payroll costs for such employees are calculated using:
 - 2019 gross wages and tips paid to such employees with a principal place of residence in the US (using 2019 IRS Form 941 Taxable Medicare wages & tips from each quarter) *plus* any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips (net of any amounts paid to any individual employee in excess of \$100,000 annualized); and
 - 2019 employer health insurance contributions and retirement contributions listed on the 2019 Form 1040 Schedule C and state and local taxes assessed on employee compensation.
- **For Partnerships with General Operating Partners** – Partners in a partnership may not submit a separate PPP loan application as a self-employed individual. Self-employment income of general active partners may be reported as a payroll cost on a PPP loan application filed by or on behalf of the partnership. The SBA's step-by-step maximum loan amount calculation guide confirms that payroll costs for self-employment income for individual U.S.-based general partners is calculated using 2019 Schedule K-1 (IRS Form 1065) net earnings from self-employment (reduced by any section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties) multiplied by 0.9235^x, subject to a \$100,000 annualized cap.
 - Under the Interim Final Rule published on May 13, 2020, if a partnership received a PPP loan that did not include any partner compensation (*i.e.*, because the partnership's PPP loan preceded rules clarifying inclusion partner compensation), a lender may submit a request to the SBA to upsize and make an additional disbursement in respect of such PPP loan to include partner compensation so long as the lender's initial 1502 report to the SBA^{xi} has not yet been submitted. A borrower must supply the lender with the required documentation to support the increase. All caps and limitations on PPP loan amounts apply to such an increased loan.
- **Excluded:** Payroll costs **do not** include: (i) cash compensation (*i.e.*, exclusive of non-cash benefits) of any individual employee in excess of an annual salary of \$100,000, as prorated for the covered period; (ii) federal income taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period (includes Federal Insurance Contributions Act and Railroad Retirement Act taxes and income taxes required to be withheld from employees); and (iii) qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act.
- Please note that the language in the PPP Rules for self-employed applicants largely tracks the employee payroll cost categories and exclusions for applicants generally. While the PPP Rules direct self-employed applicants as to the sources of information to be used to calculate payroll costs, it is somewhat unclear whether such direction is also intended to narrow the scope of included payroll costs for such applicants.
- **Period for Calculating Payroll Costs:** SBA guidance indicates that borrowers (other than self-employed applicants) can calculate their aggregate payroll costs using data either from the trailing 12 months or calendar year 2019. Seasonal businesses may use average monthly payroll for the period between 2/16-6/30/19 or 3/1-6/30/19. Note that language in the PPP Rules and CARES Act, which reference a TTM calculation, and in the PPP application, which references a calendar year 2019 calculation, is somewhat inconsistent and consequently some lenders have not accepted both calculation methods.
- **Loan Forgiveness:**

- On May 22, 2020, SBA published the an [Interim Final Rule](#) on loan forgiveness (the “[Forgiveness Rules](#)”) and an [Interim Final Rule](#) on SBA loan review procedures and related borrower and lender responsibilities (“[Review Rules](#)”). The PPPFA and PPPFA Revision Rules provide further and revised guidance on loan forgiveness. On June 17, 2020, the SBA and Treasury released an updated version of [SBA Form 3508](#) (and related [instructions](#)), which implements the changes contained in the PPPFA and the PPPFA Revision Rules. In addition, the SBA and Treasury produced a new simplified forgiveness application, [SBA Form 3508EZ](#) (and related [instructions](#)). SBA Forms 3508 3508EZ are referred to below together as the “[Forgiveness Applications](#)”. With respect to eligibility to use SBA Form 3508EZ see **Question 9** below.
- **Forgiveness Amount:** Under the PPP Rules, up to the entire principal amount and any accrued interest on a PPP loan is eligible for forgiveness if applied toward forgiveness-eligible uses. Form 3508 provides that a borrower is **eligible** for a forgiveness amount that is the lesser of (i) its full PPP loan amount (no mention of interest), (ii) the sum of all forgiveness-eligible costs as reduced for employee compensation and FTE headcount reductions (discussed below), and (iii) payroll costs during the covered period divided by .60 (such that the amount forgiven is not less than 60% payroll costs).
- **[Key Update] Covered Period and Alternative Covered Payroll Period:**
 - **Covered Period** – The covered period begins on the date the loan was originated and ends on the earlier of (i) 24 weeks after the date of loan origination or (ii) December 31, 2020. However, borrowers who received a PPP loan before the enactment of the PPPFA may elect an 8 week covered period that begins on the loan origination date (i.e., the construct under the CARES Act prior to the enactment of the PPPFA).
 - **Alternative Covered Payroll Period** – The Forgiveness Applications permit a borrower in calculating forgiveness-eligible payroll costs (and compensation-based or FTE-based forgiveness amount reductions) to utilize an Alternative Payroll Covered Period (whether 24-week or 8-week) that begins on the first day of the borrower’s first pay period following their PPP loan disbursement date. If the Alternative Payroll Covered Period is selected, a borrower must utilize it consistently in their forgiveness application wherever the option is given. If no option is given, then the standard Covered Period (beginning on the loan origination date) applies, and only the standard Covered Period applies to the calculation of eligible non-payroll costs. The Alternative Payroll Covered Period cannot extend beyond 12/31/20. For ease of review below this alert refers to the “covered period” generally, but borrowers should be aware of this option.
- **Forgiveness-Eligible Costs:** Forgiveness-eligible costs include payroll costs, interest payments on mortgages existing before 2/15/20, rent under leases in place before 2/15/20, and payments for utilities **for** which service began before 2/15/20, in each case **incurred or paid** during a 24-week (or 8-week) covered period. To receive loan forgiveness, borrower must use at least 60% of the loan amount for payroll costs. The PPPFA Revision Rules interpret this requirement as a proportional limitation on the loan forgiveness amount such that 60% of the loan forgiveness amount requested must have been used on payroll costs, rather than a threshold requirement that 60% of the total loan amount must be used on payroll costs *before* a loan can be forgiven. If payroll costs represent less than 60% of the total loan forgiveness amount requested by a borrower, then the forgiveness amount is proportionately reduced until payroll costs constitute 60% of the total forgiveness amount.
 - **Eligible Payroll Costs** – Payroll costs are considered paid on the day that paychecks are distributed or the borrower **originates** an ACH credit transaction. Payroll costs are considered incurred on the day that the employee’s pay is earned. Payroll costs incurred but not paid during the borrower’s last pay period of the covered period are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, payroll costs must be paid during the covered period. Payroll costs for employees not performing work but still on the borrower’s payroll are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work). The Forgiveness Rules also clarify that:

