



### The PPP Journey: From Application, to Loan Closing, Through Forgiveness, and Beyond!



Welcome!
We will start momentarily.



### The PPP Journey: From Application, to Loan Closing, Through Forgiveness



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## Coronavirus Aid, Relief and Economic Security (CARES) Act

- CARES Act is intended to addresses economic impacts of, and otherwise responds to, the COVID-19 (Coronavirus) outbreak and includes provisions related to Small Business Administration loan programs.
- Passed on March 27, 2020 and includes \$2
   Trillion in benefits



### **Paycheck Protection Program**

- The Paycheck Protection Program initially authorized (Phase 1) up to \$349 billion in loans toward job retention and certain other expenses, but an additional \$321 billion was added in Phase 2.
- Small businesses and eligible nonprofit organizations, Veterans organizations, Tribal businesses described in the Small Business Act, agricultural enterprises, as well as individuals who are selfemployed or are independent contractors, are eligible if they also meet certain size standards.
- Eligible recipients may qualify for a loan up to \$10 million based on 2.5 times the average monthly payroll costs.
- Loan payments will be deferred for six months.
- If you maintain your workforce, SBA will forgive the portion of the loan proceeds that are used to cover 8 weeks of payroll and certain other expenses following loan origination.



### PPP Loan Metrics through May 16, 2020

Number of Approved Loans	4,341,145
Dollar Value – Approved Loans	\$513,271,137,359
Number of Lenders	5,496

- Approved loans reflects funded loans and cancellations.
- Cancellations does not include duplicative loans, loans not closed for any reason or loans that have been repaid.
  - (Source: SBA.gov)



### Approved PPP Loans through May 16, 2020

#### **Loan Size**

Loan Size	Approved	Approved Dollars	% of	% of
Loan Size	Loans	Approved Dollars	Count	Amount
\$50K and Under	2,764,582	\$51,887,290,078	63.7%	10.1%
>\$50K - \$100K	644,259	\$45,907,851,290	14.8%	8.9%
>\$100K - \$150K	282,221	\$34,556,740,347	6.5%	6.7%
>\$150K - \$350K	368,505	\$82,842,933,567	8.5%	16.1%
>\$350K - \$1M	197,741	\$112,599,464,898	4.6%	21.9%
>\$1M - \$2M	53,142	\$73,630,589,334	1.2%	14.3%
>\$2M - \$5M	25,624	\$76,215,389,190	0.6%	14.8%
>\$5M	5,071	\$35,630,878,655	0.1%	6.9%

\* Overall average loan size is: \$118K.



## Top States for PPP Loans (by total loan amount)\*

		Approved Loans \$	No. Loans	Avg. Loan Size
1.	California	\$66,500,354,602	505,798	\$131,476
2.	Texas	\$40,479,177,091	346,839	\$116,682
3.	New York	\$37,798,829,252	281,058	\$134,487
4.	Florida	\$30,341,950,424	325,845	\$93,117
5.	Illinois	\$22,156,267,843	176,819	\$125,304
22.	Louisiana	\$7,218,312,417	65,158	<i>\$110,781</i>

\*Not clear if based on domicile of Borrower or Lender (Source SBA.gov)



### The statutory provision for PPP loan forgiveness in Section 1106(b) of the CARES Act provides:

- b) "FORGIVENESS.—An eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the sum of the following costs incurred and payments made during the **covered period**:
  - 1) Payroll costs.
  - 2) Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).
  - 3) Any payment on any covered rent obligation.
  - 4) Any covered utility payment."



### **Loan Forgiveness (Payroll)**

- Under the CARES Act, four categories of expenses are forgivable if incurred during an 8week period after the disbursement of loan funds:
  - 1. Payroll costs, including gross salaries, gross wages, gross tips, gross commissions, paid leave and allowances for dismissal or separation (up to a cap of \$100,000 of annualized pay per employee; a maximum of \$15,385 per individual for the eightweek period), employer-paid health insurance, employer-paid 401(k) matching contributions, and employer-paid state and local taxes on payroll;



### **Eligible Payroll Costs**

Payroll costs consist of compensation 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.



