

New Stimulus Package *Explained*

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A special thanks to Kevin Cameron, CPA,
MBA and our law clerks Patrick and Ian

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WARNING TO ATTENDEES:

This explanation and interpretation of the CARES Act and its updated version is based upon a best efforts review of the legislation by the presenters, and will with 100% certainty be inaccurate with respect to one or more items.

More will be learned when the SBA issues FAQs, new rules, and other pronouncements.

“The large print giveth and the SBA taketh away”

“The large print giveth and the small print taketh away” is generally credited to Tom Waits as noted in the song Small Change from the album Small Change. Elvira, the Mistress of the Dark A.K.A. Tom’s ex-wife is pictured on the album cover which has been removed from this presentation due to licensing and decency concerns.

**KEY TAKEAWAYS
FOLLOWING THE
CORONAVIRUS RESPONSE
AND RELIEF
SUPPLEMENTAL
APPROPRIATIONS ACT, 2021**

Key Takeaways

Selected changes:

1. Additional \$3 billion provided to the HHS Provider Relief Fund to assist health care providers prepare for and respond to the Coronavirus and reimbursement for lost revenues.
2. Medicare physician fee schedule increased by 3.75% temporarily as another way to reimburse health care providers.
3. Pandemic Unemployment Assistance payments of an additional \$300/ week applies through March 14, 2021 or maximum of 24 weeks.
4. Stimulus checks of \$600 per taxpayer (\$1,200 for taxpayers married filing jointly) and an additional \$600 per qualifying child. The payment phases out beginning at \$75,000 (\$150,000 MFJ) of AGI.
 - [**Stimulus Checks For Those Earning More Than \\$75,000/\\$150,000 - How It Works**](#)
5. No repayment requirement if applicable credit amount for receipt of stimulus check on 2020 return is less than payment issued.
6. Payroll taxes may be deferred until December 31, 2021, and no penalties or interest will accrue until January 1, 2022.

Key Takeaways

Tax changes:

1. The \$250 educator annual expense deduction includes expenses incurred for purchase of personal protection equipment purchased
2. Section 163(j) election to deduct otherwise limited business interest expense will result in 30 year depreciation instead of 40 year depreciation for pre 2019 residential rental property
3. FFCRA credits for paid sick and family medical leave extended through March 2021.
4. Medical Expenses Itemized Deduction Floor now permanently set at 7.5% of AGI.
5. 100% write off for business meals for 2021 and 2022 if provided by a restaurant to “wine and dine” an important business relationship and paid or incurred prior to Jan 1, 2023.
6. \$300 (\$600 for taxpayers married filing jointly) above the line charitable deduction for cash payments to public charity made in 2021.
7. 100% of AGI charitable limitation will continue to apply for 2021.
8. Health and Dependent Care FSA plans may now permit unused benefits to be carried over to next tax year through 2021 plan year.

Key Takeaways

Changes to PPP:

1. Additional eligible expenses that qualify for forgiveness are added in addition to rent, interest, and utilities which are already forgivable as “40% expenses.”
2. Borrowers may select the end of their covered period any time between 8 - 24 weeks from receipt of loan.
3. Simplified Loan Forgiveness process for borrowers with less than \$150,000 of loans.
4. Payroll costs now include employer payments for group life, disability, vision, and dental insurance payments.
5. Borrowers can amend their original application to request increased loan amount due to changes in PPP loan rules if the original loan amount was less than amount that would have otherwise applied.
6. For the purposes of calculating covered payroll expenses, an owner’s \$100,000 salary/wage limitation now applies on an annualized basis
7. EIDL Advances are non taxable and will not reduce PPP loan forgiveness.

Key Takeaways

Changes to PPP:

8. No eligibility for PPP loan if the business was not in operation before Feb 15th, 2020.
9. All existing safe harbors and exceptions for reduction in employee headcount (FTEs) remain, and the Act further provides that the SBA may modify dates of safe harbors to comply with intent of PPP.
10. Act makes it clear the Schedule F Farmers are eligible for PPP loans based on 2019 Schedule F income
11. 501(c)(6) entities (Chambers of commerce, business leagues, real-estate boards, boards of trade, with the exception of sports teams) are eligible to receive a PPP loan if they meet the necessity requirement.
12. The \$100,000 salary/wage limitation on determining loan amounts and forgiveness expenditures applies on an annualized basis.
13. Borrowers in bankruptcy can apply for PPP loans with court approval
14. Can receive both PPP and Employee Tax Retention Credit! Do not file PPP 2020 forgiveness application until you are clear on whether it could cause loss of Employee Tax Retention Credit.

Key Takeaways

PPP Second Draw Rules:

1. Small businesses with less than 300 employees and a 25% or more drop in gross receipts for a calendar quarter (as compared to the prior applicable calendar quarter) may be eligible for a second PPP loan if they meet the necessity requirement.
 - The 1st quarter of 2019 as compared to the 1st quarter 2020.
 - The 2nd quarter of 2019 as compared to the 2nd quarter of 2020.
 - The 3rd quarter of 2019 as compared to the 3rd quarter of 2020.
 - The 4th quarter of 2019 as compared to the 4th quarter of 2020
2. The loan will be for 3.5 times the average monthly payroll (instead of 2.5 times) for restaurants, hotels, motels and certain other food and lodging businesses.
3. Borrowers can elect to calculate the second round based on 2.5x the average monthly payroll costs during any 12 month period ending prior to the date of the loan or the 2019 calendar year.
4. March 31, 2021 new deadline to apply for and receive a PPP Loan.
5. Make sure to understand interaction with wage credit. PPP second draw may interfere with or complicate Employee Tax Retention Credit.

Key Takeaways

EIDL Loans:

1. EIDL Advance fund replenished with \$20 Billion to be distributed to low income communities first
2. \$15 Billion set aside for Shuttered Venue Grants that have a 25% reduction in revenue in first, second, or third quarter of 2020 as compared to the same quarter in 2019.
 - Payment equal to 40% of 2019 gross revenue with limitations as to the use of funds.
 - Recipients of Shuttered Venue grants are ineligible to receive PPP loans.
3. Watch out for EIDL loans – May not be used to pay bonuses to employees, to make distributions to S corporation owners or partners in partnerships, and may be difficult or impossible to eliminate in bankruptcy.

A Key Takeaway: Borrowers Can Amend Initial Loan Application

The Act requires that the SBA issue guidance to lenders within 17 days to provide a process for borrowers who returned all or part of their PPP loan to reapply for the maximum allowable amount so long as they have not requested forgiveness, perhaps allowing those borrowers who returned their loan before the issuance of the \$2 million loan necessity safe harbor to reapply and receive their original loan amount.

The Act also allows borrowers that would have received an increased loan amount due to changes in interim final rules issued by the SBA or as a result of the Act to reapply for the difference.

Important provision for partnership and seasonal employers as guidance changed the way PPP loan amounts were calculated for these borrowers.

May also amend to request increased loan amount for group life, dental, and vision insurance.

5 Ways to Increase Your Initial PPP Loan

1. 05/19/20 Seasonal Employers Rule Update

- If a seasonal employer received a loan before the alternative criterion for such employers was posted on April 28, 2020, and would be eligible for a higher maximum loan amount under the alternative criterion, the lender may electronically submit a request an increase to the PPP loan amount

2. 05/19/20 Partnership Rule Update:

- If a partnership received a loan that only included amounts necessary for payroll costs of the partnership's employees and other eligible operating expenses, but did not include any amount for partner compensation, the borrower may request an increase to the loan amount to include appropriate partner compensation

3. Amend your initial application to include expenses for group insurance costs like group life, dental, vision, and disability insurance which were included in the new Act

- The provision in the new Act that added these expenses as eligible payroll expenses is retroactive to the enactment of the CARES Act

4. 05/22/20 Rule Update for Tipped Employees:

- The Interim Final Rule posted on 05/22 allows borrowers to factor tips paid by customers to employees into their calculation of payroll costs.

First Round Borrowers Not Required To Expend Full Amount Before Receiving Second Round Loan

The second requirement that an eligible entity must satisfy before taking a second PPP loan is to **certify** that, if they received a first round loan, they **have or will** spend the full amount of their first loan.

The statute specifically provides the following language below. Our reading of this is that it is not a requirement that the loan money be fully expended at the time of application for the second loan, only that it will eventually be used by the business.

“A covered loan under this paragraph may only be made to an eligible entity that on or before the expected date on which the covered loan under this paragraph is disbursed to the eligible entity, **has used, or will use**, the full amount of the loan received under paragraph (36).”

The statute does not provided a time period for when the first loan would eventually have to be used, but if it is not used in the 24 weeks since the original loan disbursement date it would not be forgivable.

Strategies Going Forward

1. Understand the rules
2. Apply for everything you might receive (subject to advanced planning for wage credit and possible problems with EIDL Loans)
3. Don't necessarily wait for #1 before you do #2
4. When in doubt, fill it out

“You can't get what you don't ask for”

Income Tax Law Changes

1. 100% of Adjusted Gross Income can be deducted for charitable contributions for both 2020 and 2021, if requirements are satisfied.
2. As a result of the above, IRA owners over 59½ can transfer unlimited amounts to charities and deduct all but the “itemized deduction stub.” –Example: Polly is single and has only \$10,000 of itemized deductions other than a \$100,000 charitable contribution. Her standard deduction is \$12,000 so she can deduct \$98,000 of her charitable contribution.
3. \$300 (\$600 for a married couple filing a joint return in 2021) charitable deduction for non-itemizers.
4. Business meals and beverages will now be 100% tax-deductible if provided by restaurants for 2021 and 2022 tax year.
5. Medical expenses exceeding 7.5% of Adjusted Gross Income will be deductible.
6. Educator expense deduction (up to \$250) now includes expenses incurred for purchase of personal protection equipment.
7. No repayment required for stimulus check received that exceeds credit amount on 2020 tax return.

Checklist for Charitable Planning Opportunities for 2020 & 2021

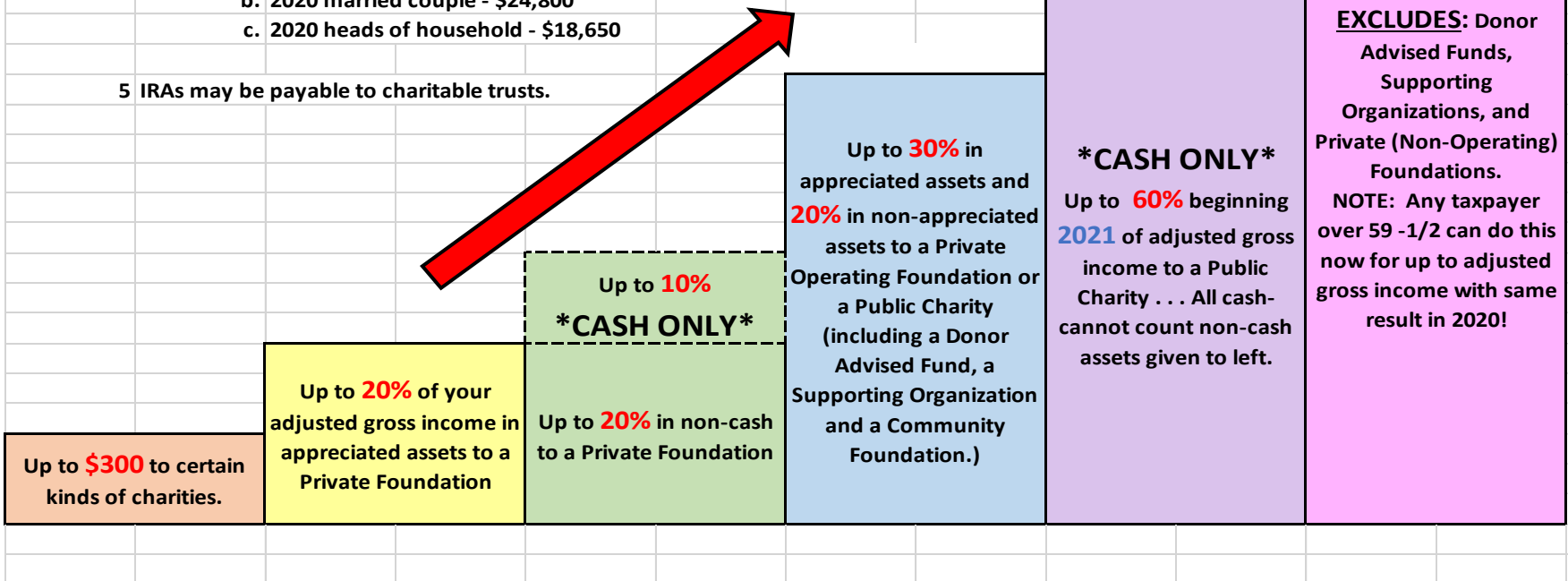
Make charitable contributions:

- a. \$300 (\$600 for married couple) is deductible regardless of itemized deductions.
- b. Gift to a private foundation, private operating foundation, donor-advised fund, or community foundation to exceed standard deduction if the client prefers to dole out gifts over following years (the donor advised funds will not apply towards 100% cash allowance.)
- c. Defer charitable gifting until 2021 if a higher tax bracket is expected.
- d. Gift in 2020 and 2021 to maximize charitable deductions at 100% AGI with 5-year carryforward even if taxable income was low in 2020 or 2021.
- e. High-bracket charitable individuals who are limited to 50% of adjusted gross income can gift 100% of AGI now even if the deduction will not be used this year - Use it or lose it.

2020 Charitable Deduction Percentage Summary Chart

Special Notes:

- 1 Donations to charitable remainder annuity trusts and charitable remainder unitrusts can generate deductions in the same categories as shown on this chart.
- 2 S corporations can deduct up to 25% of its taxable income in 2020 - normally only 10% of taxable income.
- 3 Assets left on death do not qualify for an income tax deduction but can save income taxes on "income in respect of a decedent" (IRAs, pension accounts, variable annuities, etc.)
- 4 Individual taxpayers who itemize:
 - a. 2020 single individual - \$12,400
 - b. 2020 married couple - \$24,800
 - c. 2020 heads of household - \$18,650
- 5 IRAs may be payable to charitable trusts.



CASH ONLY
Up to **100%** for **2020** of adjusted gross income to a Public Charity . . . All cash-cannot count non-cash assets given to left.
EXCLUDES: Family-funded Private Foundations and Donor Advised Funds.

CASH ONLY
Up to **60%** beginning **2021** of adjusted gross income to a Public Charity . . . All cash-cannot count non-cash assets given to left.

SPECIAL RULE FOR TAXPAYERS OVER 70-1/2
--- Can transfer up to **\$100,000** from an IRA to a Public Charity, Private Operating Foundation, or a Community Foundation.
EXCLUDES: Donor Advised Funds, Supporting Organizations, and Private (Non-Operating) Foundations.
NOTE: Any taxpayer over 59 -1/2 can do this now for up to adjusted gross income with same result in 2020!

Key Statutory Language For Selected Provisions

Charitable Deductions for Cash Payments to Charities

\$300 (\$600 for taxpayers married filing jointly) above the line charitable deduction for cash payments to public charity made in 2021.

SEC. 212. CERTAIN CHARITABLE CONTRIBUTIONS DEDUCTIBLE BY NON-ITEMIZERS.

(a) IN GENERAL.—Section 170 is amended by redesignating subsection (p) as subsection (q) and by inserting after subsection (o) the following new subsection:

“(p) SPECIAL RULE FOR TAXPAYERS WHO DO NOT ELECT TO ITEMIZE DEDUCTIONS.—In the case of any taxable year beginning in 2021, if the individual does not elect to itemize deductions for such taxable year, the deduction under this section shall be equal to the deduction, not in excess of \$300 (\$600 in the case of a joint return), which would be determined under this section if the only charitable contributions taken into account in determining such deduction were contributions made in cash during such taxable year (determined without regard to subsections (b)(1)(G)(ii) and (d)(1)) to an organization described in section 170(b)(1)(A) and not—

“(1) to an organization described in section 509(a)(3), or

“(2) for the establishment of a new, or maintenance of an existing, donor advised fund (as defined in section 4966(d)(2)).”.

