

The background is a solid teal color. On the left side, there are several white geometric shapes: a large triangle pointing downwards, a smaller triangle pointing upwards, and a curved shape that looks like a stylized 'A' or a similar letter. The text is positioned on the right side of the image.

**ADVAMED ACCEL
MEMBER WEBINAR:
PAYCHECK
PROTECTION
PROGRAM**

Thursday, April 9, 2020
2:00 PM – 3:00 PM ET

WELCOME AND INTRODUCTIONS

Patrick Brennan, Vice President, AdvaMed Accel

MEETING AGENDA

- Welcome and Introductions 2:00 p.m. – 2:05 p.m.
Patrick Brennan, Vice President, AdvaMed Accel
- Legislative Update:
Paycheck Protection Program and further stimulus 2:05 p.m. – 2:20 p.m.
Duane Wright, Vice President, Government Affairs, AdvaMed
- Paycheck Protection Program:
Eligibility, the Affiliation Rule, and Application Requirements 2:20 p.m. – 2:40 p.m.
Paula Valencia Galbraith, Attorney, Mintz
- Q&A, Discussion, and Member Feedback 2:40 p.m. – 3:00 p.m.
All Participants

LEGISLATIVE UPDATE: PAYCHECK PROTECTION PROGRAM AND FURTHER STIMULUS

*Duane Wright, Vice President, Government Affairs,
AdvaMed*

PAYCHECK PROTECTION PROGRAM: ELIGIBILITY, THE AFFILIATION RULE, AND APPLICATION REQUIREMENTS

Paula Valencia-Galbraith, Attorney, Mintz



MINTZ

**The CARES Act
Coronavirus Economic Relief Options
from the Small Business Administration**

April 9, 2020

Paula Galbraith
Attorney
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center, Boston, MA 02111
+617.210.6854
pvgalbraith@mintz.com | Mintz.com

The Paycheck Protection Program



What is the PPP?

- The “**Coronavirus Aid, Relief, and Economic Security Act**” (**CARES Act**) is a \$2 trillion economic relief bill to help individuals and business cope with the financial chaos created by the COVID-19 pandemic.
- The **Paycheck Protection Program (PPP)**, a key feature of the CARES Act, is a new loan program established under the SBA’s existing 7(a) Loan Program, designed to provide loans to small business with **less than 500 employees** (including sole proprietorships, independent contractors and self-employed persons), private non-profit organizations or 501(c)(19) veterans in order to incentivize these businesses to keep their workers on the payroll during the COVID-19 pandemic.

Key Features of PPP Loans

- Loans will be made by existing SBA 7(a) lenders or through any federally insured depository institution, or federally insured credit union that is participating in the program. Consult your bank as to whether it is participating in the program and as to any particular application procedures.
- The SBA will fully forgive the principal amount of a PPP loan if all employees are kept on the payroll for eight weeks and loan proceeds are used for “**payroll costs**”, rent, mortgage interest, or utilities (at least 75% of the loan proceeds must be used for payroll costs).
- The maximum loan amount is the lesser of (i) \$10M or (ii) the amount calculated by a payroll-based formula (further explained in a later slide).
- PPP loan interest rates are 1%, and have a two-year maturity date.
- Applications accepted beginning Friday, April 3rd. The PPP will be in effect until June 30, 2020 **or until the funds are exhausted**. \$349,000,000,000 initially authorized for the PPP. Indications are this amount will be increased.

Who is Eligible to Participate in the PPP?

- Your business is eligible for a PPP loan if:
 - The current economic uncertainty makes your loan request necessary to support the ongoing operations of the business
 - Your business and its “affiliates” have 500 or fewer employees whose principal place of residence is in the United States, or your business operates in a certain industry and meets the applicable SBA Size Standards for that industry, and
 - Your business is a small business concern as defined in the Section 3 of the Small Business Act (independently owned and operated, not dominant in its field of operation and meets the SBA Size Standards); and
 - Your business was in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.
- You are also eligible for a PPP loan if as of February 15, 2020 you were an individual who operates under a sole proprietorship, an independent contractor or an eligible self employed individual.

How Many Employees Do I Have?