- **Costs of Furloughed Employees** –if a borrower pays furloughed employees their salary, wages, or commissions during the covered period, those payments are eligible for forgiveness as long as they do not exceed an annual salary of \$100,000, as prorated for the covered period (however, the reduced hours for such furloughed employees will impact the forgiveness amount under the current rules and Form 3508);
- **Increased Compensation/Bonuses** – an employee’s hazard pay and bonuses are eligible for loan forgiveness (as a supplement to salary or wages) so long as the employee’s total compensation does not exceed \$100,000 on an annualized basis; and
- **[Key Update] Owner Employees/Self-Employed Individuals** – As contemplated in the Forgiveness Applications and the PPPLF Revision Rules, payroll costs for owner-employees and self-employed individuals is capped at \$20,833 for a 24-week covered period and \$15,385 for an 8-week covered period per individual **across all businesses**. This represents a disproportionately small increase in the forgiveness amount for payroll costs attributable to self-employed applicants in light of the additional 16-weeks of covered period added under the PPPFLA. Further, the retention in the PPP Revision Rules of the “across all businesses” language suggests that an owner-employee/self-employed individual is capped at \$20,833 (or \$15,385) on an aggregated basis for all of such individual’s businesses that receive PPP loans, which is a problematic change if owner compensation was included in the calculation of the loan amount for each borrower business (particularly if those loan proceeds have already been used to pay owner compensation). The Forgiveness Applications do not include a mechanism to ensure borrowers take into account this aggregating concept, and self-employed borrowers should be careful to track the aggregate amount for which they seek forgiveness that is attributable to payroll costs paid to themselves.
- **Eligible Non-payroll Costs** – An eligible non-payroll cost must be paid or incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period. As explained in the Forgiveness Rules, eligible non-payroll costs include any amounts paid during the covered period (regardless of when incurred if incurred *prior to* the covered period) and costs incurred during the covered period even if paid following the covered period. Other than in the case of mortgage interest, which the Forgiveness Rules expressly state cannot be prepaid, there is no express exclusion from eligible non-payroll costs for prepayments of utility or rental expenses.
- **Reduction in Forgiveness Amount:** The loan amount eligible for forgiveness will be reduced (i) **first**, dollar-for-dollar by the amount of any salary cut for any employee employed by the company during the covered period that is in excess of 25% of such employee’s total salary or wages for the January 1, 2020 to March 31, 2020 period and either (i) did not receive annualized compensation of \$100,000 or more in any pay period in 2019; or (ii) was not employed by employer in 2019; and (ii) **second**, proportionally for reductions in the average number of full-time equivalent (FTE) employees during the (24 or 8 week) covered period compared to the average number of FTE employees per month during a reference period selected by the borrower. The borrower can select, one of the following reference periods: 2/15/19 – 6/30/19, 1/1/20 – 2/29/20, or, in the case of seasonal employers, average number of FTE employees per month between 2/15/19 – 6/30/19. Form 3508 contains a worksheet that provides step-by-step instructions for calculating such reductions.
- **[Key Update] FTE Reduction Exception** – As detailed in SBA Form 3508, no reductions are required for the following categories of employees and the borrower can include the FTE of such employees in its calculation of average FTE for the covered period (it as if such employee were still employed). Categories (1) and (2) are expressly contemplated in the PPPFA.
 - (1) any positions for which the borrower made a good-faith, written offer to rehire an individual who was an employee on 2/15/20 and the borrower was unable to hire similarly qualified employees for unfilled positions **on or before** 12/31/20;

- (2) any positions for which the borrower made a good-faith, written offer to restore any reduction in hours, at the same salary or wages, during the covered period and the employee rejected the offer; and
- (3) any employee who during the covered period (a) was fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of hours.
- A borrower cannot include the FTE for such employees if the position was filled by a new employee (*i.e.*, borrower cannot double-count such former and replacement employee for the same position). *For example, if during the selected covered period a borrower fired for cause an employee with an average of 20 hours paid per week, the borrower can include 0.5 FTE in its average FTE calculations even though that employee is no longer employed. However, if the borrower filled the position of the fired employee with a new employee and that new employee has an average of 30 hours paid per week, the borrower can include only the 0.75 FTE for the new employee.* Further, while not required to be submitted with its application, the borrower must retain documentation supporting the applicability of these exceptions (see **Question 8** below).
- **Average FTE** – Average FTE during the covered period is determined using the average number of hours paid per week, divided by 40, and rounded to the nearest tenth. This calculation is done on an employee-by-employee basis and the maximum FTE for each employee is **capped** at 1.0 (*for example: (i) if the average number of hours paid per week for an employee is 45, that employee counts as 1 FTE, (ii) if the average number of hours paid per week for an employee is 30, that employee would count as 0.75 FTE*). Borrowers can use a simplified method that assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for those who work fewer, but should note that doing so may understate FTEs if a borrower's employees are working less than 40 but more than 20 hours per week. New employees not employed during the reference period can be included in the calculation of average FTE for the covered period.
- **[Key Update]** Borrowers should note that the expansion of the covered period to 24 weeks under the PPPFA has the collateral impact of requiring that Average FTE levels be preserved over a longer duration to avoid a reduction in the forgiveness amount (unless a safe harbor applies).
- **No Double Penalty for Salary Decline Due to FTE Reduction** – Under the Forgiveness Rules, to ensure that borrowers are not doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction. (*The SBA provides the following example: "An hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE of 1.0) and the borrower reduced the employee's hours to 20 hours per week during the covered period (FTE of 0.5). There was no change to the employee's hourly wage during the covered period. Because the hourly wage did not change, the reduction in the employee's total wages is entirely attributable to the FTE employee reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee."*)
- **Safe Harbors to Forgiveness Reduction:**
 - **Salary/Hourly Wage Reduction Safe Harbor** – The safe harbor for reductions in salary/wages of applicable employees must be assessed on an employee-by-employee basis. The borrower is **exempt** from a reduction with respect to an employee if both: (1) the borrower reduced that employee's compensation by more than 25% in the period beginning 2/15/20 and ending 4/26/20; and (2) the *average* annual salary or hourly wages of that employee as of 12/31/20 is equal to or greater than that employee's annual salary or hourly wages as of 2/15/20.
 - **[Key Update]** Form 3508 (PPP Schedule A Worksheet) indicates that this safe harbor applies if the reduction is restored as of the *earlier of* 12/31/20 and the date that the forgiveness application is submitted. Therefore, borrowers need not wait until year-end to restore compensation and submit if a forgiveness application. Borrowers can restore compensation levels at an earlier time, and, once restored, utilize the safe harbor in a forgiveness application.

It remains, however, an open question as to how long such restored compensation must be preserved.