### **Eligible Payroll Costs**

- Borrowers are generally eligible for forgiveness for the payroll costs paid and payroll costs incurred during the eight-week (56day) Covered Period (or Alternative Payroll Covered Period) ("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 (or Alternative Payroll 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 (or Alternative Payroll Covered Period).
- For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of \$100,000, as prorated for the covered period. Count payroll costs that were both paid and incurred only once.



### **Ineligible Payroll Costs**

- What is expressly excluded from the definition of payroll costs?
- i. Any compensation of an employee whose principal place of residence is outside of the United States;
- ii. The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;
- iii. 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; and
- iv. Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act



### Loan Forgiveness (Non-Payroll)

- Business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020;
- Business payments for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020; and
- 3. Payments of interest on any business mortgage obligation on real or personal property incurred before February 15, 2020.



### **Loan Forgiveness**

No more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs (rent, utilities, mortgage interest).



### **Covered Period**

Section 1106(a) defines "covered period" for purposes of PPP loan forgiveness as:

"the term "covered period" means the 8- week period beginning on the date of the origination of a covered loan;"



## The SBA added clarity to the definition of "covered period" in an FAQ issued on April 8, 2020:

20. Question: The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week period; when does that eight-week period begin?

Answer: The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.



Then, the SBA added "guidance" in determining the 8-week covered period through the recentlyissued Forgiveness Application and Instructions

The Loan Forgiveness application requires Borrowers to identify the "Covered Period" for its loan (which the Instructions expressly state is a 56-day period)

and/or

the "Alternative Payroll Covered Period"



### **Alternative Payroll Covered Period**

"For administrative convenience, Borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the eight-week (56-day) period that begins on the first day of the their first pay period following their PPP Loan Disbursement Date (the "Alternative Payroll Covered Period")"



### **Example of Alternative Payroll Covered Period:**

- Loan proceeds disbursed April 20; first day of first pay period is April 26; last day of Alternative Payroll Covered Period is June 20 (as opposed to June 14)
- Applicable only to calculating loan forgiveness with respect to eligible payroll costs, not nonpayroll costs
- Result: some Borrowers, voluntarily, may have to navigate 2 different 8-week forgiveness periods in the Loan Forgiveness Application



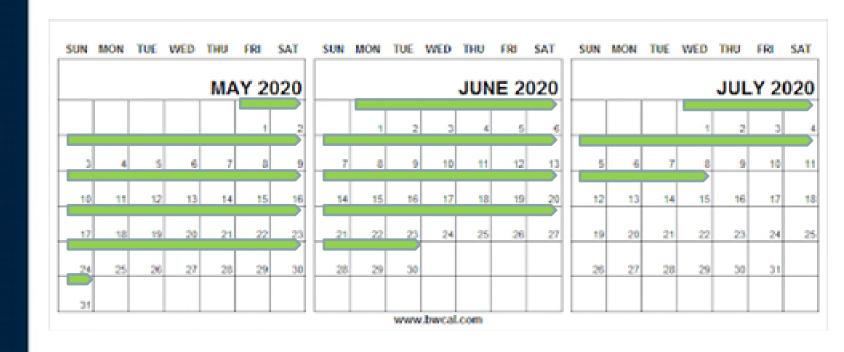
# Difference between period to calculate PPP loan amount and PPP loan forgiveness period

The CARES Act's Paycheck Protection Program created a natural "mismatch" between the time period used to calculate the maximum PPP loan amount (i.e., Avg. Monthly Payroll Costs x 2.5, roughly 10 weeks +) and the time period to use the loan proceeds and seek forgiveness (i.e. 8 weeks, or 56 days)

(avg.) Month vs. Weeks vs. Days



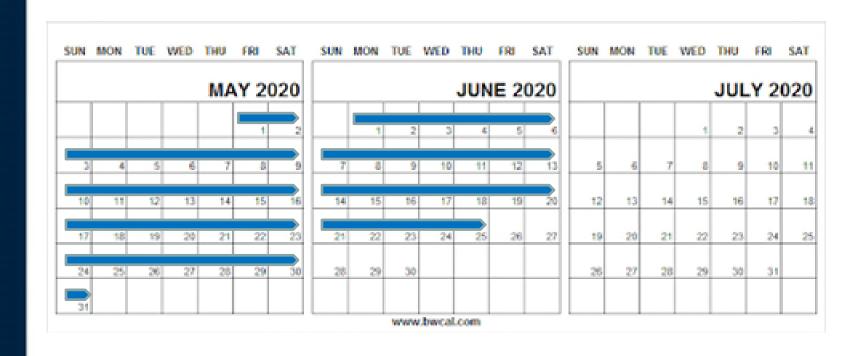
## PPP Loan Amount = 2.5 times Average Monthly Payroll Costs (roughly, 2-1/2 months or 10 weeks + or 75 days)