Extension of Federal Pandemic Unemployment Assistance

The federal Pandemic Unemployment Assistance payments of an additional \$300 per week in addition to state unemployment insurance will be extended through March 14, 2021 or maximum of 24 weeks. The CARES Act originally supplemented unemployment insurance payment with \$600 per week. That provision of the CARES Act expired back in July, but was reinstated via Executive Order by President Trump at a rate of \$300 per week.

Many individuals who were receiving these \$300 checks were set to receive their last one on December 26th because the Executive Order set a January 1st expiration date for the additional unemployment assistance.

SEC. 201. EXTENSION AND BENEFIT PHASEOUT RULE FOR PANDEMIC UNEMPLOYMENT ASSISTANCE.

(a) IN GENERAL.—Section 2102(c) of the CARES Act (15 U.S.C. 9021(c)) is amended—

(1) in paragraph (1)—

(A) by striking “paragraph (2)” and inserting “paragraphs (2) and (3)”; and

(B) in subparagraph (A)(ii), by striking “December 31, 2020” and inserting “March 14, 2021”; and

(2) by redesignating paragraph (3) as paragraph (4); and

(3) by inserting after paragraph (2) the following

“(3) TRANSITION RULE FOR INDIVIDUALS REMAINING ENTITLED TO PANDEMIC UNEMPLOYMENT ASSISTANCE AS OF MARCH 14, 2021.—

\$600 Economic Impact Payments

Additional stimulus checks of \$600 per taxpayer (\$1,200 for taxpayers married filing jointly) and an additional \$600 per qualifying child will be disbursed. The payment phases out beginning at \$75,000 (\$150,000 MFJ) of AGI.

Adjusted gross income: Defined as gross income minus adjustments to income. Gross income includes your wages, dividends, capital gains, business income, retirement distributions as well as other income. Adjustments to Income include such items as Educator expenses, Student loan interest, Alimony payments or contributions to a retirement account.

(c) LIMITATION BASED ON ADJUSTED GROSS INCOME.—The amount of the credit allowed by subsection (a) (determined without regard to this subsection and subsection (e)) shall be reduced (but not below zero) by 5 percent of so much of the taxpayer's adjusted gross income as exceeds—

- (1) \$150,000 in the case of a joint return or a surviving spouse (as defined in section 2(a)),
- (2) \$112,500 in the case of a head of household (as defined in section 2(b)), and
- (3) \$75,000 in the case of a taxpayer not described in paragraph (1) or (2)

No Repayment Requirement for Stimulus Credit Amount

A taxpayer whose Economic Impact Payments exceed their otherwise applicable tax credit will not be required to repay the difference between the two.

(e) COORDINATION WITH ADVANCE REFUNDS OF CREDIT.—

(1) IN GENERAL.—The amount of the credit which would (but for this paragraph) be allowable under this section shall be reduced (but not below zero) by the aggregate refunds and credits made or allowed to the taxpayer under subsection (f). Any failure to so reduce the credit shall be treated as arising out of a mathematical or clerical error and assessed according to section 6213(b)(1)

(f) ADVANCE REFUNDS AND CREDITS.—

(1) IN GENERAL.—Each individual who was an eligible individual for such individual's first taxable year beginning in 2019 shall be treated as having made a payment against the tax imposed by chapter 1 for such taxable year in an amount equal to the advance refund amount for such taxable year.

(2) ADVANCE REFUND AMOUNT.—For purposes of paragraph (1), the advance refund amount is the amount that would have been allowed as a credit under this section for such taxable year if this section (other than subsection (e) and this subsection) had applied to such taxable year. For purposes of determining the advance refund amount with respect to such taxable year— . . .

Article: Phaseout of \$600 Payments

Individuals with an AGI of less than \$75,000 and married couples filing jointly with a combined AGI of less than \$150,000 will be eligible to receive the entire \$600. However, that amount begins to “phase out” for individuals and couples with adjusted gross incomes greater than \$75,000/\$150,000 respectively.

Single filers with an AGI of more than \$75,000 and jointly filing couples with a combined AGI of more than \$150,000 will have their payments reduced at a rate of \$5 for every \$100 of additional income above \$75,000 according to [Congress](#).

Regarding qualifying dependents, an individual who claims a dependent child age 17 and under will be eligible to receive an additional \$600 for that child, which would extend the phase-out range and amount of AGI required to zero out the credit. Further, there does not appear to be a cap on the number of qualifying dependents an individual can receive payment for under the Act. It should be said, however, that two parents filing separately cannot receive double payments by each claiming the same child as a dependent.

Article: Phaseout of \$600 Payments

For those who truly enjoy torturing themselves the exact language of the relevant provision of the Act is below for you're reading pleasure and can be found beginning on page 1966 of the [Act](#):

“SEC. 6428A. ADDITIONAL 2020 RECOVERY REBATES FOR INDIVIDUALS.

(a) IN GENERAL.—In addition to the credit allowed under section 6428, in the case of an eligible individual, there shall be allowed as a credit against the tax imposed by subtitle A for the first taxable year beginning in 2020 an amount equal to the sum of—

(1) \$600 (\$1,200 in the case of eligible individuals filing a joint return), plus

(2) an amount equal to the product of \$600 multiplied by the number of qualifying children (within the meaning of section 24(c)) of the taxpayer.

...

(c) LIMITATION BASED ON ADJUSTED GROSS INCOME.—The amount of the credit allowed by subsection (a) (determined without regard to this subsection and subsection (e)) shall be reduced (but not below zero) by 5 percent of so much of the taxpayer's adjusted gross income as exceeds—

(1) \$150,000 in the case of a joint return or a surviving spouse (as defined in section 2(a)),

(2) \$112,500 in the case of a head of household (as defined in section 2(b)), and

(3) \$75,000 in the case of a taxpayer not described in paragraph (1) or (2).

(d) ELIGIBLE INDIVIDUAL.—For purposes of this section, the term ‘eligible individual’ means any individual other than—

(1) any nonresident alien individual,

(2) any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, and

(3) an estate or trust.”

These economic impact payments should be a welcome boost for many millions of Americans.

Payroll Taxes Deferred Until December 2021

Payroll taxes may now be deferred until December 31, 2021. No penalties or interest will accrue until January 1, 2022.

SEC. 274. EXTENSION OF CERTAIN DEFERRED PAYROLL TAXES.

The Secretary of the Treasury (or the Secretary's delegate) shall ensure that Internal Revenue Service Notice 2020-65 (entitled "Relief with Respect to Employment Tax Deadlines Applicable to Employers Affected by the Ongoing Coronavirus (COVID-19) Disease 2019 Pandemic") and any successor or related regulation, notice, or guidance is applied—

(1) by substituting "December 31, 2021" for "April 30, 2021" each place it appears therein, and

(2) by substituting "January 1, 2022" for "May 1, 2021" each place it appears therein.

Note – Failure to defer payroll taxes may be evidence that the business does not have sufficient "necessity" to receive a second round PPP loan.

Deductible Educator Expenses

The new Act now includes a deductible educator expense for the purchase of personal protective equipment using their own funds. The currently permitted deduction is \$250. We are of the opinion that this amount is comically insufficient.

SEC. 275. REGULATIONS OR GUIDANCE CLARIFYING APPLICATION OF EDUCATOR EXPENSE TAX DEDUCTION.

Not later than February 28, 2021, the Secretary of the Treasury (or the Secretary's delegate) shall by regulation or other guidance clarify that personal protective equipment, disinfectant, and other supplies used for the prevention of the spread of COVID-19 are treated as described in section 62(a)(2)(D)(ii) of the Internal Revenue Code of 1986. Such regulations or other guidance shall apply to expenses paid or incurred after March 12, 2020.

30 Year Depreciation Instead Of 40 Where Pre 2018 Residential Real Estate Is Depreciated By A Taxpayer That Elected Out Of The 163(j) Interest Expense Limitation

Under IRC Section 163 (a) a business can deduct interest paid or accrued during a taxable year on indebtedness.

Under IRC Section 163(j) the amount of business interest deductible cannot exceed a certain amount that is based upon business interest income, taxable income and floor plan income of the taxpayer.

A special rule allows a taxpayer to elect to not be subject to the interest deduction limitation if the taxpayer is willing to use a longer depreciation write off under IRC Section 168(g)(1)(F).

The new act provides that for residential rental property placed in service before 2018 the write off will be over 30 years instead 40 years if the IRC Section 163(j) election is made.

Extension of Federal Paid Sick/Family Leave Credits

Federally funded credits for paid sick and family medical leave are extended through March 2021 by this new Act. These credits were first instituted by the Families First Coronavirus Response Act.

SEC. 286. EXTENSION OF CREDITS FOR PAID SICK AND FAMILY LEAVE.

(a) IN GENERAL.—Sections 7001(g), 7002(e), 7003(g), and 7004(e) of the Families First Coronavirus Response Act are each amended by striking “December 31, 2020” and inserting “March 31, 2021”

Families First Coronavirus Response Act

	Employer(s) that the Act is Applicable to:	Duration of Leave	Qualifying Reasons for Leave	Required Compensation	Tax credits available to Employers
<p>Emergency Paid Sick Leave Act (Division E)</p> <p><u>Effective Date:</u> April 1, 2020</p> <p><u>Effective Date Ends:</u> December 31, 2020</p>	<p>Private sector employers with fewer than 500 employees.</p> <p>Public sector employers with 1 or more employees.</p> <p>Partial good cause exemption for employers with fewer than 50 employees and exclusion of certain health care providers and emergency responders from the definition of “employee” (through regulations issued by the Secretary of Labor).</p>	<p>Full-time employees are entitled to 80 hours of paid sick time</p> <p>Part-time employees are entitled to paid sick time for the number of hours equal to the number of hours the employee works, on average, over a 2-week period.</p>	<p><u>When the Employee is Sick</u></p> <ol style="list-style-type: none"> The employee is subject to Federal, State, or local quarantine or isolation order related to COVID-19. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. <p><u>When the Employee is Caring for Others/“Other Substantially Similar Condition”</u></p> <ol style="list-style-type: none"> The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2). The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor. 	<p><u>For reasons #1-3:</u> Employee’s regular rate of pay (not to exceed \$511 per day and \$5,110 in the aggregate).</p> <p><u>For reasons #4-6:</u> 2/3rds of the employee’s regular rate of pay (not to exceed \$200 per day and \$2,000 in the aggregate).</p> <p>Special rules apply to part-time employees</p>	<p>Private sector employers with fewer than 500 employees may obtain a tax credit for wage replacement:</p> <p>Employers receive 100% of payroll tax credit for required paid sick leave wages plus certain health care expenses of the employer.</p> <p>Special rule for self-employed individuals.</p>

Families First Coronavirus Response Act

	Employer(s) that the Act is Applicable to:	Duration of Leave	Qualifying Reasons for Leave	Required Compensation	Tax credits available to Employers
<p>Emergency Family and Medical Leave Act (Division C)</p> <p><u>Effective Date:</u> April 1, 2020</p> <p><u>Effective Date Ends:</u> December 31, 2020</p>	<p>Private sector employers with fewer than 500 employees.</p> <p>Good cause exemption for employers with fewer than 50 employees and exclusion of certain health care providers and emergency responders from the definition of “eligible employee”(through regulations issued by the Secretary of Labor).</p>	<p>Employer must <u>provide 12 weeks of family and medical leave</u> for employees – the first 10 days are unpaid (must be employed for at least 30 days).</p> <p>Special rule for part-time employees.</p>	<p>Employee is unable to work (or telework) due to a need for leave for care for son or daughter under 18 years of age if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.</p>	<p>Not less than 2/3rds of regular rate of pay based on number of hours scheduled to work (may not exceed \$200 per day and \$10,000 in the aggregate).</p> <p>Special rule for part-time employees.</p>	<p>Private sector employers with fewer than 500 employees may obtain a credit for wage replacement:</p> <p>Employers receive 100% of payroll tax credit for required paid family and medical leave wages plus certain health care expenses of the employer.</p> <p>Special rule for self-employed individuals.</p>

Reduction in Medical Expenses Itemized Deduction Floor

The Medical Expenses Itemized Deduction Floor has been reduced and is now permanently set at 7.5% of adjusted gross income.

SEC. 101. REDUCTION IN MEDICAL EXPENSE DEDUCTION FLOOR.

(a) IN GENERAL.—Section 213 is amended—

- (1) by striking “10 percent” in subsection (a) and inserting “7.5 percent”, and
- (2) by striking subsection (f).

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2020.

Benefits Carryover for Flexible Spending Account (FSA) Plans

This new Act allows Health and Dependent Care FSA plans to permit the carryover of unused benefits to next tax year through 2021 plan year.

SEC. 214. TEMPORARY SPECIAL RULES FOR HEALTH AND DEPENDENT CARE FLEXIBLE SPENDING ARRANGEMENTS.

(a) CARRYOVER FROM 2020 PLAN YEAR.—For plan years ending in 2020, a plan that includes a health flexible spending arrangement or dependent care flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement permits participants to carryover (under rules similar to the rules applicable to health flexible spending arrangements) any unused benefits or contributions remaining in any such flexible spending arrangement from such plan year to the plan year ending in 2021.

Business Meal Write Offs (the 3 martini lunch rule)

The new Act makes it such that you may now write off 100% of business meals expenses for 2021 and 2022 if the food and beverage is provided by a restaurant and paid or incurred prior to January 1, 2023.

SEC. 210. TEMPORARY ALLOWANCE OF FULL DEDUCTION FOR BUSINESS MEALS.

(a) IN GENERAL.—Section 274(n)(2) of the Internal Revenue Code of 1986 is amended by striking “or” at the end of subparagraph (B), by striking the period at the end of subparagraph (C)(iv) and inserting “, or”, and by inserting after subparagraph (C) the following new sub-paragraph: “(D) such expense is—

- (i) for food or beverages provided by a restaurant, and
- (ii) paid or incurred before January 1, 2023.”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to amounts paid or incurred after December 31, 2020.

HHS Provider Relief Funds

Additional \$3 billion provided to the HHS Provider Relief Fund to assist health care providers prepare for and respond to the Coronavirus and reimbursement for lost revenues:

To remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally, which shall be for necessary expenses to reimburse, through grants or other mechanisms, eligible health care providers for health care related expenses or lost revenues that are attributable to coronavirus.

The definition for “Revenue Loss” is revised:

“[A]ny reimbursement from the Provider Relief Fund to an eligible health care provider for health care related expenses or lost revenues that are attributable to coronavirus (including reimbursements made before the date of the enactment of this Act), such provider may calculate such lost revenues using the Frequently Asked Questions guidance released by the Department of Health and Human Services in June 2020, including the difference between such provider’s budgeted and actual revenue budget if such budget had been established and approved prior to March 27, 2020.”

HHS is required to distribution “not less than” 85% of that which remains of the \$175 Billion in Provider Relief Funds:

HHS Provider Relief Fund Distribution

The CARES Act and Paycheck Protection Program and Health Care Enhancement Act included \$175 billion for the COVID-19 Provider Relief Fund.

- Phase 1 General Distribution
 - First Round – \$30 Billion
 - Second Round – \$20 Billion
- Phase 2 General Distribution
 - \$18 Billion
- Phase 3 General Distribution
 - On December 16, 2020 HHS announced that it began distributing \$24.5 Billion in Phase 3 funds to eligible hospitals and other service providers
- Targeted Distributions
 - HHS is allocating targeted distribution funding to providers in areas particularly impacted by the COVID-19 outbreak, rural providers, and providers requesting reimbursement for the treatment of uninsured Americans.