- It appears that in order to benefit from the safe harbor, the employee needs to be fully restored (not just to 75% of pre-reduction compensation levels).
- **What does “average” mean?** – The implication of “average” in this context is unclear. Is it sufficient for compensation to be restored by 12/31/20 to the same annualized salary amount or hourly wages that an employee was receiving on 2/15/20 (*for example, if an employee was making \$5,000 per month (\$60,000 annualized salary) as of 2/15 and is reduced to \$3,000 per month on 3/1, does that employee simply need to be restored to \$5,000 per month going-forward as of 12/31*)? Does “average” imply that an employee needs to be “caught up” so the average salary or hourly wages for year-to-date as of 12/31/20 is equal to or greater than annual salary or hourly wages as of 2/15/20 (*for example, would the employee need to receive \$8,000 to make up for \$2,000 less in monthly compensation for March – June, so that the employee’s average annualized salary as 12/31 is the same as on 2/15 (\$60,000)*)? This is a critical question as being required to deliver make-up payments will likely prove untenable for many employers.
- **Employee Availability FTE Reduction Safe Harbor (FTE Reduction Safe Harbor 1 in Form 3508)** – The PPPFA added an exemption (that applies during the period beginning 2/15 and ending 12/31/20) from the reduction in loan forgiveness for reduction of the number of FTE employees if a borrower, in good faith is able to document an inability to return to the same level of business activity as such business was operating before 2/15/20 due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the director of the CDC or OSHA during the period beginning on 3/31/20 and ending on 12/31/20, related to the maintenance of standards for sanitation, social distancing or any other worker or customer safety requirements related to COVID-19.
- **[Key Update]** This safe harbor is captured in Form 3508, and protects a borrower broadly from any reductions in FTE employee levels between 2/15 and the end of the covered period due to compliance with requirements/guidance of the above federal departments. The borrower must expressly certify as to the applicability of this safe harbor. Important questions remain with respect to this safe harbor:
 - Does this safe harbor provide complete coverage from an FTE-based reduction to the forgiveness amount regardless of the duration or the extent of the reduction in the level of business activity? For example, if a borrower was required to operate at half capacity for only 3 weeks of the period between 2/15/20 and the end of the covered period, does this safe harbor nonetheless provide complete protection? The answer appears to be yes.
 - How is “same level of business activity” defined? Is this purely a measure of physical operations (*e.g.*, a business was required to close, operate at less than full capacity, or provide curbside pickup/delivery/take-away services), or can it be measured in terms of economic reductions (*e.g.*, if a business remained completely open, but due to COVID-19 and related federal guidelines/requirements suffered a decline in demand for its services)?
 - While the intent of this safe harbor would seem to encompass state or municipally-mandated business reductions or closures to fight the spread of COVID-19, the language of the safe harbor speaks only to the requirements or guidance issued by the U.S. federal government. The SBA will need to issue rules clarifying that such state/local requirements are inherently in accordance with federal requirements or guidance, and therefore businesses that complied with state/local directives are within the scope of this safe harbor.
 - A borrower must retain, but is not required to submit as part of its forgiveness application, documentation evidencing the applicability of this safe harbor (see **Question 8** below). However, it is unclear what documentation would be appropriate to support that a business was unable to operate at the same level of business activity due to compliance with such

federal guidelines/requirements (e.g., is simply pointing to such guidelines sufficient?). This could become relevant in the context of a review or audit.

- **FTE Reduction Safe Harbor (FTE Reduction Safe Harbor 2 in Form 3508)** – Borrower is exempt from the reduction in loan forgiveness for reduction of the number of FTE employees if both of the following conditions are met: (1) the borrower **reduced** its average FTE employee levels in the period beginning 2/15/20 and ending 4/26/20; and (2) the borrower restored by **not later than 12/31/20**, its total FTE employee levels to its total FTE employee levels for the pay period inclusive of 2/15/20. Borrower is instructed to calculate FTE for each relevant period (2/15—4/26/20, the pay period inclusive of 2/15/20, and total FTE as of 12/31/20) using the same calculation methods required for determining Average FTE during the covered period(described above).
 - **[Key Update]** Form 3508 (PPP Schedule A Worksheet) indicates that FTE Reduction Safe Harbor 2 applies if the reduction is restored as of the earlier of 12/31/20 and the date that the forgiveness application is submitted. Borrowers need not wait until year-end to restore FTE levels and submit a forgiveness application. Borrowers can restore FTE levels at an earlier time, and, once restored, utilize this safe harbor in a forgiveness application. It remains, however, an open question as to how long such restored FTE levels must be preserved.
 - It appears this is an “all or nothing” test and that any partial restoration in total FTE as of 12/31/20 below the total FTE for the pay period inclusive of 2/15/20 is insufficient for the safe harbor.
 - As written in Form 3508 and the Forgiveness Rules, the condition that the borrower must have reduced average FTE employees during the 2/15—4/26/20 period seems to imply that so long as the borrower had any reduction during that period *all reductions* (whether during that period or after) can be cured by 12/31/20. **This conflicts with prior guidance that suggested that reductions occurring after 4/26 are incurable.**
- **Simplified Option** – Form 3508 (PPP Schedule A Worksheet) provides borrowers a simplified option to determine if an FTE-based reduction in the forgiveness amount is required. If a borrower “has not reduced the number of [its] employees or the average paid hours of [its] employees between January 1, 2020 and the end of the Covered Period,” then the borrower is not subject to an FTE-based reduction. While not a “safe harbor”, this provision is effectively a short-cut around the morass of calculating a borrower’s FTE-based reduction to the forgiveness amount.
 - Note however that It is unclear if this option is conditioned on (i) no reductions *on average* between 1/1/20 and the end of the covered period as compared to the numbers of employees or average paid hours as of 1/1/20 (such that reductions restored during the covered period) would not affect the availability of this safe harbor), or (ii) no reductions at all, at any time during such period (even if restored).
- **Application Review Flag:** Borrowers that, **together with their affiliates**, received PPP Loans **in excess of \$2 million** are required to check a box on Form 3508 indicating as much. This will be used to flag applications required to be reviewed by the SBA.
- **Certifications and Materials:** Borrower must certify (among other certifications) that the forgiveness amount was used only for eligible expenses, has been appropriately reduced (for compensation or average FTE reductions), does not include non-payroll costs in excess of 40%, and does not exceed **24-weeks’** worth of 2019 compensation for any owner-employee or self-employed individual/general partner (capped at \$46,155 per individual). The application also reinforces that there are potential criminal charges for false claims in connection with the information provided in the application or supporting documents or if funds were knowingly used for unauthorized purposes. Form 3508 includes a fulsome list of materials that a borrower must submit and/or prepare and maintain with respect to its application for forgiveness (see **Question 8** below), and makes clear that the borrower must retain all such materials for 6 years and provide SBA authorized representatives access upon request.