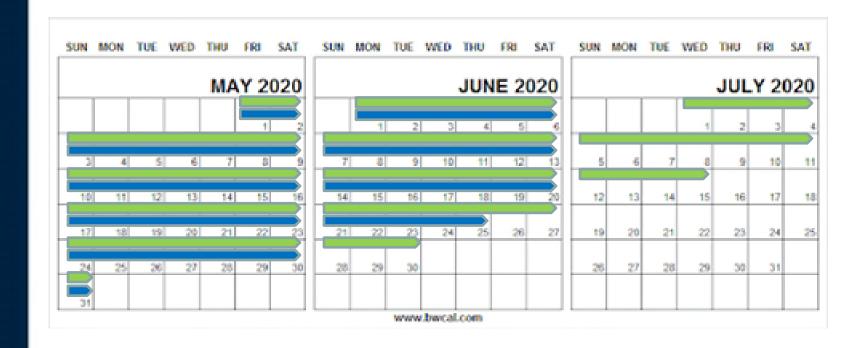
## But the PPP Loan *FORGIVENESS* "Covered Period" is only 8 weeks (56 days)

(assumes loan funding on May 1, 2020)





# versus FORGIVENESS "Covered Period" 8 weeks (56 days)





## Adjustments to Forgiveness Amount for Reductions in FTE count

- Statutory origin: Section 1106(d)(2) of the Cares Act
- Premise: If an employer receives a PPP Loan in order to continue to fund payroll for an 8-week period and maintain its level of employees, but subsequently reduces its number of employees, there should be a proportionate reduction in the amount of forgiveness the employer receives.



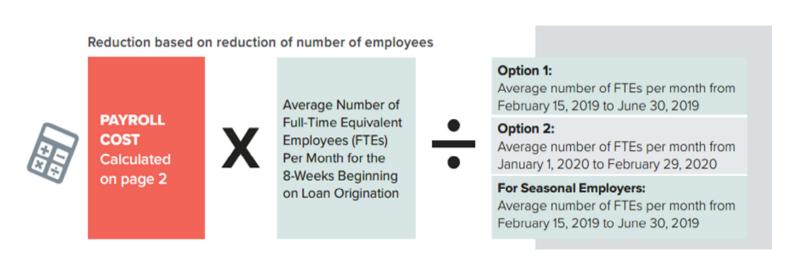
#### Statutory basis: Section 1106(d)(2):

- (2) REDUCTION BASED ON REDUCTION IN NUMBER OF EMPLOYEES.
- (A) IN GENERAL.—The amount of loan forgiveness under this section shall be reduced, but not increased, by multiplying the amount described in subsection (b) by the quotient obtained by dividing—(i) the average number of full-time equivalent employees per month employed by the eligible recipient during the covered period; by
  - (ii)(I) at the election of the borrower—
- (aa) the average number of full-time equivalent employees <u>per month</u> employed by the eligible recipient during the period beginning on February15, 2019 and ending on June 30, 2019; or
- (bb) the average number of full-time equivalent employees <u>per month</u> employed by the eligible recipient during the period beginning on **January 1**, **2020 and ending on February 29**, **2020**; or
- (II) in the case of an eligible recipient that is seasonal employer, as determined by the Administrator, the average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on February 15, 2019 and ending on June 30, 2019.



### **Reduction in Loan Forgiveness**

If a borrower reduces the number of its fulltime employees during the 8-week period after the disbursement of loan funds, the forgiveness amount will be reduced on a percentage basis as follows:





### Section 1106(d)(2) poses 2 critical questions:

- How does a Borrower determine, and count, the number of FTEs?
- 2. How does a Borrower determine the average number of FTEs per month for each of the reference periods?



