# Entertainment Alert

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## Navigating Relief Under the CARES Act in the Entertainment Industry

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### Key Points

- The Paycheck Protection Program (PPP), contained within the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act" or the "Act") signed by President Trump on March 27, 2020, creates a $349 billion loan facility to help "small" businesses make payroll and pay certain other costs and expenses over the next few months.
- The existing Small Business Act (SBAA) authorizes the Small Business Administration (SBA) to make loans to small businesses that have suffered economic injury as a result of a disaster (EIDL).
- Entertainment companies (regardless of whether employee or wage reductions are being considered) with fewer than 500 employees may qualify for PPP loan or an EIDL loan (which can be refinanced into a PPP loan), depending on the particular facts and circumstances.
- PPP loans will be forgiven to the extent used during the 8 weeks following the issuance of the loan for payroll costs, mortgage payments, lease payments, employee benefits and utility costs, provided that certain workforce and wage thresholds are maintained.
- As productions go on hiatus, theatrical releases are postponed and entertainment companies consider layoffs, PPP and EIDL loans create an incentive to maintain employees in the entertainment industry, with the federal government stepping up to subsidize payroll and related costs so that businesses can stay open and employees can be paid.
- Entertainment companies should act fast, and can apply for EIDL loans today and PPP starting tomorrow.
- Entertainment companies with more than 500 employees may be able to obtain loans under other CARES Act programs and all companies may benefit from payroll tax credits and delayed employer payroll taxes. Although companies taking advantage of PPP loans will not be able to access payroll tax credits and delayed employer payroll taxes and certain other benefits under the CARES Act.


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## The Small Business Act, the CARES Act and the Paycheck Protection Program

On March 27, 2020, President Trump signed the CARES Act, which is the most extensive federal governmental response to the COVID-19 crisis.

The PPP is contained within the CARES Act, and amends the existing SBAA, which is administered by the SBA.

Entertainment companies may benefit from several programs under the SBA and PPP to weather the ongoing economic disruption. The CARES Act authorizes a total of $349 billion for applicable loans under the PPP, with individual loan amounts to be based on (i) the borrower's payroll costs over a 2½ month period plus (ii) the amount of any EIDL loan provided after January 30, 2020 up until the PPP loan is available, up to a maximum aggregate loan of $10 million.

The deadline for obtaining a loan under the PPP is June 30, 2020, and applications will be available for processing on April 3rd.

It is important to note that entertainment companies that qualify for a PPP loan may be ineligible for certain other relief provided by the CARES Act, including the payroll tax credit and tax deferral programs discussed below. Some entertainment companies have come to the conclusion that these tax benefits outweight the need for a PPP loan.

This Alert provides a summary of loans available under SBA and PPP. Because the availability, terms and conditions of a loan for any particular business will depend upon the relevant facts and circumstances, entertainment companies should consult counsel to further understand their rights and options.

The existing SBAA is administered by the SBA and authorizes the SBA to make Economic Injury Disaster Loans to "small" businesses that have suffered economic injury as a result of a disaster (EIDL).

- These loans are capped at $2,000,000, require a personal guarantee and the eligibility and loan terms are determined on a case-by-case basis through the SBA.
- Traditionally, the loan application for EIDL loans required substantial information and disclosures, and took several weeks to secure. There is a new online application to fast track submissions related to COVID-19.
- While the EIDL loan application is pending, the applicant may apply for a grant of up to $10,000, which is paid within 3 days of submission of the loan application. Such grants are not required to be repaid, even if the business's application for an EIDL loan is denied. However, the amount of the EIDL grant will be offset against the amount available of any subsequent PPP loan.
- EIDL loans are available to "small" businesses, which generally means businesses under 500 employees.

The PPP amends and supplements the SBAA, and is the federal government's emergency effort to mitigate layoffs and provide emergency loans to allow borrowers to continue to make payroll and pay other "allowable" costs over the 8 week period once the PPP loan is issued. The loans must be used for an "allowable use" during this time period, including paying employee salaries, providing group health benefits, mortgage payments and paying rent and utilities. The loans are forgivable to a certain extent, as described below. The goal of the PPP is to disincentive layoffs, as the government largely would be subsidizing the cost of employing such personnel.