- **Taxes:** Amounts forgiven are not taxable income to the borrower. However, the IRS has held that a borrower whose PPP loan is forgiven may not deduct the expenses that relate to the forgiven amount (*i.e.*, the 24 weeks of wages, employee benefits, interest, rent, and utilities that determined **the** forgiven amount).^{xii} Disallowing the deduction of such expenses significantly reduces the tax benefit of PPP loans. There are some bi-partisan efforts to reverse that decision but it is not yet clear if they will be successful.
- **Forgiveness Review Process:** To receive loan forgiveness, a borrower must submit its Form 3508 together with the other materials required under Form 3508 or requested by the lender (see **Question 8** below). While the Review Rules require the lender to confirm receipt of all requisite documentation and to use such materials to confirm certain of the borrower's calculations as part of a "good-faith review," the lender may rely on borrower representations/certifications and the onus remains on the borrower to provide an accurate calculation of the loan forgiveness amount and to supply accurate information and calculations in its forgiveness application.^{xiii} If lenders identify errors in a borrower's calculation or material lack of substantiation in the supporting documents, lenders are directed to work with the borrower to remedy the issue (*i.e.*, as opposed to denying forgiveness without an opportunity to ameliorate such deficiencies).
 - Lenders must make a determination as to loan forgiveness in not less than **60 days** from receipt of a "complete application" and will report its decision to the SBA. The lender must also notify the borrower of its decision.
 - **Lender Approves Forgiveness (All or Part)** – If a lender determines a borrower is entitled to forgiveness of all or a portion of the amount requested, the lender must request payment from the SBA when it delivers its forgiveness determination to the SBA.^{xiv} The SBA will **not later than 90 days** after the lender issues its decision to the SBA will remit the forgiveness amount to the lender, plus any interest accrued through the date of payment, less any EIDL advance amounts. This timeframe is subject any SBA review of the loan/loan application, during which time a loan may not be forgiven (the **SBA Review Process** is discussed further below). **The forgiveness process may take as many as 150 days assuming no issues that create delays** (e.g., SBA/lender information requests, SBA undertakes a review of the loan/loan application).
 - Per the Review Rules, if the amount remitted by SBA exceeds the remaining principal balance because the borrower made scheduled payments on the loan after the payment deferral date, the lender must pay the excess amount (including accrued interest) to the borrower.
 - **Lender Denies Forgiveness (All or Part)** – If a lender issues its decision to the SBA that all or a portion of the requested forgiveness amount is to be denied, the lender must (i) provide the SBA a reason for such denial, and (ii) notify the borrower of such decision. The SBA has the right to review such determination in its sole discretion. **Within 30 days of notice from the lender, a borrower may request that the SBA review the lender's decision.** While it appears that such review must be accomplished within the 90 day forgiveness-review period, the Review Rules are not clear and such review may exceed that time frame. If only a portion of the loan is forgiven or if the forgiveness request is denied, the balance must be repaid by the borrower on or before the 2-year maturity of the loan.
- **Many Questions Remain:** The PPPFA has addressed some important issues but still leaves some important questions unanswered, including:
 - If a borrower restores employee compensation or FTE employee levels prior to December 31 and submits a forgiveness application availing itself of the applicable safe harbor, how long does such restored compensation/FTE level need to be preserved? If forgiveness is approved, are they allowed to reduce their employees or compensation immediately thereafter without affecting their forgiveness? Can a borrower have restored employee compensation or FTE employee levels as of the application date and then reduce again the day after?
 - It remains unclear how a fully-furloughed employee who is not receiving compensation, but continues to receive benefits from the borrower is to be treated for purposes of calculating (and

reducing) the forgiveness amount. While the Forgiveness Rules indicate that a reduction in an employee's wages/salary that is the result of a reduction in hours does not create a "double penalty" for purposes of reducing the forgiveness amount (such that only the FTE-based reduction applies), what about a fully-furloughed employee who has had their hours eliminated (and as a result their compensation reduced to \$0)? Is it indeed the case that if a borrower was forced to fully-furlough 50% of its workforce, in part to ensure sufficient funds to continue to pay for the healthcare benefits for such employees, that the borrower may suffer a 50% reduction in its forgiveness amount?

- There is no guidance related to if and what a borrower is required to do after December 31 or the end of the covered period. Would there be any consequences to borrower reducing its FTE count and/or reducing compensation to employees at that point in time? Form 3508 does require the borrower to provide the number of its employees as of the date it applied for the loan and as of the date it applied for forgiveness. Is that meaningful in any way? Given that the loan forgiveness process is likely to last several months after the end of the covered period this could be an important issue.
 - **The SBA has indicated that will be issuing revisions to its interim final rules on loan forgiveness and loan review procedures to address amendments under the PPPFA.**
- **Credit Elsewhere:** The SBA has waived the requirement that borrower not be able to obtain financing elsewhere (but see discussion of the "necessity" certification above).
 - **Disbursements:** Lenders must make a one-time, full disbursement of a PPP loan within 10 calendar days of approval (the date on which the SBA assigns a loan number). Loans that have not been disbursed because a borrower fails to submit required loan documentation within 20 days of loan approval are cancelled.
 - **Other Economic Considerations:** PPP loans are non-recourse obligations provided that the loan proceeds are used for permitted purposes. No yearly or guarantee SBA fees will be charged.
 - **Employee Retention Tax Credit:** Borrowers under the PPP are **ineligible** for the Employee Retention Tax Credit made available under the CARES Act. However, borrowers that return PPP loan proceeds before the expiration of the limited safe harbor are again eligible for the Employee Retention Tax Credit.
 - **Social Security Tax Deferral:** The CARES Act permits employers to delay payment of the 6.2% employer share of the Social Security tax (but not the 1.45% employer share of the Medicare tax) from the date of enactment through 12/31/20. The tax is payable over the following 2 years with half paid by 12/31/21 and the other half by 12/31/22. However, such deferral is **not** available for an employer who has a PPP loan forgiven.
 - **First Come, First Served:** The PPP Rules expressly state that the PPP is "first-come, first-served". As noted above, should additional funding become available, potential borrowers should be prepared to apply quickly.
 - **Lender Fee Limits:** Processing fees paid to lenders will be based on the balance of the loan outstanding at the time of final disbursement. A lender will receive a fee equal to a percentage of such final disbursement as follows: (i) 5.00% for loans \$350,000 and under; (ii) 3.00% for loans of more than \$350,000 and less than \$2 million; and (iii) 1.00% for loans of at least \$2 million. Lenders may not collect any fees from the applicant.
 - The Review Rules provide that if the SBA conducts a review of a PPP loan and determines that a borrower is ineligible, then the lender is not eligible for a processing fee. Lender fees are subject to clawback within 1 year of disbursement of a PPP-loan if the SBA determines that a borrower was ineligible.
 - **Agent Fee Limits:** The CARES Act authorizes the SBA to establish limits on fees that can be collected by agents that assist applicants in applying for the PPP. The PPP Rules provide that the fees of such agents will be paid by the lender out of the fees the lender receives from the SBA (*i.e.*, the agent may not collect fees from the borrower or be paid out of PPP loan proceeds). The total amount an agent can collect from a lender for providing such assistance is capped at: (i) 1.00% for loans of not more than \$350,000 ($\leq \$3,500$); (ii) 0.50% for loans of more than \$350,000 and less than \$2 million (\$1,750 - ~\$9,999); and (iii) 0.25% for loans of at least \$2 million (\$5,000 +).