### The CARES Act provides only general language as to how to calculate average number of FTE's:

Section 1106(d)(2)(B):

"CALCULATION OF AVERAGE NUMBER OF EMPLOYEES.—For purposes of subparagraph (A), the average number of full-time equivalent employees shall be determined by calculating the average number of full-time equivalent employees **for each pay period** falling within a month."

Additionally, the Cares Act does not provide a method to determine the number of FTEs.



## SBA's Interim Final Rules and FAQs failed to provide any clarity, except in FAQ #40:

**40. Question:** Will a borrower's PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA's implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?

Answer: No. As an exercise of the Administrator's and the Secretary's authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act's limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.



## Enter, the SBA's Loan Forgiveness Application, which provides more clarity, but fails to address several issues:

- Provides that the determination of an employee as an FTE is done on an employee-by-employee basis, and the maximum FTE for each employee is "1". Also, the instructions veer from the "monthly" average concept of the statute and instruct Borrowers to calculate average FTE's on a "weekly" basis.
- Based on an average 40-hour work week, rounded to the nearest tenth. Examples:
  - employee paid for 40 hrs/week = 1 FTE.
  - employee paid for 50 hrs/week = 1 FTE.
  - employee paid for 30 hrs/week = .75 FTE
  - Employee paid for 35 hrs/week = .9 FTE (rounded from .875)



- Provides for a simplified method of determining the number of FTEs for both the reference periods and the Covered Period (or Alternative Payroll Covered Period): Borrowers may elect to use a simple method of counting FTEs by assigning a "1" for each employee who *works* 40 hours or more per week and a "0.5" for employees who *work* fewer hours
- New employees hired during the Covered Period (or Alternative Payroll Covered Period) may be counted in the calculation
- Provides several safe harbors that eliminate reduction.



## Where is this applied on the PPP Loan Forgiveness Application?

Page 3 of the PPP Loan Forgiveness Calculation Form

Adjustments for Full-Time Equivalency (FTE) and Salary/Hourly Wage Reductions  Line 5. Total Salary/Hourly Wage Reduction (enter the amount from PPP Schedule A, line 3):	
Line 6. Add the amounts on lines 1, 2, 3, and 4, then subtract the amount entered in line 5:	
Line 7. FTE Reduction Quotient (enter the number from PPP Schedule A, line 13):	
Potential Forgiveness Amounts Line 8. Modified Total (multiply line 6 by line 7):	

- Line 7's quotient will determine what percentage of a Borrower's eligible expenses (Line 6) are forgivable.

Ideal Quotient: "1"



### The Journey to calculate Line 7:

#### To do so, Borrowers must navigate from:

- 1. Start at the Forgiveness Calculation Form.
- 2. Jump to PPP Schedule A.
- 3. Next, travel to the PPP Schedule A Worksheet.
- 4. Then backtrack to Schedule A.
- 5. And finally return to Line 7 of the Calculation Form.



### **Relevant Portions of Schedule A**

#### PPP Schedule A

PPP So	chedule A Worksheet, Table 1 Totals	
Line 1.	Enter Cash Compensation (Box 1) from PPP Schedule A Worksheet, Table 1:	
Line 2.	Enter Average FTE (Box 2) from PPP Schedule A Worksheet, Table 1:	
Line 3.	Enter Salary/Hourly Wage Reduction (Box 3) from PPP Schedule A Worksheet, Table 1: If the average annual salary or hourly wage for each employee listed on the PPP Schedule A Worksheet, Table 1 during the Covered Period or the Alternative Payroll Covered Period was at least 75% of such employee's average annual salary or hourly wage between January 1, 2020 and March 31, 2020, check here □ and enter 0 on line 3.	
PPP So	chedule A Worksheet, Table 2 Totals	
Line 4.	Enter Cash Compensation (Box 4) from PPP Schedule A Worksheet, Table 2:	
Line 5.	Enter Average FTE (Box 5) from PPP Schedule A Worksheet, Table 2:	
If you ha	ne Equivalency (FTE) Reduction Calculation ave not reduced the number of employees or the average paid hours of your employees between 1, 2020 and the end of the Covered Period, check here □, skip lines 11 and 12 and enter 1.0 on line	13.
Line 11.	Average FTE during the Borrower's chosen reference period:	
Line 12.	Total Average FTE (add lines 2 and 5):	
Line 13.	FTE Reduction Quotient (divide line 12 by line 11) or enter 1.0 if FTE Safe Harbor is met:	