- Independent contractors do not count as employees.
- For purposes of determining the number of employees employed by an applicant, the employees of an applicant’s “**affiliates**” must also be counted.
- Entities are “**affiliates**” of each other when one controls or has the power to control the other, or a third party controls or has the power to control both. It does not matter where control is exercised, so long as the power to control exists.
- For VC-backed small businesses, the applicant’s venture investors (and some or all of their portfolio companies) may be **affiliated** with the applicant if the VC investor owns 50% or more of the company or has certain control rights, in which case the “employee” count for an applicant will also include employees of the VC investment fund and employees of some or all of the VC investor’s other portfolio companies.

What is an “Affiliate”?

- The SBA’s Four Tests for Affiliation

1. **Affiliation based on ownership.**

Ability to control more than 50% of the applicant's voting equity, if no 50%+ holders, the SBA will deem the Board of Directors or President or Chief Executive Officer (CEO) (or other officers, managing members, or partners who control the management of the concern) to be in control of the concern. Minority shareholder may be in control, if shareholder has the ability, under the applicant's charter, by-laws, or shareholder's agreement, **to prevent a quorum or otherwise block action by the board of directors or shareholders.**

2. **Affiliation arising under stock options, convertible securities, and agreements to merge.**

3. **Affiliation based on management.**

Affiliation arises where the CEO/President of the applicant (or other officers, managing members, or partners who control the management of the concern) also controls the management of one or more other concerns.

4. **Affiliation based on identity of interest.** Affiliation arises when there is an identity of interest between close relatives, with identical or substantially, identical business or economic interests (such as where the close relatives operate concerns in the same or similar industry in the same geographic area).

Determining “Affiliate” Status

- Questions to ask:
 - Does any stockholder hold more than 50% of the applicant’s outstanding shares of stock on a fully-diluted basis? If so, that stockholder is an affiliate. If no, then analyze the power to appoint directors and any negative controls over day-to-day operations of your minority stockholders.
 - Does any stockholder who holds less than 50% of the applicant’s outstanding shares of stock on a fully-diluted basis, have the right to appoint a majority of the applicant’s board? If so, that stockholder is an affiliate. If no, then analyze the negative controls over day-to-day operations of any minority stockholders.
 - Does any stockholder who holds less than 50% of the applicant’s outstanding shares of stock on a fully-diluted basis, control significant protective provisions, enabling that stockholder, **acting on its own**, to block meaningful corporate action so that the stockholder could be deemed to control the applicant?
- Analyze protective provisions in the applicant’s charter, negative covenants in any Investors’ Rights Agreement or Stockholder Agreement and actions requiring the approval of a director appointed by a minority stockholder.

Determining “Affiliate” Status

- Negative controls likely to imply “affiliate” status (based on case law from administrative judges):
 - Issuing dividends
 - Hiring or firing company officers
 - Purchasing equipment
 - Bringing or defending a lawsuit
 - Changing or determining officer compensation
 - Controlling operating budgets or incentive plans
 - Incurring debts or obligations below a material threshold
 - Amending or terminating lease agreements
 - Mortgaging, alienating or encumbering assets below a material threshold

How Do I Calculate How Much I Can Borrow?

Loans are intended to cover two months of “burn” for payroll costs, office space and utilities by lending 250% of two months of “payroll costs”. To calculate the maximum amount an applicant can borrow:

- Step 1: Aggregate “**payroll costs**” from the last twelve months for employees whose principal place of residence is the United States.
- Step 2: Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year (maximum monthly amount includable for any employee is \$8,333).
- Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).
- Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.
- Step 5: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL COVID-19 loan (because it does not have to be repaid).

How Do I Calculate “Payroll Costs”?

- “Payroll costs” consist of:
 - Compensation paid to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation;
 - Cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips);
 - Payment for vacation, parental, family, medical, or sick leave;
 - Allowance for separation or dismissal;
 - Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement;
 - Payment of state and local taxes assessed on compensation of employees; and
 - for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment or similar compensation

Items Excluded from the Calculation of “Payroll Costs”

- Any compensation of an employee whose principal place of residence is outside of the United States;
- The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;
- Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee’s and employer’s share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees;
- Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act.