HHS Provider Relief Fund Distribution

Phase 1 General Distribution	
Distribution & Eligibility	Formulas to Determine Allocation
<p>Initial \$30 billion Automatic based on provider's share of Medicare fee-for-service reimbursements in 2019</p>	<p>Payment Allocation per Provider = (Provider's 2019 Medicare Fee-For-Service Payments / \$453 Billion) x \$30 Billion</p>
<p>Additional \$20 billion Based on CMS cost reports, submitted revenue information, or incurred losses</p>	<p>Payment Allocation per Provider = ((Most Recent Tax Year Annual Gross Receipts x \$50 Billion) / \$2.5 Trillion) – Initial General Distribution Payment to Provider</p>

Phase 2 General Distribution	
Distribution & Eligibility	Formulas to Determine Allocation
<p>\$18 billion Providers who participate in state Medicaid/CHIP programs, Medicaid managed care plans, or provide dental care, as well as certain Medicare providers, including those who missed Phase 1 General Distribution payment equal to 2% of their total patient care revenue or had a change in ownership in 2019 or 2020</p>	<p>Payment Allocation per Provider = 2% (Revenues x Percent of Revenues from Patient Care)*</p> <p>*Most recent tax filings (CY2017, 2018, or 2019)</p>

Medicare Physician Fee Temporarily Raised by 3.75%

Medicare physician fee schedule increased by 3.75% temporarily as another way to reimburse health care providers.

(1) IN GENERAL.—In order to support physicians and other professionals in adjusting to changes in payment for physicians' services during 2021, the Secretary shall increase fee schedules under subsection (b) that establish payment amounts for such services furnished on or after January 1, 2021, and before January 1, 2022, by 3.75 percent.

...

(C) APPLICATION ONLY FOR 2021.—The increase in fee schedules that establish payment amounts under this subsection shall not be taken into account in determining such fee schedules that establish payment amounts for services furnished in years after 2021.

Introduction To The Employee Retention Credit

Notable characteristics:

1. Provides a payroll tax credit for qualified wages paid to employees.
2. Can now be applied for retroactively by PPP recipients.
3. Can be applied for going forward by PPP second bite recipients.
4. Increased from up to 50% of \$10,000 per employee to up to 70% of \$10,000 per employee per quarter for wages paid from January 1, 2021 to June 30, 2021.
5. Cannot take into account wages paid with PPP funds.

Example:

Employer has 10 employees making \$40k per year each (\$10,000 per quarter). Gross receipts are down by 20% in 2021 as compared to 2019. \$10k times 70% is \$7,000 per employee per quarter.

Employee Retention Credit for Employers Subject to Closure Due to COVID-19 for 2020

- Eligible employers will receive a refundable payroll tax credit for up to 50% of wages paid to employees after March 12, 2020 through December 31, 2020 (if one of the below two requirements are met).
- Eligible Employer is defined as any employer that is carrying on a trade or business in 2020 and for the calendar quarter:
 - (1) The operation of the business is fully or partially suspended due to orders from a government authority limiting commerce, travel, or group meetings due to COVID-19.

OR

- (2) Gross receipts are less than 50% of the gross receipts for the same quarter in the previous year until gross receipts are 80% of the gross receipts in the same quarter for the previous year.
- Wages are limited to \$10,000 per employee (maximum credit of \$5,000 per employee) and cannot exceed the amount such employee would have been paid for working an equivalent duration during the 30 days immediately preceding such period.

Employee Retention Credit for Employers Subject to Closure Due to COVID-19 for 2021 (Changes are Redlined and Bolded)

- Eligible employers will receive a refundable payroll tax credit for up to **50%** ~~70%~~ of wages paid to employees after January 1, 2021 through June 30, 2021 (if one of the below two requirements are met).
 - (1) The operation of the business is fully or partially suspended due to orders from a government authority limiting commerce, travel, or group meetings due to COVID-19.

OR

- (2) Gross receipts are less than ~~50%~~ **80%** of the gross receipts for the same quarter in **2019** ~~until gross receipts are 80% of the gross receipts in the same quarter for the previous year.~~

Can also use prior quarter gross receipts compared to same quarter in 2019 to determine eligibility.

- Wages are limited to \$10,000 per employee **per quarter** (maximum credit of \$7,000 per quarter) and **can exceed the amount employer was previously paying the employee**

Employee Retention Credit for Employers Subject to Closure Due to COVID-19 (Changes are Redlined and Bolded)

- Reduced by any credits received under the Families First Coronavirus Response Act.
- ~~No credit available if employer has taken a loan through the Payroll Protection Program.~~
- **Can only claim credit on wages not paid with PPP Loan funds.**
- Available for employers with more than 500 employees.
- If the employer has over 100 employees then the credit is only available if employees stay at home and do not provide ANY services **with respect to wages paid prior to December 31 ,2020. This threshold is increased to 500 employees from January 1, 2021 to June 30, 2021.**
- **Health care costs now considered qualified wages even if no other compensation paid to the employee or employee is furloughed.**
- **Employers can request an advance on the credit equal to 70% of the average quarterly wages paid by the employer in 2019.**

Employee Retention Credit – Examples to Determine Eligibility for 2020

Quarter	Gross Receipts 2019	Gross Receipts 2020	2020 vs 2019	Eligible Quarter
1	\$300,000	\$300,000	100%	NO
2	\$300,000	\$100,000	33%	YES
3	\$300,000	\$140,000	47%	YES
4	\$300,000	\$250,000	83%	YES

Employee Retention Credit – Examples to Determine Eligibility for 2020

Quarter	Gross Receipts 2019	Gross Receipts 2020	2020 vs 2019	Eligible Quarter
1	\$300,000	\$300,000	100%	NO
2	\$300,000	\$100,000	33%	YES
3	\$300,000	\$250,000	83%	YES
4	\$300,000	\$225,000	75%	NO

Employee Retention Credit – Examples to Determine Eligibility for 2021

Quarter	Gross Receipts 2019	Gross Receipts 2021	2021 vs 2019	Eligible Quarter
1	\$300,000	\$225,000	75%	YES
2	\$300,000	\$300,000	100%	YES

Q2 is eligible quarter because the prior quarter (Q1) can be used.

Employee Retention Credit – Examples to Determine Qualified Wages for 2020

Employee Wage Per Quarter	Q2 Qualified Wages	Q3 Qualified Wages	Q4 Qualified Wages
A - \$15,000	\$10,000	\$0	\$0
B - \$7,000	\$7,000	\$3,000	\$0
C - \$3,000	\$3,000	\$3,000	\$3,000
Total Qualified Wages	\$20,000	\$6,000	\$3,000

Potential Credit Available - \$14,500 (\$29,000 * 50%)

Employee Retention Credit – Examples to Determine Qualified Wages for 2021

Employee Wage Per Quarter	Q1 Qualified Wages	Q2 Qualified Wages
A - \$15,000	\$10,000	\$10,000
B - \$7,000	\$7,000	\$7,000
C - \$3,000	\$3,000	\$3,000
Total Qualified Wages	\$20,000	\$20,000

Potential Credit Available - \$28,000 ($\$40,000 * 70\%$)

PPP Funding Recap

How much funding has gone to the Paycheck Protection Program so far?:

CARES Act	\$349,000,000,000	37%
PPP and Health Care Enhancement Act	\$310,000,000,000	33%
Coronavirus Response and Relief Supplemental Appropriations Act, 2021	\$284,000,000,000	30%
Total:	\$943,000,000,000	100%

Most of the \$310 billion that was allocated under the PPP and Healthcare Enhancement Act was never disbursed

The PPP has received **\$943 billion** to date!

Forgiven PPP Loan Expenses Will Be Deductible

In May, the IRS issued Revenue Notice 2020-32 which alarmed many PPP borrowers because it took the position that expenses paid for with forgiven loans would not be deductible.

This was against Congress's intent, as evidenced by the letter sent by Senators Grassley, Neal, and Wyden to Treasury Secretary Steve Mnuchin, and the new Act solidifies this position. In relevant part, the new Act states:

“(2) no deduction shall be denied or reduced, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by paragraph (1).”

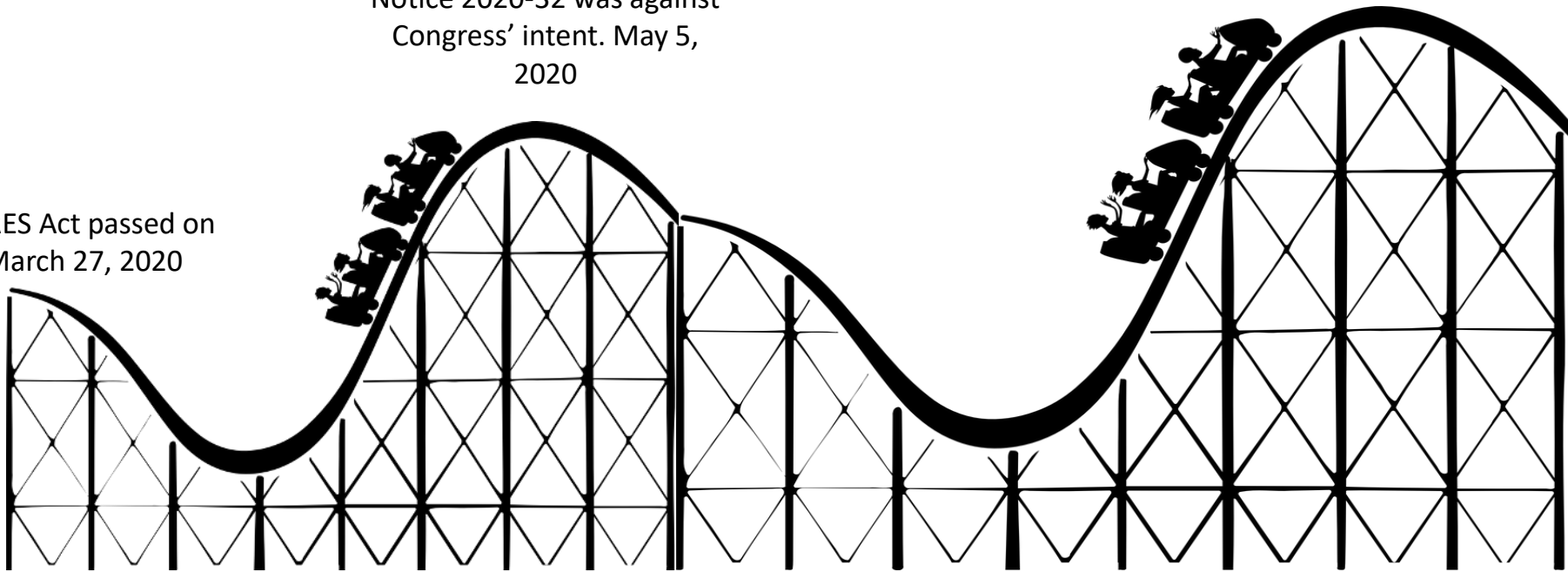
Initial reports from the Wall Street Journal indicated that at least one GOP aid had said that these deductions would be restricted in some way, however, there does not appear to be any language in the Act to suggest that this is the case.

PPP Tax-a-Coaster

Senators Grassley, Wyden,
and Neal write that IRS
Notice 2020-32 was against
Congress' intent. May 5,
2020

Senators Grassley and Wyden
issue second statement that
Rev. Rul. 2020-27 is against
Congress' intent Nov 19, 2020

CARES Act passed on
March 27, 2020



IRS Notice 2020-32
April 30, 2020

Rev. Rul. 2020-27
November 18, 2020

The applicable language from the proceeding page breaks into three important parts:

- a. (2) no deduction shall be denied or reduced,
- a. no tax attribute shall be reduced,
- b. and no basis increase shall be denied,

by reason of the exclusion from gross income provided by paragraph (1).

"This has been called the most expensive tax law change of all time" – Not Yogi Berra

When is the income from forgiveness that will increase the basis of S corporation and partnership interests recognized?

- a. When it is clear that all circumstances exist to facilitate forgiveness.
- b. When the loan is actually forgiven?

WHEN WILL A PPP LOAN BE CONSIDERED TO HAVE BEEN FORGIVEN

In the May 28, 2020 Tax Court Memorandum decision of *Novoselsky v. Commissioner* Mr. Novoselsky was a lawyer who received moneys from a law suit funding lender that was repaid from case settlements.

He claimed that the moneys received were loans that would have to be repaid if the cases were not successful, and did not pay income tax upon receipt of loan proceeds.

The Tax Court cited prior appellate cases which provided that to be considered to be a loan that has not become income the obligation to repay "must be unconditional and not contingent upon some future event.

The vast majority of PPP borrowers have absolute certainty that their loans will not have to be repaid, so it would see that the increased basis from recognition of the loan being forgiven should have occurred in 2020, and not after application and formal acceptance in 2021.

What about Basis?

The Act provides the following guidance:

In the case of an eligible recipient that is a partnership or S corporation—

“(A) any amount excluded from income by reason of paragraph (1) **shall be treated as tax exempt income for purposes of sections 705 and 1366** of the Internal Revenue Code of 1986, and

“(B) except as provided by the Secretary of the Treasury (or the Secretary’s delegate), any increase in the adjusted basis of a partner’s interest in a partnership under section 705 of the Internal Revenue Code of 1986 with respect to any amount described in subparagraph (A) shall equal the partner’s distributive share of deductions resulting from costs giving rise to forgiveness described in subsection (b).”.

What about Basis? - Partnerships

IRC 705 in relevant part reads as follows:

(a) GENERAL RULE - The adjusted basis of a partner's interest in a partnership shall, except as provided in subsection (b), be the basis of such interest determined under section 722 (relating to contributions to a partnership) or section 742 (relating to transfers of partnership interests)—

(1) increased by the sum of his distributive share for the taxable year and prior taxable years of—

(A) taxable income of the partnership as determined under section 703(a),

(B) income of the partnership exempt from tax under this title, and

(C) the excess of the deductions for depletion over the basis of the property subject to depletion;

What about Basis? – S-Corporations

IRC 1367 - Adjustments to basis of stock of shareholders, etc.

(a) General rule

(1) Increases in basis - The basis of each shareholder's stock in an S corporation shall be increased for any period by the sum of the following items determined with respect to that shareholder for such period:

(A) the items of income described in subparagraph (A) of section 1366(a)(1),

(B) any nonseparately computed income determined under subparagraph (B) of section 1366(a)(1), and

(C) the excess of the deductions for depletion over the basis of the property subject to depletion.

IRC 1366 - (a) DETERMINATION OF SHAREHOLDER'S TAX LIABILITY

(1) IN GENERAL In determining the tax under this chapter of a shareholder for the shareholder's taxable year in which the taxable year of the S corporation ends (or for the final taxable year of a shareholder who dies, or of a trust or estate which terminates, before the end of the corporation's taxable year), there shall be taken into account the shareholder's pro rata share of the corporation's—

(A) items of income (including tax-exempt income), loss, deduction, or credit the separate treatment of which could affect the liability for tax of any shareholder, and

(B) non separately computed income or loss.

What about Basis?

Example –

S-Corp receives PPP Loan of \$250,000

Shareholder basis = \$0

Taxpayer has \$250,000 of sales receipts and \$400,000 of expenses, resulting in a \$150,000 loss.

If forgiveness is considered to occur in 2020 then basis is \$250,000, so that the entire \$400,000 of expenses can be written off and the \$150,000 loss can flow through to the shareholder.

If forgiveness is not considered to have occurred in 2020 then the shareholder can only write off \$250,000 and will have \$150,000 of unused losses trapped in the S corporation except to the extent he or she makes a capital contribution or loan to the corporation before January 1, 2020.

If the basis increase from the loan forgiveness does not apply until 2021, then the amount of loss suspended in 2020 will be released. Taxpayer can contribute capital to allow the loss to flow through, or wait to recognize loss in 2021.