### **Schedule A Explained:**

- Lines 2 and 5 represent the sums of the average FTE status of all employees employed at any point during the Covered Period or Alternative Payroll Covered Period, calculated on the Schedule A Worksheet.
- Line 2 is the total of FTEs with annualized compensation of \$100,000 or less.
- **Line 5** is the total of FTE's with annualized compensation of more than \$100,000.
- The total of Lines 2 and 5 is inserted on Line 12



### Schedule A Explained (cont.):

- Line 11 Average FTE during the chosen reference period.
- The reference periods are the statutory periods provided in Section 1106 of the CARES Act: either (1) February 15, 2019 – June 30, 2019 or (2) January 1, 2020 – February 29, 2020
- Borrowers may chose either as the denominator for calculating the FTE Reduction Quotient; wise to test both



### Schedule A Explained (cont.):

- The numerator of the quotient is the number from Line 12 (explained above), representing the average FTEs during the Covered Period or Alternative Payroll Covered Period.
- Divide Line 12 by Line 11 (previous slide), insert on Line 13, which then travels back to Line 7 of the Calculation Form
- Hopefully, the quotient equals 1.



# Safe Harbors and Exceptions to FTE Reduction Quotient (which, hopefully, drive the Quotient to becoming "1")



### Safe Harbor (Rehiring Employees)

Specifically, the Borrower is exempt from the reduction in loan forgiveness based on FTE employees described above if both of the following conditions are met: (1) the Borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and (2) the Borrower then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the Borrower's pay period that included February 15, 2020.



#### Safe Harbor (PPP Schedule A Worksheet)

#### FTE Reduction Safe Harbor:

Step 1.	Enter the borrower's total average FTE between February 15, 2020 and April 26, 2020. Follow the same method that was used to calculate Average FTE in the PPP Schedule A Worksheet Tables. Sum across all employees and enter:
Step 2.	Enter the borrower's total FTE in the Borrower's pay period inclusive of February 15, 2020. Follow the same method that was used in step 1:
Step 3.	If the entry for step 2 is greater than step 1, proceed to step 4. Otherwise, the FTE Reduction Safe Harbor is not applicable and the Borrower must complete line 13 of PPP Schedule A by dividing line 12 by line 11 of that schedule.
Step 4.	Enter the borrower's total FTE as of June 30, 2020:
Step 5.	If the entry for step 4 is greater than or equal to step 2, enter 1.0 on line 13 of PPP Schedule A; the FTE Reduction Safe

Step 5. If the entry for step 4 is greater than or equal to step 2, enter 1.0 on line 13 of PPP Schedule A; the FTE Reduction Safe Harbor has been satisfied. Otherwise, the FTE Reduction Safe Harbor does not apply and the Borrower must complete line 13 of PPP Schedule A by dividing line 12 by line 11 of that schedule.

**Interpretation**: If a Borrower's total FTEs as of June 30, 2020 is greater than its total FTEs during the pay period inclusive of February 15, 2020, this seems to clearly suggest the Reduction Quotient is "1", and there would be no reduction in forgiveness.



# FTE Reduction Exception (PPP Schedule A Worksheet Instructions)

FTE Reduction Exceptions: Indicate the FTE of (1) any positions for which the Borrower made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period which was rejected by the employee; and (2) any employees who during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours. In all of these cases, include these FTEs on this line only if the position was not filled by a new employee. Any FTE reductions in these cases do not reduce the Borrower's loan forgiveness.



# Reduction in Loan Forgiveness due to Salary/Wage Reductions

 Forgiveness amount will also be reduced if a borrower reduces the salary or wages of any employee by more than 25 percent, as compared to Jan. 1, 2020 - March 31, 2020, for any employee that made less than \$100,000 annualized in 2019. The amount of any reduction in wages that is greater than 25 percent will be deducted from the amount of the loan otherwise eligible for forgiveness.