- The PPP provides $349 billion in available loans for “small” businesses, which generally means the company employed less than 500 employees during the “Covered Period” (i.e., February 15, 2020 to June 30, 2020).
  - “Employees” include individuals employed on a full-time, part-time, or other basis. The number of employees is determined based on the company’s average number of employees for each pay period over the previous 12 months.
  - “Affiliates” are included for purposes of determining whether the company has less than 500 employees. Therefore, a company with fewer than 500 employees may nevertheless be disqualified from the PPP if it is deemed to have more than 500 employees as a result of such affiliation provisions.
  - Businesses may be considered affiliated where one controls, or has the ability to control, the other. Affiliation can be based on any of the following: (i) equity ownership of one entity in another, (ii) an identity (or substantial identity) of business or economic interests, (iii) common general partners, managing members, directors, or officers, (iv) stock options, convertible securities, or agreements to merge, or (v) a totality of the circumstances. There is considerable authority under the existing SBA regulations and case law applying this definition, thus requiring a “case-by-case” analysis to assess affiliation in any particular circumstance. Entertainment companys and their affiliates will want to pay particular attention to this guidance, and to the forthcoming SBA implementing regulations.
- EIDL loans related to COVID-19 that were made after January 30, 2020 may be rolled into a PPP loan for the same purpose. The CARES Act authorizes a total of $349 billion for applicable loans under the PPP, with individual loan amounts to be based on (i) the borrower’s payroll costs over a 2½ month period plus (ii) the amount of any EIDL loan provided after January 30, 2020 up until the PPP loan is available, up to a maximum aggregate loan of $10 million.
  - “Payroll Costs” include salaries (up to an annualized rate of $100,000 per employee), paid time off (including vacation, parental leave, family leave, and medical leave), severance pay, group health care benefits, retirement benefits, and payment of state and local income tax on employee compensation. Payroll Costs do not include (a) salary for any employee in excess of an annualized rate of $100,000, (b) certain taxes imposed or withheld, including disability insurance tax and federal income tax, (c) compensation of employees based outside the U.S., and/or (d) paid leave that is eligible for a credit under the Families First Coronavirus Response Act.
- In order to qualify for a PPP loan, the business must have been operating on February 15, 2020, and the borrower must certify that (i) the loan request is “necessary” to support its ongoing operations, (ii) the funds from the loan will be used to retain workers and maintain payroll or make mortgage, lease, and/or utility payments, and (iii) the firm does not have a pending application with, nor is it receiving funds from, another SBA program for the same purpose and amount as the loan request (the exception here is that an existing EIDL loan can be refinanced with a PPP loan for the same purpose).

- All PPP loans have a term of 2 years, an interest rate of 0.5%, no prepayment penalty, no personal guarantees or collateral are required, all principal and inmterest payments are deferred for 6 months and no fees are payable by a borrower or lender to the SBA.
- Lender compensation for servicing the loan is five percent for loans of not more than $350,000; three percent for loans of more than $350,000 and less than $2,000,000; and one percent for loans of not less than $2,000,000.
- PPP loans generally will be forgiven to the extent that they are used for the following purposes during the 8 week period after the loan originates: (i) payroll costs, (ii) interest payments on mortgage obligations, (iii) rent payments, and/or (iv) utility payments; provided that (a) the amount of loan forgiveness will be reduced based on any reduction to the number of employees and/or to employee compensation over the loan period, and (b) theTreasury anticipates that "not more than 25 percent" of the forgiven loan amount may be applied to qualifying non-payroll costs including interest on (1) a mortgage obligation; (2) rent; or (3) covered utilities.
  - If an entertainment company reduced the number of employees or wage levels between February 15, 2020 and April 27, 2020, such reductions will not decrease the amount of loan forgiveness if the entertainment company restores the number of employees or the wage levels by June 30, 2020.
- The list of SBA lenders that can provide loans can be found here. Firms should navigate to the link of their local SBA office, which will have a resource guide listing the relevant application information.
- Loan applications will be available on April 3rd and can be approved on the same day.
- Make sure to have payroll records (i.e., number of employees and payroll costs) for the last 12 months handy.
- Any entertainment company that receives a PPP loan is ineligible for the CARES Act's Employee Retention Payroll Tax Credit and/or the Act's Delay of Payment of Employer Payroll Taxes program. Those tax-related provisions of the Act are discussed here. Some entertainment companies prefer such tax incentives over a PPP loan.
- Other programs aimed at helping small to mid-sized companies are under Title IV, Subtitle A of the Cares Act (including The Main Street Business Lending Program), which is expected to be administered by the Federal Reserve.

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