At Risk Rules

26 U.S. Code § 465 - Deductions limited to amount at risk

- (a) Limitation to amount at risk
 - (1) In general
 - In the case of—
 - (A) an individual, and
 - (B) a C corporation with respect to which the stock ownership requirement of paragraph (2) of section 542(a) is met, engaged in an activity to which this section applies, any loss from such activity for the taxable year shall be allowed only to the extent of the aggregate amount with respect to which the taxpayer is at risk (within the meaning of subsection (b)) for such activity at the close of the taxable year.
 - (2) Deduction in succeeding year
 - Any loss from an activity to which this section applies not allowed under this section for the taxable year shall be treated as a deduction allocable to such activity in the first succeeding taxable year.
 - (3) Special rules for applying paragraph (1)(B)
 - For purposes of paragraph (1)(B)—
 - (A) section 544(a)(2) shall be applied as if such section did not contain the phrase “or by or for his partner”; and
 - (B) sections 544(a)(4)(A) and 544(b)(1) shall be applied by substituting “the corporation meet the stock ownership requirements of section 542(a)(2)” for “the corporation a personal holding company”.

At Risk Rules – Cont'd

26 U.S. Code § 465 - Deductions limited to amount at risk

(b) Amounts considered at risk

(1) In general

For purposes of this section, a taxpayer shall be considered at risk for an activity with respect to amounts including—

- (A) the amount of money and the adjusted basis of other property contributed by the taxpayer to the activity, and
- (B) amounts borrowed with respect to such activity (as determined under paragraph (2)).

(2) Borrowed amounts

For purposes of this section, a taxpayer shall be considered at risk with respect to amounts borrowed for use in an activity to the extent that he—

- (A) is personally liable for the repayment of such amounts, or
- (B) has pledged property, other than property used in such activity, as security for such borrowed amount (to the extent of the net fair market value of the taxpayer's interest in such property).

No property shall be taken into account as security if such property is directly or indirectly financed by indebtedness which is secured by property described in paragraph (1).

(3) Certain borrowed amounts excluded

(A) In general

Except to the extent provided in regulations, for purposes of paragraph (1)(B), amounts borrowed shall not be considered to be at risk with respect to an activity if such amounts are borrowed from any person who has an interest in such activity or from a related person to a person (other than the taxpayer) having such an interest.

At Risk Rules – Cont'd

26 U.S. Code § 465 - Deductions limited to amount at risk

(d) Definition of loss

For purposes of this section, the term “loss” means the excess of the deductions allowable under this chapter for the taxable year (determined without regard to the first sentence of subsection (a)) and allocable to an activity to which this section applies over the income received or accrued by the taxpayer during the taxable year from such activity (determined without regard to subsection (e)(1)(A)).

(e) Recapture of losses where amount at risk is less than zero

(1) In general

If zero exceeds the amount for which the taxpayer is at risk in any activity at the close of any taxable year—

- (A) the taxpayer shall include in his gross income for such taxable year (as income from such activity) an amount equal to such excess, and
- (B) an amount equal to the amount so included in gross income shall be treated as a deduction allocable to such activity for the first succeeding taxable year.

(2) Limitation

The excess referred to in paragraph (1) shall not exceed—

- (A) the aggregate amount of the reductions required by subsection (b)(5) with respect to the activity by reason of losses for all prior taxable years beginning after December 31, 1978, reduced by
- (B) the amounts previously included in gross income with respect to such activity under this subsection.

Second Draw - Eligible Recipients May Receive a Second PPP Loan

An “eligible recipient” will be defined as “any business concern, nonprofit organization, housing cooperative, veterans organization, Tribal business concern, eligible self-employed individual, sole proprietor, independent contractor, or small agricultural cooperative” that meets the following three requirements:

1. Employs not more than 300 employees;
2. Has or will use the full amount of their first PPP loan; and
3. Had gross receipts during the first, second, third, or, only with respect to an application submitted on or after January 1, 2021, fourth quarter in 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the same quarter in 2019
4. Must meet the necessity requirement

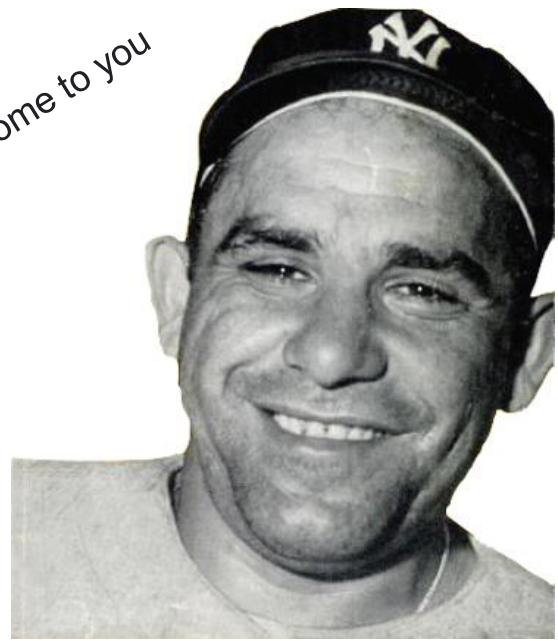
Previous iterations of this Act that did not pass, would have required a 50 percent reduction from gross receipts, so this change to 25 percent will allow PPP loans to reach a greater number of potential borrowers.

The “Berra Necessities of Life Will Come To You” in the Second Round

Look for the Berra necessities
The simple Berra necessities
Forget about your worries and your strife
I mean the Berra necessities
New York Yankee’s recipes
That brings the Berra necessities of life. . .

And don't spend your time lookin' around
For something you want that can't be found
When you find out you can live without it
And go along not thinkin' about it
I'll tell you something true
The Berra necessities of life will come to you . . .

*The Berra necessities of life will come to you
They'll come to you!*



That's why a Berra can rest at ease
With just the Berra necessities of life
With just the Berra necessities of life

- Terry Gilkyson



The “Necessity” Requirement

An “eligible recipient” will also still need to satisfy the “Necessity Test”

Some may remember that borrowers were required to certify in good faith on their initial PPP loan application that the loan is “necessary to support the on-going operations of the applicant.” Notably, this “necessity requirement” still appears to be in place following the passage of this Act. The necessity requirement is interesting because it was never fully defined which left many borrowers wondering just how much economic harm had to be inflicted upon their business before they could certify in good faith that the loan was “necessary.”

It may be hard for businesses that have survived one or two hard quarters but are now making ends meet to honestly certify that the loan is “necessary” for the ongoing operation of the business, even though the business could reasonably argue that they need the loan. The test will present a very important issue to be carefully addressed with the borrower’s CPA, financial and legal advisors.

While the SBA has announced that it will not question the necessity certification for those whose loans did not exceed \$2 million, other agencies (such as the IRS), or even whistleblowers, may. Additionally, reception of a second loan will not be kept confidential so borrowers may have to endure harsh public scrutiny.

Is There A “Necessity” Requirement?

There is some confusion Regarding Subparagraph (G) - Exemption from Certain Certification Requirements. This subparagraph provides that "An eligible entity applying for a covered loan shall not be required to make the certification described in clause (iii) or (iv) of paragraph (36)(G)."

USC 636(a)(36)(G) provides:

(G)Borrower requirements.—

- (i) Certification.—An eligible recipient applying for a covered loan shall make a good faith certification—
 - (I) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;
 - (II) acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;
 - (III) that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and
 - (IV) during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan.

This does not exempt borrowers from the certification regarding necessity and that the funds will be used for the appropriate purposes.

Second Draw - Eligible Recipients May Receive a Second PPP Loan

Eligibility Confusion

Can you get the "second draw" even if you did not receive an initial PPP loan?

“(O) SUPPLEMENTAL COVERED LOANS.—A covered loan under this paragraph may only be made to an eligible entity that—

“(i) has received a loan under paragraph (36); and

“(ii) on or before the expected date on which the covered loan under this paragraph is disbursed to the eligible entity, has used, or will use, the full amount of the loan received under paragraph (36).”.

NOTE – Paragraph (36) is a reference to initial PPP loan provisions

First Round Borrowers Not Required To Expend Full Amount Before Receiving Second Round Loan

The second requirement that an eligible entity must satisfy before taking a second PPP loan is to **certify** that, if they received a first round loan, they **have or will** spend the full amount of their first loan.

The statute specifically provides the following language below. Our reading of this is that it is not a requirement that the loan money be fully expended at the time of application for the second loan, only that it will eventually be used by the business.

“A covered loan under this paragraph may only be made to an eligible entity that on or before the expected date on which the covered loan under this paragraph is disbursed to the eligible entity, **has used, or will use**, the full amount of the loan received under paragraph (36).”.

The statute does not provided a time period for when the first loan would eventually have to be used, but if it is not used in the 24 weeks since the original loan disbursement date it would not be forgivable.

Additional Loans Cannot Exceed \$2,000,000 per Borrower—90 Day Wait Between Loans

The loan amounts for a vast majority of borrowers will be almost identical to what the borrower received for their original PPP loan. This second round of funding, however, is capped at \$2 million per borrower rather than \$10 million under the initial round of PPP loans in the CARES Act. For borrowers who received a PPP loan within the last 90 days, the new Act requires that the aggregate of the new and old loan not exceed \$10 million.

New Deadline to Apply for PPP Loans

The new deadline to apply for and receive a PPP Loan will be March 31, 2021.

SEC. 323. COMMITMENT AUTHORITY AND APPROPRIATIONS.

(a) COMMITMENT AUTHORITY.—Section 1102(b) of the CARES Act (Public Law 116–136) is amended—

(1) in paragraph (1)—

(A) in the paragraph heading, by inserting “AND SECOND DRAW” after “PPP”;

(B) (B) by striking “August 8, 2020” and inserting “March 31, 2021”;

Paycheck Protection Program Loans

<p>How Much you Can Borrow?</p> <p>“The 2.5x Test”</p>	<p>How Much Can Be Forgiven?</p> <p>“The 8/24 Week (or somewhere in between) Expense Test”</p>	<p>What You Can Use the Funds For</p>
<p>2.5 Times Monthly Average Payroll Costs for the prior 12 months or calendar year 2019</p> <p>Payroll Costs include:</p> <ul style="list-style-type: none"> • salary, wage, commission, or similar compensation • payment of cash tip or the equivalent • payment for vacation, parental, family, medical or sick leave • allowance for dismissal or separation (severance pay) • <u>payment required for the provisions of group insurance policies: health, life, disability, vision, and dental</u> • payment of any retirement benefit • payment of state or local tax assessed on the compensation of employees 	<ol style="list-style-type: none"> 1. Payroll Costs including those shown in left column 2. Payment of interest on mortgage obligations incurred prior to February 15th, 2020 3. Rent obligations for leases entered into prior to February 15th, 2020 4. Utilities (including payment for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020) 5. <u>Covered operation expenditures</u> 6. <u>Covered property damage costs</u> 7. <u>Covered supplier costs</u> 8. <u>Covered worker protection expenditures</u> 	<ol style="list-style-type: none"> 1. Payroll Costs including those items shown in left column 2. Items 2 – 8 in middle column <ul style="list-style-type: none"> • Expenses allowed, but do not reduce indebtedness. <ol style="list-style-type: none"> (1) Interest on non-mortgage debt obligations even if incurred prior to February 15th, 2020 (2) Interest payments on mortgage debts incurred after February 15, 2020. (3) Rent obligations entered into after February 15, 2020.

Paycheck Protection Program Loans – Statutory Language on Loan 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:*
- Payroll costs are defined to include the following:
 - *salary, wage, commission, or similar compensation*
 - *payment of cash tip or the equivalent*
 - *payment for vacation, parental, family, medical or sick leave*
 - *allowance for dismissal or separation (severance pay)*
 - *payment required for the provisions of group health care benefits, including insurance premiums*
 - *payment of any retirement benefit*
 - *payment of state or local tax assessed on the compensation of employees*

Expanded Definition of Payroll Costs

Payroll costs eligible for forgiveness under the 60% test now include employer payments for group life, disability, vision, and dental insurance payments.

SEC. 308. SPECIFIC GROUP INSURANCE PAYMENTS AS PAYROLL COSTS.

(a) IN GENERAL.—Section 7(a)(36)(A)(viii)(I)(aa)(EE) of the Small Business Act (15 U.S.C. 636(a)(36)(A)(viii)(I)(aa)(EE)) is amended by inserting “or group life, disability, vision, or dental insurance” before “benefits”.

(b) EFFECTIVE DATE; APPLICABILITY.—The amendment made by subsection (a) shall be effective as if included in the CARES Act (Public Law 116–136; 134 Stat. 281) and shall apply to any loan made pursuant to section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) before, on, or after the date of enactment of this Act, including forgiveness of such a loan.

Expanded Definition of Payroll Costs

Old Payroll Costs:

- 1(a). Salary, wages, commissions, tips
- 1(b). Tips were added effective 05/20/20
2. State or local payroll taxes
3. Paid leave
4. Healthcare payments
5. Retirement plan contributions

New Payroll Costs:

1. Group life insurance
2. Group disability insurance
3. Group vision insurance
4. Group dental insurance

Expenses paid with PPP loan proceeds towards any of the above categories of expenses will satisfy the 60% Rule required for full forgiveness of the loan

The 60% Rule Continues To Apply

To receive full loan forgiveness, a borrower must use at least 60 percent of the PPP loan for payroll costs, and not more than 40 percent of the loan forgiveness amount may be attributable to nonpayroll costs.

For example, if a borrower uses 59 percent of its PPP loan for payroll costs, it will not receive the full amount of loan forgiveness it might otherwise be eligible to receive. Instead, the borrower will receive partial loan forgiveness, based on the requirement that 60 percent of the forgiveness amount must be attributable to payroll costs. For example, if a borrower receives a \$100,000 PPP loan, and during the covered period the borrower spends \$54,000 (or 54 percent) of its loan on payroll costs, then because the borrower used less than 60 percent of its loan on payroll costs, the maximum amount of loan forgiveness the borrower may receive is \$90,000 (with \$54,000 in payroll costs constituting 60 percent of the forgiveness amount and \$36,000 in nonpayroll costs constituting 40 percent of the forgiveness amount).

Eligible Expenses under the 60% Rule following the new Act:

Salaries, wages, commissions, tips, healthcare payments, retirement plan contributions, group life insurance, group disability insurance, group vision insurance, group dental insurance.

New Forgivable Non-Payroll Expenses

The new Act creates four additional categories of expenses that are eligible for forgiveness as “non-payroll costs”. The sum of expenses from these categories cannot exceed 40% of the loan amount in order to a borrower to obtain full forgiveness.

SEC. 304. ADDITIONAL ELIGIBLE EXPENSES.

(a) ALLOWABLE USE OF PPP LOAN.— Section 7(a)(36)(F)(i) of the Small Business Act (15 U.S.C. 636(a)(36)(F)(i)) is amended—

(1) in subclause (VI), by striking “and” at the end;

(2) in subclause (VII), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following:

“(VIII) **covered operations expenditures**, as defined in section 7A(a);

“(IX) **covered property damage costs**, as defined in section 7A(a);

“(X) **covered supplier costs**, as defined in section 7A(a); and

“(XI) **covered worker protection expenditures**, as defined in section 7A(a).”

Expanded Definition of Non-Payroll (40%) Costs

Old Non-Payroll Costs:

1. Payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation)
2. Rent (including rent under a lease agreement – limited for related party landlords);
3. Utilities
4. Interest on any other debt obligations that were incurred before the covered period.

New Non-Payroll Costs:

1. Covered operations expenditures
2. Covered property damage expenditures
3. Covered supplier costs
4. Covered worker protection expenditures

Expenses paid with PPP loan proceeds towards any of the above categories of expenses will be eligible for full forgiveness so long as the sum of said expenses does not exceed 40% of the loan amount (*see*, conversely, the 60% Rule).

Covered Worker Protection Expenditures

“(9) the term ‘covered worker protection expenditure’—

“(A) means an operating or a capital expenditure to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID– 19;

Examples:

Purchase, maintenance, or renovation of assets that create or expand a drive-through window facility, an indoor, outdoor, or combined air or air pressure ventilation or filtration system, a physical barrier such as a sneeze guard, an expansion of additional indoor, outdoor, or combined business space, an onsite or offsite health screening capability or the purchase of covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, particulate filtering facepieces, or other kinds of personal protective equipment.