### **Reduction in Loan Forgiveness**

Reduction based on reduction in salaries



PAYROLL COST Calculated on page 2



For any employee who did not earn during any pay period in 2019 wages at an annualized rate more than \$100,000, the amount of any reduction in wages that is greater than 25% compared to their most recent full quarter.



### Safe Harbor (Reduction of Salary/Wages)

- Despite reductions in salary/hourly wage levels, if you restored salary/hourly wage levels prior to June 30, 2020, you may be eligible for elimination of the Salary/Hourly Wage Reduction amount.
- To determine if you qualify for this safe harbor, for each employee:
  - A. Enter the annual salary or hourly wage as of February 15, 2020.
  - B. Enter the average annual salary or hourly wage between February 15, 2020 and April 26, 2020.
  - C. If B is less than A, enter the average annual salary or hourly wage as of June 30, 2020.
- If C is equal to or greater than A, the Salary/Hourly Wage Reduction Safe Harbor has been met.



### **Additional Considerations**

- PPP Loans in excess of \$2 million
  - Must check the box on Calculation Form
  - Relates to Borrower's good faith certification in loan application that economic uncertainty at the time of application made the loan request necessary to support ongoing operations
  - SBA's FAQ #46 provides these loans are subject to review for compliance with program requirements



### **Additional Considerations (cont.):**

- Additional "certifications" in the Forgiveness Application.
  - The money was used to pay eligible costs
  - Forgiveness requested includes all applicable reductions, does not include non-payroll costs in excess of 25% of the amount requested
  - Acknowledge the federal government may pursue recovery if used for unauthorized purposes
  - Information and documentation submitted is true and correct in all material respects
  - Understand additional documentation may be requested



### **Additional Considerations (cont.):**

- Will the HEROES Act (pending in U.S. Senate) provide some fixes to the PPP? What's in the bill passed by the House of Representatives:
  - Expands eligible borrowers to include nonprofits operating as trade groups and other 501(c)(6) organizations
  - Extends the 8-week covered period to 24 weeks
  - Extends period to rehire furloughed workers through December 31, 2020
  - Eliminates the 25% cap on eligible non-payroll expenses
  - Allows eligible expenses paid with PPP loan proceeds to be tax deductible



### **Many Ambiguities Remain**

- How to treat salaried employees as FTEs who work less than full week
- Can payroll costs include bonuses
- How to deal with employers with multiple pay periods (biweekly, semi-monthly)
- The proper time period for determining averages (i.e., weekly, monthly, pay-period)
- Deductibility of expenses funded with PPP loan (i.e., payroll, rent, utilities); IRS Notice 2020-32 said not deductible



#### Documentation that must be submitted

**Payroll:** Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Payroll Covered Period consisting of each of the following:

- Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
- b. Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Payroll Covered Period:
  - Payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941); and
  - State quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state.
- c. 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 (PPP Schedule A, lines (6) and (7)).

FTE: Documentation showing (at the election of the Borrower):

- a. the average number of FTE employees on payroll per month employed by the Borrower between February 15, 2019 and June 30, 2019;
- the average number of FTE employees on payroll per month employed by the Borrower between January 1, 2020 and February 29, 2020; or
- c. in the case of a seasonal employer, the average number of FTE employees on payroll per month employed by the Borrower between February 15, 2019 and June 30, 2019; between January 1, 2020 and February 29, 2020; or any consecutive twelveweek period between May 1, 2019 and September 15, 2019.

The selected time period must be the same time period selected for purposes of completing PPP Schedule A, line 11. Documents may include payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state. Documents submitted may cover periods longer than the specific time period.



**Nonpayroll:** Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period.

- a. 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.
- b. 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.
- c. Business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments.



