

Silver Diner, Inc.
Summary of Legislative / Regulatory Actions to Help Small Businesses

Listed below are actions that Congress can take to fix the Paycheck Protection Program (PPP) to help small businesses survive the COVID-19 crisis. The fundamental issue is that in the CARES Act, loan forgiveness is based on eight weeks of eligible spend after loan origination. But the latest information indicates that businesses will be essentially closed much longer than anticipated when the CARES Act was enacted (Virginia's stay at home order lasts until June 10, 2020; and President Trump acknowledges that it will be at least May before businesses start to reopen; and these timelines continue to get extended on a state by state basis). Adding to the problem are several positions taken by the Treasury Department that are more conservative than the text of the CARES Act.

Legislative Solution

The recommended legislative solutions below adjust the covered period for loan forgiveness using *the permitted opening date as the trigger for the commencement of the covered period, rather than relying on the loan origination date*. When the CARES Act was enacted, loan originations were contemplated in April, around the time businesses were expected to start reopening, with a forgiveness period lasting for eight weeks after origination (*i.e.*, through June), and an outside rehire date of June 30, 2020, approximately 90 days after the start of the covered period of forgiveness. The legislative solutions below keep these timelines intact (*i.e.*, the covered period is still eight weeks, and the outside rehire date is still 90 days from the start of the covered period for forgiveness). But, in order to account for the unpredictability of COVID-19, the start point is keyed to the permitted reopening date, which is really the timeframe that restaurant businesses can start to rehire.

1. Tie the "Covered Period" for Loan Forgiveness to Reopening. Revise Section 1106(a)(3) of the CARES Act as follows (deletions ~~stricken~~; insertions underlined):

(3) the term "covered period" means the 8-week period beginning on the later of (i) the date of origination of a covered loan¹, and (ii) the date which is thirty (30) days after the date on which the eligible recipient is legally permitted to operate the eligible recipient's business as such business was operated prior to February 15, 2020;

2. Extend the Outside Rehire Date to Avoid Forgiveness Reduction. Revise Section 1106(d)(5)(B) as follows (deletions ~~stricken~~; insertions underlined):

(B) CIRCUMSTANCES.—A circumstance described in this subparagraph is a circumstance—

(i) in which—

(I) during the period beginning on February 15, 2020 and ending on the date that is 30 days after the date of enactment of this Act, there is a reduction, as compared to February 15, 2020, in the number of full-time equivalent employees of an eligible recipient; and

(II) not later than the later of (1) June 30, 2020, and (2) the date which is ninety (90) days after the date on which the eligible recipient is legally permitted to operate the eligible recipient's business as such business was operated prior to February 15, 2020, the eligible employer has eliminated the reduction in the number of full-time employees;

(ii) in which—

(I) during the period beginning on February 15, 2020 and ending on the date that is 30 days after the date of enactment of this Act, there is a reduction, as compared to February 15, 2020, in the salary or wages of 1 or more employees of the eligible recipient; and

(II) not later than the later of (1) June 30, 2020, and (2) the date which is ninety (90) days after the date on which the eligible recipient is legally permitted to operate the eligible recipient's business as such business was operated prior to February 15, 2020, the eligible employer has eliminated the reduction in the salary or ways of such employees; or

(iii) in which the events described in clause (i) and (ii) occur.

¹ Note that the outside loan origination date of June 30, 2020 stays the same.

Editing the outside rehire date in this fashion mimics the current statutory intent that loan forgiveness would not be reduced if the eligible recipient rehires and/or returns wages to their pre-COVID-19 levels before the end of the forgiveness period.²

Regulatory Solutions

Until the legislative changes described above can be enacted, Congress, the SBA and Treasury should urgently align to ensure that regulations governing the PPP are consistent with the statutory intent set forth in the CARES Act.

1. **Loan Term.** The CARES Act specified that PPP loans would have a maximum term of 10 years. A fact sheet issued by the treasury department indicated that PPP loans would have a term of two years. ***Congress, the SBA and Treasury should ensure that the final regulations specify that PPP loans will have a term of 10 years as permitted by the CARES Act.***

2. **Permitted Uses.** The CARES Act indicated that during the covered period, an eligible recipient may use loan proceeds of a PPP loan for the allowable uses of a loan made under Subsection 7(a) of the Small Business Act (*which includes uses such as working capital*). The fact sheet issued by the Treasury Department indicates that the loan may only be used for payroll costs, interest on mortgage obligations, rent, and utilities. And the sample application published by treasury includes a certification to this effect. As a result of the length of the COVID-19-related closures, small businesses need flexibility to use PPP loan proceeds for working capital to keep their businesses alive. ***Congress, the SBA and Treasury should ensure that the use of proceeds specified in the PPP regulations aligns with the broader permitted use of proceeds specified in the CARES Act and the reality faced today by small businesses affected by COVID-19.***

3. **Forgiveness for Non-Payroll Spend.** The CARES Act specified that an eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan for (1) “any payment of interest on a covered mortgage obligation,” (2) “any payment on any covered rent obligation” and (3) “any covered utility payment.” A fact sheet issued by the treasury department indicated that forgiveness for non-payroll expenses would be capped at 25% of the forgiveness amount. ***Congress, the SBA and Treasury should ensure that the final regulations specify that all payments of interest on all covered mortgage obligations, all payments on all covered rent obligations, and all covered utility payments are forgiven as specified in the statute.***

4. **Pre-Loan Origination Expenses.** Under the CARES Act, covered rent and payroll must be incurred after loan origination in order to be eligible for forgiveness. Loan proceeds used to pay deferred rent and payroll for periods occurring after February 15, 2020 but before loan origination, should clearly be deemed “incurred” after loan origination and therefore eligible for forgiveness. For example, if landlords defer April 2020 rent until after loan proceeds are received, a payment of that rent from loan proceeds should be eligible for reimbursement, and this should be clarified in the SBA regulations. ***Congress, the SBA and Treasury should ensure that the regulations clarify that deferred rent and payroll paid during the covered period for forgiveness is eligible for forgiveness.***

² Note that some conforming changes in other statutory provisions may be required to achieve the intent of these changes.