NOTE: This provision does not apply to residential real property or intangible property

Covered Property Damages Costs

“(5) the term ‘covered property damage cost’ means a cost related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation;”

We can surely expect future guidance on this provision from the SBA. It is, for now, unclear how damage, vandalism, or looting will be defined. It is unclear how a business will certify that the damage resulted from “public disturbances in 2020.” It is unclear exactly what will qualify as a “public disturbance.” It is unclear how this provision will apply for businesses who are still undergoing insurance claim processes/disputes relating to property damage in 2020.

Covered Operation Expenditures

'(3) the term 'covered operations expenditure' means a payment for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses;'

Examples:

- Google Drive Business subscription
- New QuickBooks or other accounting software licenses
- New work-from-home remote workstation software licenses
- Enhanced cloud storage
- Skype or zoom licenses
- New customer relationship management (CRM) software license

Covered Supplier Costs

“(7) the term ‘covered supplier cost’ means an expenditure made by an entity to a supplier of goods for the supply of goods that—

“(A) are essential to the operations of the entity at the time at which the expenditure is made; and

“(B) is made pursuant to a contract, order, or purchase order

“(i) in effect at any time before the covered period with respect to the applicable covered loan; or

“(ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan;”

Examples:

- *Conceivably*, expenses for anything that is necessary for the operation of the business
- Goods that are no longer needed but which were contracted for prior to receipt of the loan
- Goods that expire and go to waste during the covered period

Deadline to Issue Guidance

SEC. 303. EMERGENCY RULEMAKING AUTHORITY.

“Not later than 10 days after the date of enactment of this Act, the Administrator shall issue regulations to carry out this Act and the amendments made by this Act without regard to the notice requirements under section 553(b) of title 5, United States Code.”

The “Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act” was signed by President Trump on December 27th, which means the SBA and Treasury must release guidance on these new rules by January 6th, 2021.

As was the case with the CARES Act and the Flexibility Act, we can expect rolling guidance released from the SBA and Treasury over the course of the next few months.

Independent Contractor/Sole Proprietor Rules Reviewed

Unchanged by the new Act



SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For a Self-Employed Individual With No Employees

If you are self-employed and have no employees, and your principal place of residence is in the United States, including if you are an independent contractor or operate a sole proprietorship (but not if you are a partner in a partnership):

- *Step 1: Find your 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value). If this amount is over \$100,000, reduce it to \$100,000. If this amount is zero or less, you are not eligible for a PPP loan.*
- *Step 2: Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).*
- *Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5.*
- *Step 4: Add the outstanding amount of any Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).*

Your 2019 IRS Form 1040 Schedule C must be provided to substantiate the applied-for PPP loan amount. You must also provide a 2019 IRS Form 1099-MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record establishing you were self-employed in 2019 and a 2020 invoice, bank statement, or book of record establishing you were in operation on February 15, 2020.

SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For a Self-Employed Individual With Employees

- *Step 1: Compute your 2019 payroll costs by adding the following:*
 - *2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value); if this amount is over \$100,000, reduce it to \$100,000; and if this amount is less than zero, set this amount at zero;*
 - *2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amount paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S.;*
 - *2019 employer contributions for employee health insurance (portion of IRS Form 1040 Schedule C line 14 attributable to health insurance);*
 - *2019 employer contributions to employee retirement plans (IRS Form 1040 Schedule C line 19); and*
 - *2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).*
- *Step 2: Calculate the average monthly payroll costs amount (divide the amount from Step 1 by 12).*
- *Step 3: Multiply the average monthly payroll costs amount from Step 2 by 2.5.*
- *Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).*

Your 2019 IRS Form 1040 Schedule C, IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with documentation of any retirement or health insurance contributions, must be provided to substantiate the applied for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date.

SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For a Self-Employed Individual In Operation on February 15, 2020, But Not in Operation Between February 15 and June 30, 2019

- *Step 1: Fill out an IRS Form 1040 Schedule C (or Schedule F, if applicable) for January and February 2020. The entries on the schedule must reflect all business income and expenses from those two months, with the exception that on Schedule C line 13 (or Schedule F line 14):*
 - *you must include only 1/6 of the amount of any annual depreciation and section 179 expense deduction attributable to investment made in those months, and*
 - *you must include 1/6 of the amount of the 2020 depreciation deduction attributable to investment made in prior years.*
- *Step 2: Take the net profit amount for January and February on Schedule C line 31 (or Schedule F line 34). If this amount is more than \$16,667 for the two months combined, set it to \$16,667.*
- *Step 3: If you have employees, add your employee payroll costs for January and February 2020 to the result in Step 2. Only include payroll costs for those employees whose principal place of residence is in the United States and up to \$16,667 of cash compensation per employee.*

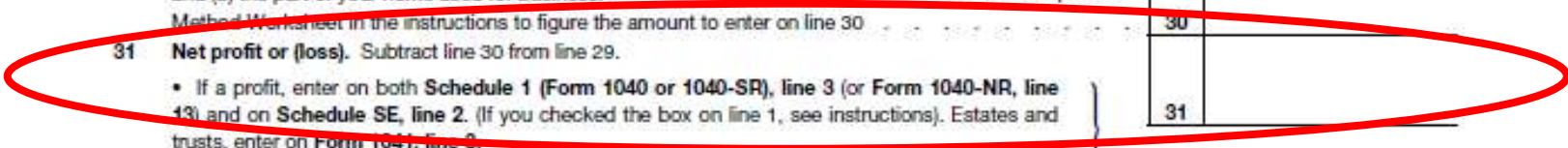
SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For a Self-Employed Individual In Operation on February 15, 2020, But Not in Operation Between February 15 and June 30, 2019

- *Step 4: Divide the total by 2, and then multiply it by 2.5.*
- *Step 5: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).*

Your IRS Form 1040 Schedule C (or Schedule F, if applicable) as completed must be provided to your lender when you apply for a PPP loan. This information should be consistent with what you will submit to the IRS and must be true and accurate in all material respects. You must also supply bank statements from your business account(s) for the months of January and February 2020 to substantiate your net profit amount from Schedule C or F, as applicable. If you have employees, you also must provide payroll records from those two months and your IRS Form 941 for the first quarter of 2020

Special Considerations for Independent Contractors and Proprietors – Calculating the Maximum Loan

Part II Expenses. Enter expenses for business use of your home only on line 30.							
8	Advertising	8		18	Office expense (see instructions)	18	
9	Car and truck expenses (see instructions).	9		19	Pension and profit-sharing plans	19	
10	Commissions and fees	10		20	Rent or lease (see instructions):		
11	Contract labor (see instructions)	11		a	Vehicles, machinery, and equipment	20a	
12	Depletion	12		b	Other business property	20b	
13	Depreciation and section 179 expense deduction (not included in Part III) (see instructions).	13		21	Repairs and maintenance	21	
14	Employee benefit programs (other than on line 19)	14		22	Supplies (not included in Part III)	22	
15	Insurance (other than health)	15		23	Taxes and licenses	23	
16	Interest (see instructions):			24	Travel and meals:		
a	Mortgage (paid to banks, etc.)	16a		a	Travel	24a	
b	Other	16b		b	Deductible meals (see instructions)	24b	
17	Legal and professional services	17		25	Utilities	25	
28	Total expenses before expenses for business use of home. Add lines 8 through 27a			26	Wages (less employment credits)	26	
29	Tentative profit or (loss). Subtract line 28 from line 7			27a	Other expenses (from line 4B)	27a	
30	Expenses for business use of your home. Do not report these expenses elsewhere. Attach Form 8829 unless using the simplified method (see instructions). Simplified method filers only: enter the total square footage of: (a) your home: _____ and (b) the part of your home used for business: _____ Use the Simplified Method Worksheet in the instructions to figure the amount to enter on line 30			b	Reserved for future use	27b	
31	Net profit or (loss). Subtract line 30 from line 29. • If a profit, enter on both Schedule 1 (Form 1040 or 1040-SR), line 3 (or Form 1040-NR, line 13) and on Schedule SE, line 2 . (If you checked the box on line 1, see instructions). Estates and trusts, enter on Form 1041, line 3 . • If a loss, you must go to line 32.						31
32	If you have a loss, check the box that describes your investment in this activity (see instructions). • If you checked 32a, enter the loss on both Schedule 1 (Form 1040 or 1040-SR), line 3 (or Form 1040-NR, line 13) and on Schedule SE, line 2 . (If you checked the box on line 1, see the line 31 instructions). Estates and trusts, enter on Form 1041, line 3 . • If you checked 32b, you must attach Form 6198 . Your loss may be limited.						32a <input type="checkbox"/> All investment is at risk. 32b <input type="checkbox"/> Some investment is not at risk.



Relief for Schedule F Farmers *(Old McDonald Had a Loan)*

There was some confusion as to whether farmers reporting income on Schedule F were eligible to receive a second bite PPP loan. Fortunately, the Act includes specific provisions that allow farmers reporting income on a Schedule F to qualify for a PPP loan based on their 2019 Schedule F income in a similar manner that applies to Schedule C taxpayers.

“(ii) NO EMPLOYEES.—

With respect to covered recipient without employees, the maximum covered loan amount shall be the lesser of—

“(I) the sum of—

“(aa) the product obtained by multiplying—

“(AA) the gross income of the covered recipient in 2019, as reported on a Schedule F (or any equivalent successor schedule), that is not more than \$100,000, divided by 12; and

“(BB) 2.5; and . . .

**Did they
accidentally give
away the farm?
They must have
meant net income.**

Special Considerations for Schedule F Filers – Calculating the Maximum Loan

SCHEDULE F (Form 1040)		Profit or Loss From Farming		OMB No. 1545-0074	
Department of the Treasury Internal Revenue Service (99)		▶ Attach to Form 1040, Form 1040-SR, Form 1040-NR, Form 1041, or Form 1065. ▶ Go to www.irs.gov/ScheduleF for instructions and the latest information.		2020 Attachment Sequence No. 14	
Name of proprietor				Social security number (SSN)	
A Principal crop or activity		B Enter code from Part IV ▶		C Accounting method: <input type="checkbox"/> Cash <input type="checkbox"/> Accrual	
				D Employer ID number (EIN) (see instr.)	
E Did you "materially participate" in the operation of this business during 2020? If "No," see instructions for limit on passive losses				<input type="checkbox"/> Yes <input type="checkbox"/> No	
F Did you make any payments in 2020 that would require you to file Form(s) 1099? See instructions				<input type="checkbox"/> Yes <input type="checkbox"/> No	
G If "Yes," did you or will you file required Form(s) 1099?				<input type="checkbox"/> Yes <input type="checkbox"/> No	
Part I Farm Income—Cash Method. Complete Parts I and II. (Accrual method. Complete Parts II and III, and Part I, line 9.)					
1a Sales of livestock and other resale items (see instructions)		1a			
b Cost or other basis of livestock or other items reported on line 1a		1b			
c Subtract line 1b from line 1a				1c	
2 Sales of livestock, produce, grains, and other products you raised				2	
3a Cooperative distributions (Form(s) 1099-PATR)		3a		3b Taxable amount	
4a Agricultural program payments (see instructions)		4a		4b Taxable amount	
5a Commodity Credit Corporation (CCC) loans reported under election				5a	
b CCC loans forfeited		5b		5c Taxable amount	
6 Crop insurance proceeds and federal crop disaster payments (see instructions):					
a Amount received in 2020		6a		6b Taxable amount	
c If election to defer to 2021 is attached, check here <input type="checkbox"/>				6d Amount deferred from 2019	
7 Custom hire (machine work) income				7	
8 Other income, including federal and state gasoline or fuel tax credit or refund (see instructions)				8	
9 Gross income. Add amounts in the right column (lines 1c, 2, 3b, 4b, 5a, 5c, 6b, 6d, 7, and 8). If you use the accrual method, enter the amount from Part III, line 50. See instructions				9	

?

SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan for Individual Who Reports Income on Form 1040 Schedule F

Self-employed farmers (i.e., those who report their net farm profit on IRS Form 1040 Schedule 1 and Schedule F) should use IRS Form 1040 Schedule F in lieu of Schedule C, and Schedule F line 34 net farm profit should be used to determine their loan amount in place of Schedule C line 31 net profit. The calculation is otherwise the same as for Schedule C filers above. The 2019 IRS Form 1040 Schedule 1 and Schedule F must be included with the loan application.

Special Considerations for Schedule F Filers – Calculating the Maximum Loan

Part II Farm Expenses—Cash and Accrual Method. Do not include personal or living expenses. See instructions.							
10	Car and truck expenses (see instructions). Also attach Form 4562	10		23	Pension and profit-sharing plans	23	
11	Chemicals	11		24	Rent or lease (see instructions):		
12	Conservation expenses (see instructions)	12		a	Vehicles, machinery, equipment	24a	
13	Custom hire (machine work)	13		b	Other (land, animals, etc.)	24b	
14	Depreciation and section 179 expense (see instructions)	14		25	Repairs and maintenance	25	
15	Employee benefit programs other than on line 23	15		26	Seeds and plants	26	
16	Feed	16		27	Storage and warehousing	27	
17	Fertilizers and lime	17		28	Supplies	28	
18	Freight and trucking	18		29	Taxes	29	
19	Gasoline, fuel, and oil	19		30	Utilities	30	
20	Insurance (other than health)	20		31	Veterinary, breeding, and medicine	31	
21	Interest (see instructions):			32	Other expenses (specify):		
a	Mortgage (paid to banks, etc.)	21a		a	.....	32a	
b	Other	21b		b	.....	32b	
22	Labor hired (less employment credits)	22		c	.....	32c	
33	Total expenses. Add lines 10 through 32f. If line 32f is negative, see instructions ▶			d	.....	32d	
34	Net farm profit or (loss). Subtract line 33 from line 9 ▶ If a profit, stop here and see instructions for where to report. If a loss, complete lines 35 and 36.			e	.....	32e	
35	Reserved for future use.			f	.....	32f	
36	Check the box that describes your investment in this activity and see instructions for where to report your loss:						
a	<input type="checkbox"/> All investment is at risk.						
b	<input type="checkbox"/> Some investment is not at risk.						

For Paperwork Reduction Act Notice, see the separate instructions.

Cat. No. 11346H

Schedule F (Form 1040) 2020

Calculating PPP Loan Amounts For Partnerships

SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For Partnerships

- *Step 1: Compute 2019 payroll costs by adding the following:*
 - *2019 Schedule K-1 (IRS Form 1065) Net earnings from self-employment of individual U.S. based general partners that are subject to self-employment tax, computed from box 14a (reduced by any section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties) multiplied by 0.9235,2 up to \$100,000 per partner (if 2019 schedules have not been filed, fill them out);*
 - *2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, if any, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S.;*
 - *2019 employer contributions for employee health insurance, if any (portion of IRS Form 1065 line 19 attributable to health insurance);*
 - *2019 employer contributions to employee retirement plans, if any (IRS Form 1065 line 18); and this treatment follows the computation of self-employment tax from IRS Form 1040 Schedule SE Section A line 4 and removes the “employer” share of self-employment tax, consistent with how payroll costs for employees in the partnership are determined.*
 - *2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms), if any.*

SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For Partnerships

- *Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).*
- *Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.*
- *Step 4: Add any outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).*

The partnership's 2019 IRS Form 1065 (including K-1s) and other relevant supporting documentation if the partnership has employees, including the 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements) along with records of any retirement or health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. If the partnership has employees, a payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish the partnership was in operation and had employees on that date. If the partnership has no employees, an invoice, bank statement, or book of record establishing the partnership was in operation on February 15, 2020 must instead be provided.