- **Application:** Each applicant seeking a 7(a) loan under the PPP is required to submit a Paycheck Protection Program Borrower Application Form (SBA Form 2483) to a participating lender (together with any other documentation required by the lender as part of the application process (see **FAQ 4** below)).
- **Burden of Assessing Eligibility/Certifications:** PPP Rules and related SBA guidance place the burden on borrowers to confirm their own eligibility (including calculating payroll costs, assessing affiliation and determining employee headcount) and the accuracy of the information it supplies to the lender, and permit lenders to rely on borrower certifications in determining loan eligibility and provide that the SBA will hold lenders harmless for a borrower's failures to comply with the PPP's criteria.
- **SBA Review Process:** Under the [Review Rules](#), the SBA has broad authority to review any PPP loan at any time, in its discretion (including after a loan is forgiven).
 - **Scope of Review** – The SBA may review: (i) **borrower eligibility** (based on the CARES Act, rules and guidance in effect at the time of its application and its Form 2483), including the application of the SBA's affiliation rules (see **Size Standard** and **Affiliation** above) and list of ineligible industries (as modified for the PPP) (see **Ineligible Industries** below); (ii) **loan amount calculation and use of proceeds**; and (iii) **loan forgiveness amount claimed by the borrower**. If the SBA undertakes a review of a PPP loan, it will notify the lender and the lender must notify the borrower in **writing within 5 business days**. A lender **cannot** approve any application for loan forgiveness until the SBA notifies the lender in writing that it has completed its review.
 - **SBA Requests** – If loan documentation submitted to the SBA or any other information indicates that a borrower may be ineligible for a PPP loan or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower, the SBA will (directly or via the lender) request additional information from the borrower and the SBA will consider all information provided in response. Failure to respond may result in a finding of ineligibility or that a borrower is ineligible for loan amount/forgiveness amount claim.
 - **SBA Determinations** – If the SBA determines that a borrower was ineligible for the PPP loan (e.g., because the borrower lacked an adequate basis for the certifications made in its PPP loan application) the loan will **not** be eligible for loan forgiveness and the SBA will direct the lender to deny the forgiveness application. If the SBA determines that the borrower is ineligible for the loan amount or forgiveness amount claimed, the will direct the lender to deny the loan forgiveness application in whole or in part, as applicable. Such denial may be in addition to the SBA's exercise of other remedies (including, e.g., repayment of the PPP loan) and many expose the borrower to penalties (discussed below "**Consequences of a False Filing**")
 - **Appeal** – A borrower may appeal such SBA determinations. The SBA intends to issue a separate interim final rule on the appeal process.
- **Consequences of a False Filing:** An applicant is required as part of both Form 2483 (Loan Application) and Form 3508 (Forgiveness Application) to certify that it understands that knowingly making a false statement in order to obtain a SBA-guaranteed loan is punishable by law (including by imprisonment and significant monetary fines). Penalties include:
 - **Criminal Penalties** – Potential criminal penalties for false statements or fraud in connection with a PPP loan include (i) imprisonment of not more than 5 years and/or a fine of up to \$250,000 (18 USC §§ 1001 & 3571); (ii) imprisonment of not more than 2 years and/or a fine of not more than \$5,000 (15 USC § 645(a)); and (iii) imprisonment of not more than 30 years and/or a fine of not \$1 million (18 USC § 1014).^{xv} Beyond the penalties expressly referenced in the PPP loan application, criminal penalties under other federal fraud statutes or SBA-specific criminal statutes (e.g., regarding embezzlement or concealment) may apply. For further discussion on the subject of potential criminal risks see our client alert [Rear View Mirror: Criminal Exposure for Companies that Received PPP Loans under the CARES Act](#).
 - **Civil Penalties** – In addition to criminal penalties, the government can pursue civil fraud remedies under the civil False Claims Act (31 U.S.C. 3729-3733) or the Program Fraud Civil Remedies Act (31 U.S.C. 3801-3812).

The threat of enforcement of such penalties is bolstered by the answer to Question 39 of the SBA’s FAQ (published on April 29, 2020) which was reiterated in the answer to Question 46 (published May 13, 2020) which states that the SBA “will review all loans in excess of \$2 million, *in addition to other loans as appropriate*, following the lender’s submission of the borrower’s loan forgiveness application.” (emphasis added). The SBA has indicated additional guidance implementing such review and audit procedures are forthcoming. Given the potential risks and heightened scrutiny from Treasury, the SBA, the U.S. Justice Department (nationally and regionally), and the public and press more broadly of the companies receiving PPP loans, it is imperative the applicants carefully read and consider all certifications being made in Form 2483, Form 3508, and in any other documentation submitted to the SBA or an PPP lender.

II. Frequently Asked Questions

- **Q1: What affiliation rules apply (for purposes of determining the number of employees of an applicant together with its affiliates)?** ^{xvi}
 - **A:** According to the U.S. Treasury Department’s affiliation guidance, the four affiliation tests below are applicable to an affiliation assessment for purposes of determining eligibility under the PPP. The Treasury Department’s guidance (combined with language in the CARES Act rescinding the SBA’s February 2020 Interim Final Rule on affiliation standards) confirms that the pre-2020 SBA rules on affiliation (13 C.F.R. § 121.301(f)(1) – (4)) are the relevant affiliation rules for purposes of the PPP:
 - Affiliation based on ownership;
 - Affiliation arising under stock options, convertible securities, and agreements to merge;
 - Affiliation based on management; and
 - Affiliation based on identity of interest between “close relatives.”
- **Q2: When is a minority shareholder deemed to have control (and therefore affiliation)?**
 - **A:** The SBA distinguishes between rights in respect of ordinary business actions and “extraordinary” business actions necessary to protect the minority investor’s investment. In instances where supermajority consent is required for **ordinary business actions**, the minority investor’s ability to block such actions gives rise to negative control and the investor will be **deemed an affiliate**. In contrast, a minority investor’s ability to block “**extraordinary**” business actions should **not** give rise to affiliation between a minority investor and the applicant. **Please note that this distinction is derived from SBA case law, not all of which is specific to the affiliation rules for 7(a) loan programs (like the PPP). Applicants are strongly encouraged to carefully assess any minority protections before determining that such protections do not give rise to affiliation.**

Examples of minority rights that have been determined to establish **control** by the minority investor and **result in affiliation** include the following:

- Making, declaring, or paying distributions or dividends other than tax distributions;
- Establishing a quorum at a meeting of stockholders (and likely, by extension, at a meeting of the board);
- Approving or making changes to the company’s budget or approving capital expenditures outside the budget;
- Determining employee compensation;
- Hiring and firing officers and executives;

Examples of minority rights that are with respect to “extraordinary” business actions and have been determined **not to establish control** (and thus, **no affiliation**) include the following:

- Selling all or substantially all of the company’s assets;
- Placing an encumbrance or lien on all or substantially all of the company’s assets;
- Engaging in any action that could result in a change in the amount or character of a company’s capital contributions;
- Changing the company’s line of business;
- Engaging in a merger transaction (only applies to veteran-owned businesses);
- Issuing additional stock/equity;

- Blocking changes in the company's strategic direction;
- Establishing or amending an incentive or employee stock ownership plan;
- Incurring or guaranteeing debts or obligations;
- Initiating or defending a lawsuit;
- Entering into contracts or joint ventures; and
- Amending or terminating leases.
- Amending the organizational documents of a company;
- Filing for bankruptcy;
- Amending the governing documents to materially alter the rights of the existing owners;
- Dissolving the company;
- Increasing, decreasing, or reclassifying the authorized capital of the company;
- Taking an action in contravention of a company's charter, bylaws, operating agreement or similar governing documents;
- Disposing of the company's goodwill;
- Committing any act that would make it impossible for the company to carry on its ordinary course of business;
- Submitting a company's claim to arbitration;
- Entering into a confession of a judgment;
- Adding new members; and
- Approving an increase or decrease in the size of the company's board of directors or other governing body.

- The SBA has confirmed that a minority shareholder can eliminate such affiliation if such shareholder "irrevocably waives or relinquishes" such rights.

- **Q3: When does a management agreement create "control"?**

- **A:** Management agreements that give the management company sole discretion over the business operations with minimal oversight of the decision-making by the applicant, while not passive, create affiliation between the management company and applicant. However, affiliation is not created between the applicant and the management company if the management agreement includes "meaningful oversight" by the applicant over the management company's activities. A management agreement that provides for the applicant business to do all of the following inherently provides for "meaningful oversight": (i) approval of the annual operating budget; (ii) approval of any capital expenditures or operating expenses over a significant dollar threshold; (iii) control over bank accounts; and (iv) oversight over the employees operating the business.

