GUIDE to the PAYROLL PROTECTION PROGRAM

By Sanjay Mody, Partner

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ISSUE	RULE
Borrower Eligibility [§ 1102(a)(1)(D)] [Interim Final Rule dated April 2, 2020, pp. 5-8] [Treasury FAQ dated April 6, 2020 #2]	**<u>Business & Nonprofit Entities</u>** - Small business concerns as defined in Small Business Act and subject to affiliation rules (see below) - 501(c)(3) nonprofit organizations; - 501(c)(19) tax-exempt veterans organizations; - Tribal business concerns as defined in Small Business Act; - Any other businesses (but see below); (a) (x) (i) with fewer than 500 employees whose principal place of residence is in the United States (ii) that meet the SBA's employee-based size standards for certain industries, whichever is greater; and (y) that were in operation on February 15, 2020 <u>or</u> (b) that meet both tests in SBA's "alternative size standard" as of March 27, 2020: (1) maximum tangible net worth of the business is not more than $15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million. **<u>Individuals</u>** - individuals operating as sole proprietors, independent contractors, or eligible self-employers - that were in operation on February 15, 2020

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	<u>Ineligible Borrowers</u> - Businesses involved in illegal activities; - Household employers; - Businesses with 20% + equity owners who are incarcerated or subject to indictment or criminal investigation; - SBA borrowers that are currently delinquent or that defaulted in last 7 years and caused a loss to the government; or - Businesses listed in 13 CFR 120.110 [see also SOP 50 10 5(J)]: (a) Financial businesses primarily engaged in business of lending, e.g., banks, finance companies and factors (b) Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (but note eligible passive businesses include hotels, motels, nursing homes, assisted living facilities); (c) Life insurance companies; (d) Businesses located in a foreign country (U.S. businesses owned by aliens may qualify); (e) Pyramid sale distribution plans; (f) Businesses deriving more than 1/3 of gross annual revenue from legal gambling activities; (g) Businesses engaged in illegal activities; (h) Private clubs and businesses that limit number of memberships for reasons other than capacity; (i) Government-owned businesses (except Native American tribal businesses); (j) Businesses engaged in teaching religion or religious beliefs; (k) [reserved]; (l) Loan packagers that earn more than 1/3 of gross annual revenue from packaging SBA loans; (m) Businesses with an associate who is incarcerated or has been indicated for felony or crime of moral turpitude; (n) Businesses in which the Lender owns an equity interest; (o) Businesses of a prurient sexual nature; (p) Businesses that have previously defaulted on a Federal

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	loan resulting in a loss; (q) Businesses engaged in political or lobbying activities; (r) Speculative businesses (e.g., oil wildcatting) [Where the IFR and 13 CFR 120.110 conflict, unclear which governs]
Affiliation Rules [§ 1102(a)(1)(D)(vi)] [Supplemental Rule dated April 4, 2020, pp. 4-11] [Treasury Fact Sheet on Affiliation Rule dated April 3, 2020] [Treasury FAQs ##4, 5, 6]	Borrowers generally will be considered together with their affiliates for purposes of determining PPP eligibility. Entities may be considered affiliates based on equity ownership (more than 50%), stock options, convertible securities and agreements to merge; management; and identity of interest. * These affiliation rules do <u>not</u> apply to: (a) business concerns assigned NAICS code beginning with 72; (b) concerns operating as a franchise and assigned a franchise identifier code; (c) concerns receiving financial assistance from company under section 301 of Small Business Investment Act; and (d) faith-based organizations otherwise be disqualified from participation in PPP because of affiliations that are part of their religious exercise. Borrowers are responsible for determining which entities are affiliates and determining the employee headcount. Lenders are permitted to rely on borrowers' certifications.
Maximum Loan Amount Computation [§ 1102(a)(1)(E)] [IFR pp. 8-11] [Treasury FAQs ##7, 15, 16]	Lesser of (a) 2.5 times average monthly payroll costs (excluding compensation above $100,000 and any compensation of employees whose principal residence is outside U.S.) for one-year period before loan is made plus EIDL loan amount (excluding any EIDL advance)*; or (b) $10 million.

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	[for seasonal employers, average monthly payroll costs for 12 week period beginning February 15, 2019 or March 1, 2019 (at borrower's election) and ending June 30, 2019] Computation of "payroll costs" include: (a) Gross employee compensation in the form of salary, wages, commissions or similar compensation; (b) Cash tips; (c) Payment for vacation, parental, family, medical or sick leave; (d) Allowance for separation or dismissal; (e) Payments for group health care coverage, including insurance premiums and retirement; and (f) State and local taxes. For independent contractors and sole proprietors, "payroll costs" include wage, commissions, income, or net earnings from self-employment or similar compensation. Computation of "payroll costs" does <u>not</u> include: (a) Compensation of any employee whose principal residence is outside U.S.; (b) Compensation above $100,000 (non-cash benefits excluded); (c) Qualified sick and family leave wages for which credit is allowed under Families First Coronavirus Response Act; (d) Payments to independent contractors; and (e) Employer-side federal payroll taxes on employee wages. * Outstanding EIDL loans must be refinanced with PPP loan proceeds
Loan Terms [§ 1102(a)(1)(F)(v),(J),(K),(L),(M)] [IFR pp. 11-13]	- 1% interest rate - 2-year maturity - Repayment automatically deferred for 6 months - SBA 100% guaranty - No personal guaranty required - No collateral required