Calculating PPP Loan Amounts For S and C Corporations

SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For S corporations and C corporations

- *Step 1: Compute 2019 payroll costs by adding the following:*
 - *2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S;*
 - *2019 employer health insurance contributions (portion of IRS Form 1120 line 24 or IRS Form 1120-S line 18 attributable to health insurance);*
 - *2019 employer retirement contributions (IRS Form 1120 line 23 or IRS Form 1120-S line 17); and*
 - *2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).*
- *Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).*
- *Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.*
- *Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).*

The corporation's 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with the filed business tax return (IRS Form 1120 or IRS 1120-S) or other documentation of any retirement and health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date

Key PPP Payroll Expense Limitations

Key Percentages and Amounts	
	2.5 divided by 12 = 20.833%
	20.833% of 2019 "payroll" or Schedule C net income determine the loan amount
	8/52 = 15.38%
	Maximum forgiveness per employee earning more than \$100,000 for 8 weeks - \$15,385
	24/52 = 46.15%
	Non-owner employee Maximum counted for 24 weeks - \$46,154

	Independent Contractor/ Sole Proprietor	Owner/Employee	Non-Owner/Employee
8 weeks	Lesser of: (1) \$15,385 or (2) 15.385% of 2019 Schedule C net income	Lesser of: (1) \$15,385 or (2) 15.385% of 2019 compensation	\$15,385
24 weeks	Lesser of: (1) \$20,833 or (2) 20.833% of 2019 Schedule C net income	Lesser of: (1) \$20,833 or (2) 20.833% of 2019 compensation	\$46,154

	Sole Proprietor/ Independent Contractor – No Employees	Sole Proprietor/ Independent Contractor w/ Employees	Partners in Partnerships	S Corporations (More than 2% Shareholder)	S Corporations (Less than 2% Shareholder)	C Corporations
Group Health Expenses for Owners*	0	0	0	0	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks
Group Health Expenses for Employees	N/A	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks
Retirement Plan Expenses for Owners*	0	0	0	As paid or incurred during 8 or 24 weeks limited to 20.833% of 2019 contribution amount	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks limited to 20.833% of 2019 contribution amount
Retirement Plan Expenses for Employees	N/A	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks	As paid or incurred during 8 or 24 weeks

NOTE - Forgiveness is not provided for employer contributions for retirement benefits or health insurance accelerated from periods outside the Covered Period, and cannot include any retirement contributions or health insurance costs deducted from employees' pay or otherwise paid by employees.

*Owner is defined as 5% or more shareholder in an S-Corporation or C-Corporation. No threshold provided for partners in a partnership.

	S Corporations (Less than 2% Shareholder)	S Corporations (2% or More but Less than 5% Shareholder)	S Corporations (5% or More)
Owner Compensation Limitation	Up to \$46,154	Up to \$46,154	Lesser of \$20,833 or 20.833% of 2019 compensation
Health Insurance	As paid or incurred during 8 to 24 week period	0	0
Retirement Plan Contributions	As paid or incurred during 8 to 24 week period	As paid or incurred during 8 to 24 week period	As paid or incurred during 8 to 24 week period limited to 20.833% of 2019 contribution amount

NOTE - Forgiveness is not provided for employer contributions for retirement benefits or health insurance accelerated from periods outside the Covered Period, and cannot include any retirement contributions or health insurance costs deducted from employees' pay or otherwise paid by employees.

Owner's \$100,000 Wage Limitation Annualized

For the purposes of calculating covered payroll expenses, an owner's \$100,000 salary/wage limitation now applies on an annualized basis in recognition of the rule change that permits a borrower to choose any covered period between 8 and 24 weeks after the date PPP loan was received.

SEC. 344. APPLICABLE PERIODS FOR PRORATION.

Section 7(a)(36)(A)(viii) of the Small Business Act (15 U.S.C. 636(a)(36)(A)(viii)) is amended—

- (1) in subclause (I)(bb), by striking “in 1 year, as prorated for the covered period” and inserting “on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred”; and
- (2) in subclause (II)—
- (3) in item (aa), by striking “an annual salary of \$100,000, as prorated for the covered period” and inserting “\$100,000 on an annualized basis, as prorated for the period during which the compensation is paid or the obligation to pay the compensation is incurred”;
 - (B) in item (bb), by striking “covered” and inserting “applicable”

SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For Eligible Nonprofit Organizations

- *Step 1: Compute 2019 payroll costs by adding the following:*
 - *2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S;*
 - *2019 employer health insurance contributions (portion of IRS Form 990 Part IX line 9 attributable to health insurance);*
 - *2019 employer retirement contributions (IRS Form 990 Part IX line 8); and*
 - *2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).*

SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For Eligible Nonprofit Organizations

- *Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).*
- *Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.*
- *Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).*

The nonprofit organization's 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with the filed IRS Form 990 Part IX or other documentation of any retirement and health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date. Eligible nonprofits that do not file an IRS Form 990, typically those with gross receipts less than \$50,000, should see the next question

Calculating PPP Loan Amounts For Eligible Religious Institutions, Veterans Organizations, and Tribal Businesses



SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For Eligible Religious Institutions, Veterans Organizations, and Tribal Businesses

- *Step 1: Compute 2019 payroll costs by adding the following:*
 - *2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S;*
 - *2019 employer health insurance contributions;*
 - *2019 employer retirement contributions and*
 - *2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).*

SBA Guidance Updated June 26th - How to Calculate Maximum PPP Loan For Eligible Religious Institutions, Veterans Organizations, and Tribal Businesses

- *Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).*
- *Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.*
- *Step 4: Add any outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).*

The entity's 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with documentation of any retirement and health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date.

Maximum Amount of New PPP Loans For Seasonal Employers, New Entities, and Businesses With More Than One Physical Location

Seasonal Employers

- For Seasonal Employers - the maximum amount of new PPP loans is based upon 2.5 times the average monthly payroll costs for the 12-week that begins February 15, 2019 and ends February 15th, 2020. The loan can be for up to, but not exceed, \$2 million.

“(ii) SEASONAL EMPLOYERS.—

The maximum amount of a covered loan made to an eligible entity that is a seasonal employer is the lesser of—

“(I) the product obtained by multiplying—

“(aa) at the election of the eligible entity, the average total monthly payments for payroll costs incurred or paid by the eligible entity for any 12-week period between February 15, 2019 and February 15, 2020; by

“(bb) 2.5; or

“(II) \$2,000,000.

New Entities

- For “New entities” which were in business prior to February 15, 2020 - the maximum amount of new PPP loans is based upon the average monthly payroll costs up through the date when the entity applies multiplied by 2.5, but not exceeding \$2 million. Must have been in business prior to February 15th, 2020 to be eligible.

“(iii) NEW ENTITIES.—

The maximum amount of a covered loan made to an eligible entity that did not exist during the 1-year period preceding February 15, 2020 is the lesser of—

“(I) the product obtained by multiplying—

“(aa) the quotient obtained by dividing—

“(AA) the sum of the total monthly payments by the eligible entity for payroll costs paid or incurred by the eligible entity as of the date on which the eligible entity applies for the covered loan; by

“(BB) the number of months in which those payroll costs were paid or incurred; by

“(bb) 2.5; or

“(II) \$2,000,000.



Businesses With More Than One Physical Location

- For businesses with more than one physical location, the maximum amount of new PPP loans is stated as follows:

“(D) BUSINESS CONCERNS WITH MORE THAN 1 PHYSICAL LOCATION.—

“(i) IN GENERAL.—For a business concern with more than 1 physical location, the business concern shall be an eligible entity if the business concern would be eligible for a loan under paragraph (36) pursuant to clause (iii) of subparagraph (D) of such paragraph, as applied in accordance with clause (ii) of this subparagraph, and meets the revenue reduction requirements described in item (bb) of subparagraph (A)(iv)(I).

“(ii) SIZE LIMIT.—For purposes of applying clause (i), the Administrator shall substitute ‘not more than 300 employees’ for ‘not more than 500 employees’ in paragraph (36)(D)(iii).

- The total amount of all covered loans across each location shall be not be more than \$2,000,000;



Borrower's Applicable Payroll Cost Time Period Election

'(C) MAXIMUM LOAN AMOUNT.—

“(i) IN GENERAL.—Except as otherwise provided in this subparagraph, the maximum amount of a covered loan made to an eligible entity is the lesser of—

“(l) the product obtained by multiplying—

“(aa) at the election of the eligible entity, the average total monthly payment for payroll costs incurred or paid by the eligible entity during—

“(AA) the 1-year period before the date on which the loan is made; or

“(BB) calendar year 2019; by

“(bb) 2.5; or

When determining the maximum loan amount a borrower is eligible for under a second draw PPP loan, with respect to the time period a borrower will use to determine their average monthly payroll cost, a borrower may elect to use any of the following:

- Calendar year 2019
- Calendar year 2020 (if after December 31st, 2020)
- Any fiscal year prior to the date of the application
 - Example: April 2019 – April 2020; November 30, 2019 – November 30, 2020; etc.

Requirement for Date in Operation

A borrower will not be eligible for a PPP loan if the business was not in operation as of Feb 15th, 2020.

SEC. 310. CLARIFICATION OF AND ADDITIONAL LIMITATIONS ON ELIGIBILITY.

(a) DATE IN OPERATION.—

(1) IN GENERAL.—Section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) is amended by adding at the end the following:

(T) REQUIREMENT FOR DATE IN OPERATION.—A business or organization that was not in operation on February 15, 2020 shall not be eligible for a loan under this paragraph.”.

(2) EFFECTIVE DATE; APPLICABILITY.—The amendment made by paragraph (1) shall be effective as if included in the CARES Act (Public Law 116–136; 134 Stat. 281) and shall apply to any loan made pursuant to section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) before, on, or after the date of enactment of this Act, including forgiveness of such a loan.

Article: Good News for Restaurants and Other Food Service Providers Taking Second Draw PPP Loans

This week Congress agreed in principle to the Coronavirus Response and Relief Supplemental Appropriations Act which brings much needed relief to small businesses affected by the harsh economic realities associated with the Coronavirus pandemic.

One of the prevailing features of the Act is the fact that it creates the opportunity for “second draw” PPP loans. Many will recall that the Paycheck Protection Program (“PPP”) was first instituted under the CARES Act back in March. Its purpose was to put funds in the hands of businesses who were increasingly being forced to close their doors due to health protocols in the hopes that the money would prevent mass layoffs by funding these businesses’ payrolls. The loans could be fully forgiven if the businesses spent at least 60% of the proceeds on payroll costs.

The first iteration of the PPP was a success with tens of thousands of businesses receiving hundreds of billions of dollars that went toward keeping people in their jobs. It was such a success that business owners and elected officials alike have been clamoring for a second round of the program to be included in any future COVID-19 related stimulus package. Well this week they got their wish.

Article: Good News for Restaurants and Other Food Service Providers Taking Second Draw PPP Loans, *Cont'd*

Below, we will discuss what this means for the average borrower and why there is a little extra good news for food service providers.

Requirements for second round borrowers:

The Act imposes a new set of requirements for those seeking a second PPP loan.

First, the borrower must certify that the loan is “necessary for the continued operation of the business.” This requirement was much easier to satisfy back in March when many borrowers were applying for their first loan and it looked like the economy was teetering on a cliff. Now, however, businesses have had a few months to adapt to new methods of operation. Businesses who have, for the most part, been able to navigate through these last few months and remain operational may have a hard time justifying the loan as “necessary” for the survival of the business. That is, unless, the business is imminently about to close its doors.

Next, a borrower can employ no more than 300 individuals. This is emblematic of Congress’s intent to direct these “second draw” loans into the hands of smaller businesses. The rules are slightly different for businesses with more than one physical location. For those businesses, they can employ up to 500 people before they become ineligible to receive a second loan.

Next, a borrower must certify that if they took a round one PPP loan they have or will expend it all. This does not require a business to expend the entirety of their first loan before they receive a second; only that they certify they WILL eventually expend the full amount of the loan.

Finally, a borrower must show that they suffered a 25% loss in gross receipts for any quarter in 2020, when compared to that same quarter in 2019.



Article: Good News for Restaurants and Other Food Service Providers Taking Second Draw PPP Loans, *Cont'd*

Determining the amount a borrower is eligible to receive:

The amount a borrower can obtain through a second draw PPP loan is determined much the same way it was for first round PPP loans. Borrowers may receive 2.5 times the average total monthly payroll costs incurred or paid during the 1-year period before the date on which the loan is made or, at the election of the borrower, calendar year 2019. This amount is not to exceed \$2,000,000 whereas first round loans were capped at \$10,000,000.

The applicable time periods are slightly different for businesses that were not in operation for the entirety of 2019, however, the 2.5 times average monthly payroll costs multiplier is a constant for all second draw borrowers...

Except for food service providers!

Article: Good News for Restaurants and Other Food Service Providers Taking Second Draw PPP Loans, *Cont'd*

Determining the amount an NAICS Code 72 borrower is eligible to receive:

Section 311 of the Act provides the following:

(iv) NAICS 72 ENTITIES.—The maximum amount of a covered loan made to an eligible entity that is assigned a North American Industry Classification System code beginning with 72 at the time of disbursement is the lesser of—

(I) the product obtained by multiplying—

(aa) at the election of the eligible entity, the average total monthly payment for payroll costs incurred or paid by the eligible entity during—

(AA) the 1-year period before the date on which the loan is made; or

(BB) calendar year 2019; by

(bb) 3.5; or

(II) \$2,000,000.

The 3.5 times the average total monthly payroll costs multiplier that NAICS Code 72 entities receive as opposed to the standard 2.5 times multiplier that everyone else receives is truly monumental news for all sorts of food service providers - they will be able to receive 40% more as compared to any other PPP second draw borrower!

Article: Good News for Restaurants and Other Food Service Providers Taking Second Draw PPP Loans, *Cont'd*

Here is a list of all entities that fall under the North American Industry Classification System Code 72. It is comprised mostly of food service providers:

Code	Title
72	Accommodation and Food Service
7211	Traveler Accomodation
721110	Hotels (except Casino Hotels) and Motels
721120	Casino Hotels
721191	Bed-and-Breakfast Inns
721199	All Other Travel Accommodation
7212	RV Parks and Recreational Camps
721211	RV Parks and Campgrounds
721214	RV Parks and Vacation Camps
7213	Rooming and Boarding Houses, Dormitories, and Worker's Camps
721310	Rooming and Boarding Houses, Dormitories, and Worker's Camps
7223	Special Food Services
722310	Food Service Contractors
722320	Caterers
722330	Mobile Food Services
7224	Drinking Places (Alcoholic Beverages)
722410	Drinking Places (Alcoholic beverages)
7225	Restaurants and Other Eating Places
722511	Full-Service Restaurants
722513	Limited-Service Restaurants
722514	Cafeterias, Grill Buffets, and Buffets
722515	Snack and Nonalcoholic Beverage Bars

Article: Good News for Restaurants and Other Food Service Providers Taking Second Draw PPP Loans, *Cont'd*

It is hard to overstate just how impactful the additional 40% of loan proceeds available to the above listed service providers is. Congress must have been truly compelled by the plight of the food service industry to institute such a favorable rule when compared to these provider's counterparts in other industries.

If you are taking a second draw PPP loan be sure to check your organization's NAICS designation before submitting your loan application. You may be eligible for a very favorable loan amount!



Chinese Owned Entities Are Ineligible For a Second Draw PPP Loan

Publically traded businesses and entities affiliated with the People's Republic of China are on the list of entities that cannot qualify for a new PPP loan. The Act states the following:

(AA) for which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or a capital or profit interest in a limited liability company or partnership; or

(BB) that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China

Interestingly, China is the only restricted country included in the new Act while other adversarial nations such as Iran, Russia, or North Korea are not.

No Enforcement Action Against Banks

The proposed bill provides that there will be no “enforcement action” with respect to lenders. The Act states as follows:

“(3) NO ENFORCEMENT ACTION.—With respect to a lender that relies on a certification or documentation described in paragraph (2) related to an initial or second draw PPP loan, an enforcement action may not be taken against the lender, and the lender shall not be subject to any penalties relating to loan origination or forgiveness of the initial or second draw PPP loan, if—

(A) the lender acts in good faith relating to loan origination or forgiveness of the initial or second draw PPP loan based on that reliance; and

(B) all other relevant Federal, State, local, and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the initial or second draw PPP loan.”