Other Items to Note

- Borrowers may receive only one PPP loan.
- PPP Loans are “first-come, first-served”
- Initial principal and interest payments (if not forgiven) will not be due until six months following the distribution of the PPP loan.
- The entire principal and interest amount of a PPP loan may be forgiven if a borrower uses all of the loan proceeds for forgivable purposes described below during the 8 week period after the loan is received by the borrower, and employee and compensation levels are maintained during this period. Borrowers will have to apply to their lender for forgiveness.
 - Forgivable Purposes include:
 - “Payroll costs”
 - Payments of interest on mortgage obligations incurred before February 15, 2020
 - Rent payments on leases dated before February 15, 2020
 - Utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the PPP loan
 - Not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs. Borrowers will have to document proceeds used for payroll costs in order to determine the amount of forgiveness.

Other Items to Note

- Loan proceeds may be used to pay interest on any other debt obligation incurred before February 15, 2020 but these amounts are not forgivable.
- No collateral or personal guarantees are required.
- Applicants with prior SBA loan defaults are not eligible.
- No fees are charged to PPP borrowers.
- The amount of forgiveness will be reduced if a borrower conducts layoffs or cuts salaries during the two-month loan period.
- Layoffs between February 15, 2020 and April 26, 2020 will not result in forgiveness reduction if layoffs are reversed prior to June 30, 2020.

Other Items to Note

- Borrowers will have to certify:
 - Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant
 - Funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments and utility payments
 - There is no other SBA loan or application for the same purpose
 - Borrowers will have to provide documentation verifying the number of FTEs on payroll as well as the dollar amounts of payroll costs, mortgage interest payments, rent payments and utilities for the eight week period following the loan
 - Application is true and accurate in all material respects
- Lenders will confirm the eligible loan amount using Borrower's tax documents, payroll processor records, payroll tax filings, 1099-MISCs, or income or expenses from a sole proprietorship.
- Penalties and potential personal liability for fraud.

Economic Injury Disaster Loans

- CARES Act also expands access to the SBA's **Economic Injury Disaster Loan (EIDL)** program to small businesses.
- Applicant's can apply for loans under the PPP and EIDL program but cannot use the loans for the same purpose.
- EIDL Key Features
 - Applications can be made anytime prior to December 31, 2020
 - No personal guarantee for loans under \$200,000, above that amount, personal guarantees required from all 20%+ owners
 - Initial "grants" of up to \$10,000 within three days of application and no requirement to repay this grant
 - No forgiveness beyond \$10,000 advance
 - Maximum loan amount is \$2M
 - Must demonstrate temporary loss of revenue to due COVID-19 pandemic

Other Potential Relief

- Debt relief for non-disaster SBA loans-SBA will cover all loan payments on outstanding SBA loans for six months.
- Potential modification of existing government contracts
- Delay of payment of employer payroll taxes-Allows taxpayers to defer paying the employer portion of certain payroll taxes through the end of 2020, with all 2020 deferred amounts due in two equal installments, one at the end of 2021 and the other at the end of 2022. **Deferral is not available to employers receiving assistance through the PPP.**
- Employee Retention Credit for Employers Subject to Closure or Experiencing Economic Hardship. **Credit is not available to employers receiving assistance through the PPP.**

See:

<https://www.sba.gov/>

Practical Advice

- Apply quickly if interested!
- Be prepared for an application and lending process that is very likely to be disjointed
- Consider amending existing investment documents to remove “affiliate” control provisions, if applicable, prior to submitting an application.
- Expect further clarification of loan requirements and potential modifications of affiliate issues
- Contact your bank as soon as possible if interested in applying and develop a secondary lending source

TREASURY/SBA GUIDANCE

- *Frequently Asked Questions (April 8) - [here](#)*
- *Applicable Affiliation Rules (April 3) - [here](#)*
- *A Guide to the SBA's Size Program and Affiliation Rules (June 2018) - [here](#)*

ADVAMED COVID-19 MEDTECH RESOURCE PAGE:

<https://www.advamed.org/issues/global-trade/coronavirus-outbreak/advamed-covid-19-member-resource-center>

Q&A, DISCUSSION, AND MEMBER FEEDBACK

Raise your hand in the GoToWebinar Control Panel, and your line will be unmuted.

Post questions in the Questions box.

*Send additional questions feedback to:
accel@advamed.org*

THANK YOU!