- **Q4: In addition to the Form 2483, what other documentation are lenders asking for?**

- **A:** Lenders have been generally requesting the following, though they may request additional or alternative materials:
 - IRS 940, 941, or 944 payroll tax forms for 2019, and if available, Q1 2020;
 - Payroll processor records and other payroll reports/ledger for 2019 and YTD 2020 with corresponding bank statements (which should capture the following information: salary, wages, commission, or similar compensation; tips; vacation; parental, family, medical or sick leave; group healthcare benefits; retirement benefits; and state or local taxes on employee compensation);
 - 1099s for independent contractors for 2019;
 - Documentation evidencing health insurance premiums under a group health plan;
 - Documentation evidencing the sum of all retirement plan funding paid for by the applicant; and

- Organizational documents (articles of incorporation/organization, bylaws, operating agreement, partnership agreement, owners' driver's licenses, etc.) and tax identification numbers (EINs or SSNs, as appropriate).
- **Q5: What non-profits are eligible for the PPP?**
 - **A:** The SBA's Interim Final Rule on the PPP states that tax-exempt nonprofit organizations described in section 501(c)(3) of the Internal Revenue Code (IRC) and tax-exempt veterans organizations described in section 501(c)(19) of the IRC are eligible for the PPP. The fact that the SBA specifically called out these two types of non-profits suggests that these are the only types of non-profits eligible for the PPP.
- **Q6: What information about PPP borrowers will become publicly available?**
 - **A:** Requests for information about a borrower may be denied unless the SBA has the written permission of the borrower or the information is subject to disclosure under the Freedom of Information Act (FOIA). FOIA requires the SBA to disclose, upon request, information supplied by borrowers as part of loan programs upon request, including:
 - Statistics on the PPP (individual borrowers are not identified in the statistics) and
 - Borrower information including: (i) names and commercial street and e-mail addresses; (ii) names of officers, directors, stockholders or partners; and (iii) loan amount.

Proprietary data on a borrower is not routinely made available to third parties, and commercial or financial information obtained from a person is exempt from FOIA requests. Further, according to the SBA, materials and information *generally* exempt from FOIA requests include: financial statements; credit reports; business plans; fiscal projections; pricing or payroll information; corporate structures; personal and business tax returns; non-statistical information on pending, declined, withdrawn or cancelled applications or on defaults or delinquencies; requests for size determinations; loan applications; and loan officer's reports (among other materials and information). Under the Privacy Act, the SBA is also authorized to make certain "routine uses" of information protected by that Act (e.g., disclosure of information maintained in SBA's records when it indicates a violation or potential violation of law to the appropriate Federal, State, local or foreign enforcement agency).
- **Q7: What should a borrower do if a rule change (or FAQ) alters a Borrower's eligibility?**
 - **A:** While there is greater clarity now around the risks associated with the necessity certification, there remains a broader issue of what actions an existing borrower must take when a PPP Rule or FAQ that alters or clarifies PPP eligibility would result in that borrower being ineligible. Question 17 of the SBA FAQs provides that borrowers "may rely on the laws, rules, and guidance available at the time of the relevant application" and do not need to take action based on updated guidance. However, leaning on Question 17 comes with potentially serious pitfalls. First, FAQ is not law or part of an Interim Final Rule, so it is uncertain how much equal weight an FAQ carries. Second, it is unclear whether the SBA draws a meaningful distinction between a *new* law, rule, or guidance that is a true change in the PPP as compared to a clarification, or less, a reassertion of an existing rule. The government may also take the position that the May 18th safe harbor period, while purportedly applying only to the necessity certification, allowed borrowers the opportunity to return funds and any borrower who choose not to do so, in effect, recertified that it is eligible for a PPP loan. A borrower whose eligibility is in question that retained its PPP loan after May 18th may ultimately have to repay loan proceeds in full (potentially immediately or on an expedited basis) and perhaps even criminal and civil penalties (e.g., if a borrower has to re-certify as to eligibility in a forgiveness application) (see "Consequences of a False Filing" below).
- **[Key Update] Q8: In addition to the Form 3508 (as revised on June 16, 2019), what other materials must be submitted as part of the loan forgiveness application and for how long must such materials be retained?**
 - **Payroll Cost Documentation** – Documentation verifying the eligible cash compensation and non-cash benefit payments from the 24-week covered period, consisting of:

- Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees;
- Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the covered (payroll tax filings (*i.e.*, Form 941) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings).
- Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the Borrower included in the forgiveness amount.
- **Nonpayroll Costs** – Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the covered period.
 - **Business Mortgage Interest Payments** – Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the covered period; or lender account statements from February 2020 and the months of the covered period through one month after the end of the covered period verifying interest amounts and eligible payments.
 - **Business Rent or Lease Payments** – Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the covered period or lessor account statements from February 2020 and from the covered period through one month after the end of the covered period verifying eligible payments.
 - **Business Utility Payment** – Copy of invoices from February 2020 and those paid during the covered period and receipts, cancelled checks, or account statements verifying those eligible payments.
- **FTE Reference Period Documentation** – Documentation showing the average number of FTE employees on payroll per week employed by the borrower during the selected reference period (see “**Reductions in Forgiveness Amount above**”). Such documentation may include payroll tax filings and state quarterly business and individual employee wage reporting and unemployment insurance tax filings.
- **Borrower is not required to submit (but must retain) the PPP Schedule A Worksheet included in Form 3508** (which is used to calculate average FTE during the covered period, list salary and compensation paid to employees during the covered period, confirm whether any related reductions to the forgiveness amount are required, and confirm whether any such reductions fall within the safe harbor exceptions (if restored by December 31, 2020)) **and related documentation supporting the calculations in such worksheet, including (as clarified in the revised Form 3508), if applicable:**
 - regarding any employee job offers and refusals, refusals to accept restoration of reductions in hours, firings for cause, voluntary resignations, written requests by any employee for reductions in work schedule, and any inability to hire similarly qualified employees for unfilled positions on or before 12/31/20; and
 - supporting the certification that the borrower was unable to operate between 2/15/20, and the end of the covered period at the same level of business activity as before 2/15/20, due to compliance with requirements established or guidance issued between 3/1/20 and 12/31/20 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19. This documentation must include copies of the applicable requirements for each borrower location and relevant borrower financial records.
- **The Borrower must retain all such documentation in its files for 6 years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.**