Lender Compensation

This Act also provides that lenders will be compensated by the Administrator of the SBA. The Act states as follows:

“(L) REIMBURSEMENT FOR LOAN PROCESSING AND SERVICING.—The Administrator shall reimburse a lender authorized to make a covered loan—

(i) for a covered loan of not more than \$50,000, in an amount equal to the lesser of—

(I) 50 percent of the balance of the financing outstanding at the time of disbursement of the covered loan; or

(II) \$2,500;

(ii) at a rate, based on the balance of the financing outstanding at the time of disbursement of the covered loan, of—

(I) 5 percent for a covered loan of more than \$50,000 and not more than \$350,000; and

(II) 3 percent for a covered loan of more than \$350,000.

PPP Borrower Covered Period Election

Borrowers are now able to choose the 8 to 24 week covered period during which the borrower is required to spend a sufficient amount on qualified expenses to receive forgiveness. This begins the day the borrower received the funds and ends on any day selected by the borrower, but no earlier than 8-weeks from the date the loan proceeds are received and no later than 24 weeks after such date of origination.

This change will enable borrowers to cut off the testing period before making a reduction in workforce that would cause the applicable reduction in workforce penalties to apply, as long as the workforce is at its pre-February 15 levels on the last day of the Covered Period. The proposed bill states as follows:

(4) the term ‘covered period’ means the period—

(A) beginning on the date of the origination of a covered loan; and

(B) ending on a date selected by the eligible recipient of the covered loan that occurs during the period—

(i) beginning on the date that is 8 weeks after such date of origination; and

(ii) ending on the date that is 24 weeks after such date of origination;

Simplified Application for Loans Under \$150,000

Borrowers who received less than \$150,000 in PPP loans during the first round will now only have to submit a one-page application for forgiveness, but all of the same rules apply. The signer of this application may as well sign the longer application to make sure that they have everything done right because personal liability can be enormous. Our recommendation is that clients consult with their CPAs carefully and fill out the long application but actually submit the short application, with their answers in the long application being kept in case they are ever investigated.

The proposed bill states as follows:

- “(A) IN GENERAL .—With respect to a covered loan made to an eligible recipient that is not more than \$150,000, the covered loan amount shall be forgiven under this section if the eligible recipient—
- (i) signs and submits to the lender a certification, to be established by the Administrator not later than 24 days after the date of enactment of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, which—
 - (I) shall be not more than 1 page in length; and
 - (II) shall only require the eligible recipient to provide—
 - (aa) a description of the number of employees the eligible recipient was able to retain because of the covered loan;
 - (bb) the estimated amount of the covered loan amount spent by the eligible recipient on payroll costs; and
 - (cc) the total loan value;
 - (ii) attests that the eligible recipient has—
 - (I) accurately provided the required certification; and
 - (II) complied with the requirements under section 7(a)(36); and
 - (iii) retains records relevant to the form that prove compliance with such requirements—
 - (I) with respect to employment records, for the 4-year period following submission of the form; and
 - (II) with respect to other records, for the 3-year period following submission of the form.

501(c)(6) Organization Eligibility

Organizations that are classified as a 501(c)(6) will have expanded eligibility to PPP loans. A 501(c)(6) is defined as follows:

(6) Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension fund for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

The proposed bill states as follows regarding 501(c)(6) eligibility:

(I) IN GENERAL.—Any organization that is described in section 501(c)(6) of the Internal Revenue Code and that is exempt from taxation under section 501(a) of such Code (excluding professional sports leagues and organizations with the purpose of promoting or participating in a political campaign or other activity) shall be eligible to receive a covered loan if—

(aa) the organization does not receive more than 15 percent of its receipts from lobbying activities;

(bb) the lobbying activities of the organization do not comprise more than 15 percent of the total activities of the organization; and

(cc) the cost of the lobbying activities of the organization did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and

(dd) the organization employs not more than 300 employees.

Borrowers Can Amend Loan Applications to Request Increase in PPP Loan Amount As a Result of A Change In the Rules

The Act requires that the SBA issue guidance to lenders within 17 days to provide a process for borrowers who returned all or part of their PPP loan to reapply for the maximum allowable amount so long as they have not requested forgiveness, perhaps allowing those borrowers who returned their loan before the issuance of the \$2 million loan necessity safe harbor to reapply and receive their original loan amount.

The Act also allows borrowers that would have received an increased loan amount due to changes in interim final rules issued by the SBA or as a result of the Act to reapply for the difference.

Important provision for partnership and seasonal employers as guidance changed the way PPP loan amounts were calculated for these borrowers.

May also amend to request increased loan amount for group life, dental, and vision insurance.

5 Ways to Increase Your Initial PPP Loan

1. Check for accuracy and amend the initial application as needed – did you receive the maximum amount possible?
 - Some common errors on initial applications include:
 - Improper calculations for seasonal employees or partnerships
 - Failure to include all eligible payroll costs
 - Improper calculation of maximum loan amount for independent contractors or sole proprietors
2. 05/19/20 Seasonal employers Rule Update
 - If a seasonal employer received a loan before the alternative criterion for such employers was posted on April 28, 2020, and would be eligible for a higher maximum loan amount under the alternative criterion, the lender may electronically submit a request an increase to the PPP loan amount
3. 05/19/20 Partnership Rule Update:
 - If a partnership received a loan that only included amounts necessary for payroll costs of the partnership's employees and other eligible operating expenses, but did not include any amount for partner compensation, the borrower may request an increase to the loan amount to include appropriate partner compensation
4. Amend your initial application to include expenses for group insurance costs like group life, dental, vision, and disability insurance which were included in the new Act
 - The provision in the new Act that added these expenses as eligible payroll expenses is retroactive to the enactment of the CARES Act
5. 05/22/20 Rule Update for Tipped Employees:
 - The Interim Final Rule posted on 05/22 allows borrowers to factor tips paid by customers to employees into their calculation of payroll costs.

FTE Headcount and Salary/Wage Reduction Discussion

FTE = Full-Time Equivalent



Review of FTE Headcount and Salary/Wage Reduction Exceptions and Safe Harbors

FTE Reduction Exceptions:

1. Headcount and salary/wage reductions are **irrelevant for borrowers with loans of \$50,000 or less** that use Loan Forgiveness Application Form 3508S.
2. Any positions for which the Borrower made a good-faith, written offer to rehire an individual who was an employee on February 15, 2020 and the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
3. Any positions for which the Borrower made a good-faith, written offer to restore any reduction in hours, at the same salary or wages, during the Covered Period or the Alternative Covered Period and the employee rejected the offer.
4. Any employee that was fired for cause.
5. Any employee that voluntarily resigned
6. Any employee that voluntarily requested and received a reduction in their hours.

NOTE - In all of these cases, only include these FTEs in your headcount if the position was not filled by a new employee.

Review of FTE Headcount and Salary/Wage Reduction Exceptions and Safe Harbors

FTE Reduction and Salary/Wage Reduction Safe Harbors

1. The Borrower is exempt from the reduction in loan forgiveness based on a reduction in FTE employees described above if the Borrower, in good faith, is able to document that it was unable to operate between February 15, 2020, and the end of the Covered Period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020, by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

2. The Borrower is exempt from the reduction in loan forgiveness based on a reduction in FTE employees described above **if both** of the following conditions are met:
 - (a) the Borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and

 - (b) the Borrower then restored its FTE employee levels by not later than December 31, 2020 to its FTE employee levels in the Borrower's pay period that included February 15, 2020.

Exceptions to Workforce Reduction

Exception	Source Document	Where to Claim	Required Documentation*
An employee who <u>rejected a good-faith, written offer to rehire</u> them at the same pay as before	05/22/20 - Interim Final Rule on Loan Forgiveness	Only available on standard Loan Forgiveness Application - Count the equivalent of the applicable FTE on PPP Schedule A Worksheet for each employee to whom this exception applies.	Written documentation of the offer and its rejection. Must inform the state unemployment office of employee's rejected offer within 30 days of the rejection.
An employee that was <u>fired for cause</u>	05/22/20 - Interim Final Rule on Loan Forgiveness	Only available on standard Loan Forgiveness Application -Count the equivalent of the applicable FTE on PPP Schedule A Worksheet for each employee to whom this exception applies.	Payroll documents showing the reduction. Written documentation of the firing for cause
An employee who <u>voluntarily resigned</u>	05/22/20 - Interim Final Rule on Loan Forgiveness	Only available on standard Loan Forgiveness Application - Count the equivalent of the applicable FTE on PPP Schedule A Worksheet for each employee to whom this exception applies.	Payroll documents showing the reduction. Written documentation of the voluntary resignation.

Exceptions to Workforce Reduction - *Continued*

<p>An employee who <u>requested and received a reduction in work hours</u></p>	<p>05/22/20 - Interim Final Rule on Loan Forgiveness</p>	<p>Only available on standard Loan Forgiveness Application - Count the equivalent of the applicable FTE on PPP Schedule A Worksheet for each employee to whom this exception applies.</p>	<p>Payroll documents showing the change. Written documentation of the request for the reduction in hours.</p>
<p>A position that <u>could not be filled by a similarly qualified individual</u> after the previous employee rejected a good-faith, written offer to rehire them at the same pay as before</p>	<p>06/05/2020 - PPP Flexibility Act of 2020 (PPPFA)</p>	<p>Only available on standard Loan Forgiveness Application - Count the equivalent of the applicable FTE on PPP Schedule A Worksheet for each employee to whom this exception applies.</p>	<p>Records documenting the offer and its rejection. Must inform the state unemployment office of employee's rejected offer within 30 days of the rejection.</p>
<p>An inability to return to pre-February 15, 2020 levels business activity due to <u>compliance with federal requirements or guidance</u> relating to COVID-19</p>	<p>06/05/2020 - PPP Flexibility Act of 2020 (PPPFA)</p>	<p>If using the regular Forgiveness Application, check "FTE Reduction Safe Harbor 1" box and initial last line on Page 2. If using the EZ Application, initial last line on Page 2.</p>	<p>Payroll documents showing the change. The applicable federal guidance document(s) that affected the borrower.</p>

EIDL vs PPP

EIDL Advance Non-Taxable and No Longer Reduces PPP Loan Forgiveness

The Act also replenishes the EIDL Advance fund, which allows businesses suffering a substantial economic injury to apply for an advance that does not need to be repaid or up to \$1,000 per employee limited to \$10,000 total.

Prior law stated that any EIDL Advance received would reduce PPP Loan Forgiveness, essentially requiring the Advance to be repaid.

The new Act repeals this provision so the receipt of an EIDL Advance will have no impact on PPP loan forgiveness. Borrowers that have already applied for and received loan forgiveness presumably may now amend their application to request that the \$10,000 EIDL Advance (or amount actually received) not reduce their forgiveness amount and request repayment.

EIDL Program For Hardest Hit Businesses

The term “covered entity” for the targeted EIDL program is stated as follows:

(2) COVERED ENTITY.—The term “covered entity”—

(A) means an eligible entity that—

(i) applies for a loan under section 7(b)(2) of the Small Business Act (15 U.S.C. 636(b)(2)) during the covered period, including before the date of enactment of this Act;

(ii) is located in a low-income community;

(iii) has suffered an economic loss of greater than 30 percent; and

(iv) employs not more than 300 employees; and

(B) except with respect to an entity included under section 123.300(c) of title 13, Code of Federal Regulations, or any successor regulation, does not include an agricultural enterprise.

EIDL Program For Hardest Hit Businesses

The priority for the targeted EIDL program is as follows:

(d) ORDER OF PROCESSING.—The Administrator shall process and approve requests for payments under subsection (b) in the order that the Administrator receives the requests, except that the Administrator shall give—

- (1) first priority to covered entities described in subsection (b)(2)(A); and
- (2) second priority to covered entities that have not received emergency grants under section 1110(e) of the CARES Act (15 U.S.C. 9009(e)), as of the date on which the Administrator receives such a request, because of the unavailability of funding to carry out such section 1110(e).

EIDL Program For Hardest Hit Businesses

Businesses that receive EIDL loans are unable to pay several things without SBA approval, including paying dividends, paying bonuses to any employees, including non-owners, and using EIDL funds for anything other than business purposes.

EIDL borrowers must keep records of how the EIDL loan is spent, and provide this information to the SBA within 90 days after the loan is repaid. There is a lack of privacy for the borrower of an EIDL loan, and the loan details are available to the public because of the Freedom of Information Act, enumerated at 5 U.S.C. § 552.



	<u>Economic Injury Disaster Loan (EIDL)</u>	<u>Paycheck Protection Program (PPP)</u>
Who is Eligible?	<p>Small businesses, including independent contractors and sole proprietors, with less than 500 employees that have <u>suffered substantial economic injury</u> as a result of a declared disaster</p> <p><u>From SBA 2011 Regulation:</u> (a) If your business is located in a declared disaster area, and suffered <u>substantial economic injury</u> as a direct result of a declared disaster, you are eligible to apply for an economic injury disaster loan.</p> <p>(1) <u>Substantial economic injury</u> is such that a business concern is unable to meet its obligations as they mature or to pay its ordinary and necessary operating expenses.</p> <p>(2) Loss of anticipated profits or a drop in sales is not considered <u>substantial economic injury</u> for this purpose.</p>	<p>Small businesses, including independent contractors and sole proprietors, with less than 500 employees (or otherwise qualifies as a small business under SBA published size guidelines), and the <u>uncertainty of the current economic conditions make the loan necessary to support the ongoing operations of the business.</u></p> <p><u>Rubio Tweet</u> - “Any company with revenue to cover operations isn’t eligible.”</p> <p><u>From SBA Issued FAQ 46, May 13, 2020:</u> “Any borrower that . . . received PPP loans . . . of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.”</p> <p><u>Also From SBA Issued FAQ 46, May 13, 2020:</u> “If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment . . . and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies”</p>



	<u>Economic Injury Disaster Loan (EIDL)</u>	<u>Paycheck Protection Program (PPP)</u>
Application Process	Available now at https://covid19relief.sba.gov/#/	Applications will be provided by SBA approved lenders. Sample application available at: https://www.sba.gov/document/sba-form--paycheck-protection-program-ppp-sample-application-form
Maximum Loan	Up to \$2,000,000	Lesser of: 1. 2.5 times average monthly payroll costs for employees for the prior 12 months (SBA regulations say this will not include payments to independent contractors); or 2. \$10,000,000 Proposed PPP Act 2 would allow for a second round up to \$2 Million for borrowers with at least a 50% (maybe 35%) drop in revenue.
Application Deadline	December 31, 2020	June 30, 2020 extended to August 8, 2020

	<u>Economic Injury Disaster Loan (EIDL)</u>	<u>Paycheck Protection Program (PPP)</u>
Permitted Use of Funds	<ol style="list-style-type: none"> 1. Payroll costs during business disruptions or substantial slowdowns 2. Providing paid sick leave to employees unable to work due to the direct effect of COVID-19 3. Mortgage payments 4. Rent 5. Meeting increased costs to obtain materials unavailable from the applicants original source due to interrupted supply chains 6. Repaying obligations other than those listed above that cannot be met due to revenue losses <p>Note: EIDL loan documents provide as follows: “Borrower will use all the proceeds of this Loan solely as <u>working capital</u> to alleviate economic injury caused by disaster occurring in the month of January 31, 2020 and continuing thereafter and for loans of more than \$25,000 to pay Uniform Commercial Code (UCC) lien filing fees and a third-party UCC handling charge of \$100 which will be deducted from the Loan amount stated above.”</p> <p>“Borrower will not, without the prior written consent of SBA, make any distribution of Borrower’s assets, or give any preferential treatment, make any advance, directly or indirectly, by way of loan, gift, bonus, or otherwise, to any owner or partner or any of its employees, or to any company directly or indirectly controlling or affiliated with or controlled by Borrower, or any other company.”</p>	<ol style="list-style-type: none"> 1. Payroll costs including health care benefits, medical, or family leave, and retirement benefits 2. Providing paid sick leave for any illness 3. Mortgage interest payments, but not principal 4. Rent 5. Interest on other debt but not principal 6. Utilities <p>NOTE: Proposed Acts would expand this to Personal Protective Equipment (PPE) and certain COVID-19 related capital expenses.</p>