### The PPP Journey: ... and Beyond!

# Conditions, Compliance, and Potential Whistleblower Complaints



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### Enforcement Actions on Wrongful Payment

- Audit/Overpayment
  - Usually done at agency level—in this case, the SBA. The SBA Administrator has authority to adjudicate overpayments in administrative proceedings. The Administrator may refer a matter to the Department of Justice.
- Civil False Claims Action
  - Usually initiated by a whistleblower
  - Department of Justice may also initiate a claim
- Criminal Action
  - Often referred by agency or by whistleblower complaint
  - Will likely be handled by a strike force for pandemic fraud claims



# The False Claims Act: 31 U.S.C § 3729 et seq.

- Claim for payment
- Falsity of Claim
- Knowledge of falsity
- Materiality
  - The falsity must be material to the Government's payment decision."
- Damages (up to treble the amount of loss to the government plus statutory fines)
- Causation
  - Lender may also be liable under certain circumstances





# The False Claims Act: 31 U.S.C § 3729 et seq.

- The terms "knowing" and "knowingly" mean that a person, with respect to information –
  - Has actual knowledge of the information;
  - ii. Acts in deliberate ignorance of the truth or falsity of the information; or
  - iii. Acts in reckless disregard of the truth or falsity of the information.
- Failure to remit an amount owed can be a basis of liability.



# The False Claims Act: Qui Tam Provisions

- Sealed Period
- Relator Works With Government to Develop Case
- Relator May Recovery (15-30%)
- Relator may be barred if
  - not first to file
  - allegations based on publicly disclosed information and relator does not qualify as an original source (some exceptions)



Anti-retaliation provision in FCA



# FCA Civil Penalties—Individual and Corporate

- Up to treble damages of amount falsely billed to government + statutory penalties (but based generally on ability to pay)
- Joint and several liability with other defendants (both corporate and individual)
- Corporate Integrity Agreement
- Enforceable money judgment that survives bankruptcy





### **Paycheck Protection Payment**

- \$650 Billion
- Loans at low interest rate
- Converted to Grants
- Designed for small businesses
- Little initial guidance
- Target for fraud





### Certification

- Theory of FCA liability often premised on certifications.
- Three relevant periods:
  - Initial certification
  - "Safe harbor" deadline
  - Certification for loan forgiveness



#### Certification

- I certify that:
  - I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
  - The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
  - The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
  - I will comply, whenever applicable, with the civil rights and other limitations in this form.



#### Certification

- (cont.)
  - All SBA loan proceeds will be used only for businessrelated purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
  - To the extent feasible, I will purchase only Americanmade equipment and products.
  - The Applicant is not engaged in any activity that is illegal under federal, state or local law.
  - Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.



### **Certification and Authorization**

- The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.
- Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.
- The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.



### **Certification and Authorization**

- The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.
- I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.
- During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.



### **Certification and Authorization**

I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.



# Paycheck Protection Payment Risk Areas—Application

- Necessity for Loan
- Failure to repay by safe harbor or afterwards
- Qualification for Loan
- Affiliation Rules
- Amount of Loan requested



Catherine M. Maraist catherine.maraist@bswllp.com



# Paycheck Protection Payment Risk Areas—Application

#### JUSTICE NEWS

#### Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, May 19, 2020

#### Texas Man Charged with \$5 Million COVID-Relief Fraud

Individual Copied List of Names off the Internet and Claimed Them as Employees

A Texas man has been charged in the Eastern District of Texas with allegedly filing bank loan applications fraudulently seeking more than \$5 million dollars in forgivable loans guaranteed by the Small Business Administration (SBA) under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

Samuel Yates, 32, of Maud, Texas, allegedly sought millions of dollars in forgivable loans guaranteed by the SBA from two different banks by claiming to have over 400 employees earning wages when, in fact, no employees worked for his purported business.

Yates is charged by way of a federal criminal complaint with violations of wire fraud, bank fraud, false statements to a financial institution, and false statements to the SBA.



# Paycheck Protection Payment Risk Areas Post-Application

- Use of loan proceeds
- Valid purpose under PPP program
  - What is loan is used for other

purposes but paid back with interest?

- Loan forgiveness
  - Do not meet threshold
  - Did not maintain employee compensation etc.



Catherine M. Maraist catherine.maraist@bswllp.com



### Paycheck Protection Payment Enforcement

- False certification (also used to prove knowledge)
- Knowing retention of loan proceeds where not proper
- Causation/conspiracy
- False promises (inducement)
- Enforcement priorities may change with additional guidance



### Questions?



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