- **Demographic Information** – Borrowers can complete an optional form on certain demographic information (including gender, race, ethnicity, and veteran status/relationship).
- **[Key Update] Q9: Which borrowers are eligible to utilize SBA Form 3508EZ?**
 - SBA Form 3508EZ is a simplified forgiveness application that can be utilized by a borrower that certifies that it falls into one of the below categories. Form 3508EZ generally tracks Form 3508 and has similar documentation requirements, but eliminates steps that address the reduction in the forgiveness-amount due to reductions in employee compensation in or FTE employee levels.
 - **Category 1:** Borrower is a self-employed individual, independent contractor, or sole proprietor who had no employees at the time of the PPP loan application and did not include any employee salaries in the computation of average monthly payroll in the Borrower Application Form (SBA Form 2483); **OR**
 - **Category 2:** Borrower did not reduce:
 - (1) annual salary or hourly wages of any employee (that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) by more than 25% during the Covered Period (or Alternative Payroll Covered Period) compared to the period between 1/1/20 and 3/31/20; **AND**
 - (2) Borrower did not reduce the number of employees or the average paid hours of employees between 1/1/20 and the end of the Covered Period. Form 3508EZ expressly states that in assessing eligibility under this second prong, borrowers should ignore reductions that arose from (i) an inability to rehire individuals who were employees on 2/15/20 if the borrower was unable to hire similarly qualified employees for unfilled positions on or before 12/31/20, and (ii) hours that the borrower offered to restore and the employee refused.
 - **Category 3:**
 - (1) Borrower did not reduce annual salary or hourly wages of any employee (that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) by more than 25% during the Covered Period (or Alternative Payroll Covered Period) compared to the period between 1/1/20 and 3/31/20; **AND**
 - (2) Borrower was unable to operate during the Covered Period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.
 - If the borrower selects the second or third category, it is required to provide documentation supporting its certification as to that category.

III. **Overview of the Paycheck Protection Program Liquidity Facility**

On April 9, 2020 the Board of Governors of the Federal Reserve System introduced the Paycheck Protection Program Liquidity Facility (the “PPPLF”) pursuant to section 13(3) of the Federal Reserve Act. The PPPLF came as part of a broader [announcement](#) by the Federal Reserve and [Treasury](#) regarding the implementation of new and expansion of existing Federal lending programs, including the Main Street Lending Program aimed at making new loans available to businesses with up to 10,000 employees. Notably, the guidance provides that a borrower under the PPP can also borrow under the Main Street Lending Program. (For more on the Main Street Lending Program, see our client alert: [Where is Main Street?—Fed Provides Guidance on the Main Street Lending Program](#)).

The terms of the PPPLF are summarized in a [term sheet](#) released by the Federal Reserve in conjunction with its announcement, and further detailed in [frequently asked questions](#) published by the Federal Reserve. The purpose of the PPPLF is to increase liquidity for lenders participating in the PPP (a “PPP Lender”)^{xvii} so that they can

engage in more expansive origination of PPP loans. Under the PPPLF, Federal Reserve Banks will extend credit to PPP Lenders in the form of non-recourse^{xviii} term loans (“PPPLF Loans”) at an interest rate of 0.35%. PPP loans will serve as collateral for a corresponding PPPLF Loan (with such collateral valued at the principal amount of the PPP loan). PPP Lenders can borrow from the PPPLF an amount up to the principal amount of PPP loan collateral that it can pledge to the Federal Reserve. On April 30, 2020, the Federal Reserve [confirmed](#) that a PPP Lenders will be able to pledge as collateral not only PPP loans that it originates, but also PPP loans acquired on the secondary market.

PPP Lenders seeking PPPLF Loans are required to pool all PPP Loans that have the same maturity date, and will receive a single extension of credit secured by such pooled PPP loans. PPP Lenders will need to ensure that they simultaneously pledge all PPP loans with the same maturity date. There will be a separate extension of PPPLF credit for each maturity date of PPP loans that are pledged as collateral. PPP loans cannot be pledged as collateral until the PPP loan has been originated, and cannot be pledged in advance for an extension of credit at a later date.

The terms of a PPPLF Loan will be closely aligned with the underlying PPP loans serving as collateral. The principal amount and maturity period of a PPPLF Loan will be the same as that of the underlying pool of PPP loans. A PPP Lender is required to repay an extension of credit under the PPPLF whenever (i) the PPP Lender has been reimbursed by the SBA for a loan forgiveness (to the extent of the forgiveness), (ii) the PPP Lender has received payment from the SBA representing exercise of a loan guarantee, or (iii) the PPP Lender has received payment from the PPP borrower of an underlying PPP loan. In each such instance, the PPP Lender must promptly report to the lending Federal Reserve Bank any payments on pledged PPP loans so that the corresponding PPPLF Loan can be adjusted accordingly. The maturity of a PPPLF Loan will accelerate (i) in conjunction with the acceleration of an underlying PPP loan upon a default and resulting sale to the SBA by the PPP Lender of such PPP loan to realize on the 100% guarantee, and (ii) to the extent of any loan forgiveness reimbursement received by a PPP Lender from the SBA in respect of the underlying PPP loan.^{xix} PPP Lenders are not required to pay any fees to participate in the PPPLF and there are no prepayment penalties.

PPP Lenders seeking a PPPLF Loan must execute a [PPPLF Letter of Agreement](#) and make a [certification](#) that (i) it is not insolvent and (ii)^{xx} is unable to secure adequate credit accommodations from other banking institutions.^{xxi} The Federal Reserve, through its discount window site, has produced: (i) a page with all information and guidance regarding the PPPLF for [depository institutions](#); and (ii) a page with all information and guidance regarding the PPPLF for [non-depository institutions](#).

The Federal Reserve has indicated that it will publicly disclose certain information regarding the PPPLF. The Federal Reserve will report weekly (on an aggregate nationwide basis) balance sheet items related to the PPPLF. Further, the Federal Reserve has [indicated](#) that it will also produce a monthly report regarding the new CARES Act-related lending facilities, which would include PPPLF, detailing (i) names and details of participants in each facility, (ii) amounts borrowed and interest rate charged, and (iii) overall costs, revenues and fees for each facility. Similar information will also be publicized by the Federal Reserve one year after the termination of the PPPLF.

All depository institutions that originate PPP loans are eligible to borrow under the PPPLF. On April 30, 2020, the Federal Reserve [confirmed](#) that other SBA-qualified PPP lenders, including depository institutions (*i.e.*, banks and credit unions) and non-depository institutions, such as community development financial institutions, small business lending companies licensed by the SBA, and some financial technology firms.

As with the other Federal programs implemented in connection with the CARES Act, it is reasonable to expect that the contours of the PPPLF will continue to evolve. The PPPLF is scheduled to remain in effect until September 30, 2020.