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Loan Forgiveness Amount [§ 1106(b)] [IFR pp. 13-14]	Loan forgiveness amount may be up to sum of principal and interest for PPP loan. Sum of the following for the 8-week period following lender's first disbursement of PPP loan to borrower: (a) payroll costs; (b) mortgage interest on obligations incurred before February 15, 2020; (c) rent payments on leases dated before February 15, 2020; (d) Utility payments under service agreements dated before February 15, 2020; Provided that no more than 25% of the loan forgiveness amount may be for non-payroll costs.
Reduction of Loan Forgiveness Amount [§ 1106(d)(2)]	Reduction Based on Reduction in Number of Employees - based on any reduction in the average number of full-time equivalent monthly employees during the 8-week period beginning on the loan origination date as compared to, at the borrower's option, the average number of full-time equivalent monthly employees during (a) the period February 15, 2019 to June 30, 2019 or (b) the period January 1, 2020 to February 29, 2020. The amount of reduction is based on this ratio, *e.g.*, if there were 50 full time employees during the 8-week covered period but 100 employees during the selected prior comparison period, the loan forgiveness amount would be reduced by ½ (*i.e.*, 50/100 times the original forgiveness amount). Reduction Relating to Salary and Wages – based on any reduction greater than 25% in total salary or wages of any employee during the 8-week covered period beginning on the loan origination date (note that this only applies with respect to employees who did not receive more than $100,000 in annualized salary or wages in 2019. The applicable comparison period in determining whether the

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	reduction is greater than 25% is the most recent full quarter before the covered period. In essence, there would be no reduction of the loan forgiveness amount relating to salary and wages if a company were to only (a) reduce the wages of employees earning over $100,000 by any amount, and/or (b) reduce the wages of employees earning less than $100,000 by less than 25%. The "penalty" rules above will not apply if (a) a borrower that has already laid off workers before April 27, 2020 eliminates the reduction in number of employees on or before June 30, 2020 or (b) a borrower that has reduced the salaries of eligible employees by more than 25% before April 27, 2020 eliminates such reduction on or before June 30, 2020. We assume that a borrower may not lay off workers after April 27th and still obtain loan forgiveness.
Process for Requesting Loan Forgiveness [§ 1106(e),(f),(g)]	Borrower must apply to lender for forgiveness and submit (i) documentation verifying number of FTE employees on payroll and pay rates for the 8-week covered period for loan forgiveness and the prior comparable periods, including: (a) payroll tax filings and (b) state income, payroll and unemployment insurance filings; (ii) documentation verifying payments on covered mortgage obligations, covered lease obligations and covered utility payments; and (iii) certification that documentation is true and correct and loan forgiveness amount was used to retain employees and make payments for mortgage, rent or utility payments. Lenders must issue decision on loan forgiveness within 60 days of request.
Loan Permitted Uses [§ 1102(a)(1)(F)]	- Payroll costs; - Group health care benefits and insurance premiums;

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[IFR pp. 15-16]	- Mortgage interest payments; - Rent payments; - Utility payments (e.g., electric, gas, water, telephone and internet access) - Interest on debt obligations incurred before February 15, 2020; - Refinancing EIDL loan made between January 31, 2020 and April 3, 2020; Provided that no more than 25% of loan proceeds may be used for non-payroll costs.
Borrower Certification Requirements [§ 1102(a)(1)(G)] [IFR pp. 17-18] [Treasury FAQs #5]	- Borrower was in operation on February 15, 2020 and had employees or paid independent contractors; - Borrower is eligible to receive a PPP loan (including meeting size requirements and subject to the affiliation rules); - Current economic uncertainty makes loan request necessary to support applicant's ongoing operations; - Funds will be used for payroll, mortgage interest payments, lease payments and utility payments (subject to 25% payroll costs requirement described above) and that, if funds are misused, the government may hold borrower liable; - Documentation verifying number of FTE employees on payroll and dollar amounts of payroll costs, mortgage interest payments, rent payments, and utilities for 8-week period following loan origination date will be provided to lender; - Loan forgiveness will be provided for sum of documented payroll costs, mortgage interest payments, rent payments, and utilities for 8-week period following loan origination date (subject to 25% payroll costs requirement described above); - Borrower will not receive another loan under PPP between February 15, 2020 and December 31, 2020; - Information provided in application and supporting documentation is true and accurate in all material respects; and

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	- Acknowledgement that lender will verify loan amount using tax documents submitted to lender (and that such tax documents are identical to those submitted to IRS).
Application Deadline & Process; Lender Liability [§ 1106(h)] [IFR pp. 5, 24] [Treasury FAQs ## 1, 4]	Borrowers submit PPP applications to lenders (not SBA directly). Application deadline is June 30, 2020. Borrowers are responsible for providing an accurate calculation of payroll costs and attest to the accuracy of those calculations on the Borrower Application Form. Lenders are permitted to rely on borrower certifications to determine borrower eligibility and use of loan proceeds, and to rely on borrower documents to determine qualifying loan amount and eligibility for loan forgiveness. With respect to calculation of average monthly payroll costs, lenders "are expected to perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents" and "minimal review of calculations based on a payroll report by a recognized third-party payroll processor would be reasonable." SBA will hold lenders harmless for borrowers' failure to comply with program criteria and lender's reliance on borrower documents and attestation.
Lender Disbursement of PPP Loan Proceeds [Treasury FAQs #20]	Lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.

Disclaimers – This guide proposes to summarize several of the more relevant sections of the PPP Loan Program in a manner that will be helpful to those seeking a rudimentary understanding of the statutory and regulatory framework of this new program as it stands, as of April 7, 2019. It is not intended to be dispositive of on all of the eligibility and applicability issues this new program presents to a potential participant, nor should it be viewed as legal advice on any particular issue.

For questions or concerns, please contact Sanjay Mody, Partner, at smody@windelsmarx.com or your Relationship Partner.

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