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, related rules and regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

ⁱ The “PPP Rules” include: (i) an [Interim Final Rule](#) governing the PPP generally (published April 2, 2020); (ii) an [Interim Final Rule](#) regarding the application of the SBA’s affiliation rules to the PPP (published April 2, 2020); (iii) an [Interim Final Rule](#) regarding additional eligibility criteria and requirements for certain pledges of loans (with a principal focus on certain self-employed applicants) (published April 14, 2020); (iv) an [Interim Final Rule](#) regarding certain requirements for promissory notes, authorizations, affiliation, and eligibility (published April 24, 2020); (v) an [Interim Final Rule](#) on additional criterion for seasonal employers; (vi) an [Interim Final Rule](#) on disbursements (published April 28, 2020); (vii) an [Interim Final Rule](#) on corporate groups and non-bank and non-insured depository institution lenders (published April 30, 2020); (viii) an [Interim Final Rule](#) on nondiscrimination and additional eligibility criteria (published May 5, 2020); (ix) an [Interim Final Rule](#) regarding extension of the limited safe harbor with respect to certification concerning need for PPP loan request (published May 8, 2020); (x) an [Interim Final Rule](#) on loan increases (published May 13, 2020); (xi) an [Interim Final Rule](#) on eligibility of certain electric cooperatives (published May 14, 2020); (xii) an [Interim Final Rule](#) on the treatment of entities with foreign employees; (xiii) an [Interim Final Rule](#) on the second extension of the limited safe harbor with respect to the necessity certification and lender reporting (published May 20, 2020); (xiv) an [Interim Final Rule](#) on Loan Forgiveness (published May 22, 2020); (xv) an [Interim Final Rule](#) on SBA loan review procedures and related borrower and lender responsibilities (published May 22, 2020); (xvi) an [Interim Final Rule](#) on the eligibility of certain telephone cooperatives (published June 5, 2020); (xvii) an [Interim Final Rule](#) amending the first Interim Final Rule in light of the PPPFA (published June 11, 2020); (xviii) an additional [Interim Final Rule](#) amending the first Interim Final Rule (published June 12, 2020); and (xix) an [Interim Final Rule](#) amending the third (published April 14, 2020) and the sixth (published April 38, 2020) Interim Final Rules .

ⁱⁱ Of the newly appropriated \$310 billion, \$60 billion is expressly allocated for guarantees of loans made by smaller banks, smaller credit unions, and community financial institutions (which encompasses certain community development financial institutions, minority depository institutions and other institutions that provide financing to underserved and economically disadvantaged communities). The PPPHCEA also increased the funding available for the SBA’s economic injury disaster loan (“EIDL”) program (\$50 billion in new funding) and for the EIDL grant program introduced in the CARES Act (\$10 billion in new funding). Additionally, the PPPHCEA appropriated a total of \$100 billion to the Public Health and Social Services Emergency Fund, including \$75 billion to be distributed by the U.S. Department of Health and Human Services to certain eligible healthcare providers (e.g., hospitals) to reimburse expenses and lost profits attributable to coronavirus. Read more in our client alert on the health care funding under the PPPHCEA and the CARES Act (including grants from the Provider Relief Fund).

ⁱⁱⁱ Plus any outstanding amount under a pre-existing EIDL made on or after January 31, 2020 and before April 3, 2020 net of any EIDL advance (as EIDL advances do not require repayment).

^{iv} The PPPFA provides a corresponding extension to the deferral date built into the secondary market sales provisions as well.

^v Under the Interim Final Rule published on May 13, 2020, if a seasonal employer received a PPP loan before the alternative criterion for determining its maximum loan amount (published on April 28, 2020) and would be eligible for a higher maximum loan amount under the alternative criterion, the lender may submit a request to the SBA to upsize and make an additional disbursement in respect of such PPP loan. The lender must have not yet submitted its initial SBA Form 1502 in respect of such PPP loan and the borrower must supply the lender with the required documentation to support the increase. All caps and limitations on PPP loan amounts apply to such an increased loan.

^{vi} The CARES Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount (including, per the PPP Rules, any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees). **The PPP Rules further clarify that affiliation rules are waived even if the borrower received investment from other non-SBIC investors.**

^{vii} The SBA’s determination concerning the certification regarding the necessity of the loan request will not affect SBA’s loan guarantee.

^{viii} For instance, must cash reserves be depleted and other investments or assets liquidated before a borrower can certify? Does access to other (non-forgivable) debt (e.g., undrawn lines of credit), which likely comes at a higher cost of capital, dictate that the borrower cannot make the certification of need? If such other sources of capital are available but can only carry the business for a limited period of time, what financial cushion makes it impossible to make the certification?

^{ix} The Interim Final Rule on Additional Eligibility Criteria and Requirements for Certain Pledges of Loans address in detail the process and requirements for PPP loan applications by self-employed applicants who filed or will file a Form 1040 Schedule C for 2019, including step-by-step instructions for calculating payroll costs depending on whether such applicant has or does not have employees.

^x SBA guidance clarifies that this treatment follows the computation of self-employment tax from IRS Form 1040 Schedule SE Section A line 4 and removes the “employer” share of self-employment tax, consistent with how payroll costs for employees in the partnership are determined.

^{xi} Initial Forms 1502 for PPP loans approved prior to April 28, 2020 are due on May 22, 2020. For all other PPP Loans, the initial Forms 1502 are due within 20 calendar days after the PPP loan is approved.

^{xii} Internal Revenue Service, Notice 2020-32.

^{xiii} Calculations to be confirmed by the lender (via review of supporting materials provided with the Form 3508) include (i) the amount of Cash Compensation, Non-Cash Compensation, and Compensation to Owners (claimed on Lines 1, 4, 6, 7, 8, and 9 of PPP Schedule A), (ii) the amount of Business Mortgage Interest Payments, Business Rent or Lease Payments, and Business Utility Payments (claimed on Lines 2, 3, and 4 of the PPP Loan Forgiveness Calculation Form), and (ii) the calculation of payroll costs divided by 0.75% (on Line 10 of the PPP Loan Forgiveness Calculation Form).

^{xiv} A lender must provide the SBA as part of its a forgiveness approval or denial determination: (1) the PPP Loan Forgiveness Calculation Form; (2) PPP Schedule A; and (3) the (optional) PPP Borrower Demographic Information Form

^{xv} EIDL borrowers may also be subject to fraud charges (and resulting fines and imprisonment) under 18 USC § 1040, which addresses fraud in connection with major disaster or emergency benefits.

^{xvi} The SBA has confirmed that, for purposes of the PPP, an applicant's participation in an employee stock ownership plan (ESOP) does not trigger application of the affiliation rules.

^{xvii} While referred to here as PPP Lenders (as these are the institutions that ultimately lend to the end-recipients of PPP loans), the term sheet and FAQ refer to such institutions in the context of the PPPLF as PPPLF borrowers.

^{xviii} Non-recourse status of the PPPLF Loan may change if the PPP Lender breaches any of the representations, warranties, or covenants in the PPPLF documentation, or engages in fraud/misrepresentation in connection with participation in the PPPLF.

^{xix} As described in [Interim Final Rule](#) published collectively by the Federal bank regulatory agencies (Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC)), for participating eligible financial institutions: (i) the PPPLF is considered to be zero percent risk for purposes of risk-based and leverage-based capital requirements because PPP loans are 100% guaranteed by the SBA; and (ii) loans extended by the PPPLF to participating eligible financial institutions will not increase the regulatory capital requirements for those institutions. The Interim Final Rules take effect immediately, but are subject to a 30-day public comment period.

^{xx} However, the Federal Reserve has clarified that this certification may be based on economic conditions in the market or markets intended to be addressed by the PPPLF facility. The certifying PPP Lender may consider current economic or market conditions as compared to usual economic or market conditions, including the availability and price of credit for small businesses with diminished revenue streams. For purposes of certifying that it is unable to secure adequate credit accommodations elsewhere, such PPP Lender does not need to establish that credit is unavailable, rather that credit accommodations may be available, but at prices or on conditions that are inconsistent with a normal, well-functioning market.

^{xxi} Certain additional documentation requirements apply for depository institutions that have not already established access to the Federal Reserve's lending programs for depository institutions ("discount window" programs).