	<u>Economic Injury Disaster Loan (EIDL)</u>	<u>Paycheck Protection Program (PPP)</u>
Loan Forgiveness Eligibility	<p>Only \$10,000 may be received as a grant and is not required to be repaid even if subsequently denied for a loan.</p> <p>Amounts over \$10,000 will be required to be repaid.</p> <p>Can roll loan into PPP loan if subsequently approved for PPP loan to be eligible for forgiveness.</p>	<p>Forgivable to the extent that the proceeds are used during an eight or up to twenty-four week period following the origination of the loan for:</p> <ol style="list-style-type: none"> 1. payroll costs 2. mortgage interest 3. rent 4. utility payments <p>NOTE: Proposed Acts would expand this to Personal Protective Equipment (PPE) and certain COVID-19 related capital expenses.</p>
Forgiveness Reduction	<p>\$10,000 grant will only need to be repaid to the extent that \$10,000 is not used for permitted expenses</p>	<p>Amount eligible for forgiveness is reduced by:</p> <ol style="list-style-type: none"> 1. amount of grant received under an EIDL loan 2. Amount proportionate to any reduction in the number of employees 3. Compensation reduction in excess of 25% for each employee <p>Exception if reduction in employees or salary is corrected by December 31, 2020 or due to compliance with social distancing guidelines.</p>



	<u>Economic Injury Disaster Loan (EIDL)</u>	<u>Paycheck Protection Program (PPP)</u>
Treatment of Payments to Independent Contractors	Permitted if considered a payment of an obligation that cannot be met due to revenue losses	Not permitted, except for fishing boat owners (See June 25 th Interim Final Rule for guidance provided to fishing boat owners)
Business Operation Requirement	Must be in business prior to January 30, 2020	Must be in business prior to February 15, 2020
Is Business Required to be Unable to Obtain Credit Elsewhere?	Maybe - See “Who Is Eligible” above	No
Max Interest Rate	3.75%	1% per Interim Final Rules published by SBA (max of 4% under the statute)
Payment Deferral	For amounts received over \$10,000 grant, no payments are due until one year after loan origination, but interest is accrued.	Principal and interest payments are deferred until SBA issues decision on loan forgiveness, but interest is accrued per Interim Final Rules published by SBA.
Term of Loan	Amortized over 30 years!!	Remaining balance after forgiveness will have a 2 or 5 year term.

	<u>Economic Injury Disaster Loan (EIDL)</u>	<u>Paycheck Protection Program (PPP)</u>
Collateral Requirement	Assets of business required as collateral for loans over \$25,000 Individual UCC may disqualify the Borrower's IRAs!	None
Personal Guarantee	Only for loans over \$200,000 Loan cannot be secured by real estate of guarantor. [Has anyone seen a Personal Guarantee?]	None
Where to get the loan	SBA	Sponsoring Bank
Income Tax Treatment of Loan Forgiveness	Like any other non-governmental loan? No official guidance received.	Tax Free but forgivable expenses not deductible
Compensation to Lender (Paid from Government)	N/A	5% on of loaned amount up to \$350,000 3% - \$350,000 - \$2,000,000 1% - \$2,000,000+



ECONOMIC INJURY DISASTER LOANS (EIDL)

	STATUTORY LANGUAGE	2011 SBA REGULATION	LOAN AGREEMENT	EMAIL FROM SBA
Substantial Economic Injury	To make such loans as the Administration may determine to be necessary or appropriate to any small business concern if the Administration determines that the concern has <u>suffered a substantial economic injury as a result of such disaster.</u>	Substantial Economic Injury is such that business is unable to meet its obligations as they mature or to pay its ordinary and necessary operating expenses. Loss of anticipated profits or a drop in sales is not considered substantial economic injury for this purpose	NO GUIDANCE AVAILABLE	NO GUIDANCE AVAILABLE
Use of Funds	<ol style="list-style-type: none"> 1. providing paid sick leave to employees unable to work due to the direct effect of COVID-19 2. Maintaining payroll to retain employees during business disruptions or substantial slowdowns 3. Meeting increased costs to obtain materials unavailability from the applicant's original source due to interrupted supply chains 4. Making rent or mortgage payments 5. Repaying obligations that cannot be met due to revenue losses. 	NO GUIDANCE AVAILABLE	Borrower will use all the proceeds of this Loan solely as working capital to alleviate economic injury caused by disaster occurring in the month of January 31, 2020 and continuing thereafter and to pay Uniform Commercial Code (UCC) lien filing fees and a third-party UCC handling charge of \$100 which will be deducted from the Loan amount stated above.	<ol style="list-style-type: none"> 1. Fixed Debts 2. Payroll 3. Accounts Payable 4. Bills that could have been paid had the disaster not occurred.

ECONOMIC INJURY DISASTER LOANS (EIDL)

	STATUTORY LANGUAGE	2011 SBA REGULATION	LOAN AGREEMENT	EMAIL FROM SBA
Ineligible Uses of Funds	SILENT	NO GUIDANCE AVAILABLE	<p>1) Anti-Distribution Rule - Borrower will not, without the prior written consent of SBA, make any distribution of Borrower's assets, or give any preferential treatment, make any advance, directly or indirectly, by way of loan, gift, bonus, or otherwise, to any owner or partner or any of its employees, or to any company directly or indirectly controlling or affiliated with or controlled by Borrower, or any other company.</p> <p>2) Relocation Expenses</p> <p>3) Purchase of Non-American made Equipment to extent feasible</p>	<p>1. Dividends and bonuses</p> <p>2. Disbursements to owners, unless for performance of services</p> <p>3. Repayment of stockhold loans</p> <p>4. Expansion of facilities or acquisition of fixed assets</p> <p>5. Repair or replacement of physical damages</p> <p>6. Refinancing long term debt.</p> <p>SBA representative stated that Anti Distribution Rule "does not apply to normal business operations, including distributions of net income in accordance with bylaws or operating agreement of the company."</p>

What Can EIDL Loan Proceeds Be Used For?

The EIDL Loan documents provide guidance on how the loan can be spent.

"Borrower will use all the proceeds of this Loan solely as working capital to alleviate economic injury caused by disaster occurring in the month of January 31, 2020 and continuing thereafter and for loans of more than \$25,000 to pay Uniform Commercial Code (UCC) lien filing fees and a third-party UCC handling charge of \$100 which will be deducted from the Loan amount stated above."

"Borrower will not, without the prior written consent of SBA, make any distribution of Borrower's assets, or give any preferential treatment, make any advance, directly or indirectly, by way of loan, gift, bonus, or otherwise, to any owner or partner or any of its employees, or to any company directly or indirectly controlling or affiliated with or controlled by Borrower, or any other company."

The SBA does not explicitly define "working capital." Under Generally Accepted Accounting Principles, "working capital" is simply defined as the sum of current assets over current liabilities. Other SBA 7(a) loan experts say "working capital" is the amount of capital available for the day-to-day operations of a business and is typically used to pay for regular expenses, such as utility bills, employee payroll, rent, inventory, and marketing costs.

EIDL Loan Documents - Collateral

- *For loan amounts of greater than \$25,000, Borrower hereby grants to SBA, the secured party hereunder, a continuing security interest in and to any and all "Collateral" as described herein to secure payment and performance of all debts, liabilities and obligations of Borrower to SBA hereunder without limitation, including but not limited to all interest, other fees and expenses (all hereinafter called "Obligations"). The Collateral includes the following property that Borrower now owns or shall acquire or create immediately upon the acquisition or creation thereof: all tangible and intangible personal property, including, but not limited to: (a) inventory, (b) equipment, (c) instruments, including promissory notes (d) chattel paper, including tangible chattel paper and electronic chattel paper, (e) documents, (f) letter of credit rights, (g) accounts, including health-care insurance receivables and credit card receivables, (h) deposit accounts, (i) commercial tort claims, (j) general intangibles, including payment intangibles and software and (k) as-extracted collateral as such terms may from time to time be defined in the Uniform Commercial Code. The security interest Borrower grants includes all accessions, attachments, accessories, parts, supplies and replacements for the Collateral, all products, proceeds and collections thereof and all records and data relating thereto.*
- *For loan amounts of \$25,000 or less, SBA is not taking a security interest in any collateral.*

EIDL Loan Documents - Requirements For Use Of Loan Proceeds and Receipts

- *Borrower will obtain and itemize receipts (paid receipts, paid invoices or cancelled checks) and contracts for all Loan funds spent and retain these receipts for 3 years from the date of the final disbursement. Prior to each subsequent disbursement (if any) and whenever requested by SBA, Borrower will submit to SBA such itemization together with copies of the receipts.*
- *Borrower will not use, directly or indirectly, any portion of the proceeds of this Loan to relocate without the prior written permission of SBA. The law prohibits the use of any portion of the proceeds of this Loan for voluntary relocation from the business area in which the disaster occurred. To request SBA's prior written permission to relocate, Borrower will present to SBA the reasons therefore and a description or address of the relocation site. Determinations of (1) whether a relocation is voluntary or otherwise, and (2) whether any site other than the disaster-affected location is within the business area in which the disaster occurred, will be made solely by SBA.*

Special Rights and Powers of the SBA

There are draconian provisions of the Federal law that permit the government to override many state law exemptions and protections when a borrower defaults on an SBA loan. Both EIDL and PPP loans fall under these rules.

In addition, the conduct of a debtor that has breached the loan rules may result in civil or even criminal problems that would not apply for non SBA loans, and these issues may be looked at under a magnifying glass, given the fiduciary duties of a Trustee in Bankruptcy, and that the US Trustee's office and Department of Justice have involvement with many cases.

For example, a Payroll Protection Program loan could only be applied for if the loan was “necessary to support the ongoing operations of the business,” but this was not recognized by many borrowers, including those who panicked, even though their businesses were not actually threatened, as evidenced later.

Further, while the law concerning EIDL loans was passed to indicate that a borrower only needed to show that there was a “substantial injury” to apply and receive the loan, it was later realized that the definition of a “substantial injury” under the regulations for Small Business Association loans indicate that “substantial injury” means that the business would not be able to continue without the loan. These same regulations indicate that a loss of revenue or increase in expenses are not sufficient to justify receiving a loan.

In addition, the vast majority of EIDL borrowers and their advisors are unaware that the Loan Agreement prevents a company borrower from paying any bonuses to any employees, or making profit distributions to owners during the term of the loan.

Special Rights and Powers of the SBA

For example, when a married couple living in a tenancy by the entireties state, like Florida, Delaware or Wyoming, which prevent creditors of a spouse from seizing joint assets, when one spouse has an SBA judgment against him, and a joint tax return is filed, the SBA can attach to the tax refund and keep the portion that would be attributable to the debtor spouse's income.

Also, normal state law wage exemption statutes will not apply, and making a "fraudulent transfer" to avoid paying the SBA may be a criminal act.

The SBA regulation 13 C.F.R. 140.11 reads as follows:

- (a) SBA may order your employer to pay SBA a portion of your disposable pay to satisfy delinquent non-tax debt you owe to the United States. This process is called "administrative wage garnishment" and is authorized by 31 U.S.C. § 3720D.*
- (b) Scope.*
 - (1) This Section provides procedures for SBA to collect delinquent non-tax debts through administrative wage garnishment.*
 - (2) This Section applies despite any State law.*

Special Rights and Powers of the SBA

- (3) *Nothing in this Section prevents SBA from settling for less than the full amount of a debt. See, for example, the Federal Claims Collection Standards (FCCS), 31 CFR parts 900- 904.*
- (4) *SBA's receipt of payments under this Section does not prevent SBA from pursuing other debt collection remedies. SBA may pursue debt collection remedies separately or together with administrative wage garnishment.*
- (5) *This Section does not apply to the collection of delinquent non-tax debt owed to the United States from the wages of federal employees. Federal pay is subject to the federal salary offset procedures set forth in 5 U.S.C. § 5514 and other laws, including subpart B of this part.*
- (6) *Nothing in this Section requires SBA to duplicate notices or administrative proceedings required by contract, other laws, or regulations.*

Because of the above, the authors commonly advise clients not to take out SBA loans that will not be forgiven, or might not be repaid, if these can be avoided.

New Grants for Shuttered Venues

The Act sets aside \$15 Billion for Shuttered Venue Grants that have a 25% reduction in revenue in first, second, or third quarter of 2020 as compared to the same quarter in 2019. These grants are similar but separate from PPP loans. They do not need to be repaid.

SEC. 324. GRANTS FOR SHUTTERED VENUE OPERATORS.

(a) DEFINITIONS.—In this section:

(1) ELIGIBLE PERSON OR ENTITY.—

(A) IN GENERAL.—The term “eligible person or entity” means a live venue operator or promoter, theatrical producer, or live performing arts organization operator, a relevant museum operator, a motion picture theatre operator, or a talent representative that meets the following requirements:

(i) The live venue operator or promoter, theatrical producer, or live performing arts organization operator, the relevant museum operator, the motion picture theatre operator, or the talent representative—

(I) was fully operational as a live venue operator or promoter, theatrical producer, or live performing arts organization operator, a relevant museum operator, a motion picture theatre operator, or a talent representative on February 29, 2020; and

(II) has gross earned revenue during the first, second, third, or, only with respect to an application submitted on or after January 1, 2021, fourth quarter in 2020 that demonstrates not less than a 25 percent reduction from the gross earned revenue of the live venue operator or promoter, theatrical producer, or live performing arts organization operator, the relevant museum operator, the motion picture theatre operator, or the talent representative during the same quarter in 2019

Shuttered Venues Grant Amount

Grant payment to Shuttered Venues will be equal to 45% of 2019 gross revenue with certain strings attached as to the use of funds.

(c) AMOUNT.—

(1) INITIAL GRANTS.—

(A) IN GENERAL.—A grant under subsection (b)(2) shall be in the amount equal to the lesser of—

(i) --

(I) for an eligible person or entity that was in operation on January 1, 2019, the amount equal to 45 percent of the gross earned revenue of the eligible person or entity during 2019; or

(II) for an eligible person or entity that began operations after January 1, 2019, the amount equal to the product obtained by multiplying—

(aa) the average monthly gross earned revenue for each full month during which the eligible person or entity was in operation during 2019; by

(bb) 6; or

(ii) \$10,000,000.

Shuttered Venues Eligible Expenses

An eligible person or entity may use amounts received under a grant under this section for—

- (i) payroll costs;
- (ii) payments on any covered rent obligation;
- (iii) any covered utility payment;
- (iv) scheduled payments of interest or principal on any covered mortgage obligation (which shall not include any prepayment of principal on a covered mortgage obligation);
- (v) scheduled payments of interest or principal on any indebtedness or debt instrument (which shall not include any prepayment of principal) incurred in the ordinary course of business that is a liability of the eligible person or entity and was incurred prior to February 15, 2020;
- (vi) covered worker protection expenditures;
- (vii) payments made to independent contractors, as reported on Form–1099 MISC, not to exceed a total of \$100,000 in annual compensation for any individual employee of an independent contractor;

Shuttered Venues Eligible Expenses

An eligible person or entity may use amounts received under a grant under this section for—

(viii) other ordinary and necessary business expenses, including—

(I) maintenance expenses;

(II) administrative costs, including fees and licensing costs;

(III) State and local taxes and fees;

(IV) operating leases in effect as of February 15, 2020;

(V) payments required for insurance on any insurance policy; and

(VI) advertising, production transportation, and capital expenditures related to producing a theatrical or live performing arts production, concert, exhibition, or comedy show, except that a grant under this section may not be used primarily for such expenditures.

Shuttered Venues Prohibited Expenses

PROHIBITED EXPENSES.—An eligible person or entity may not use amounts received under a grant under this section—

- (A) to purchase real estate;
- (B) for payments of interest or principal on loans originated after February 15, 2020;
- (C) to invest or re-lend funds;
- (D) for contributions or expenditures to, or on behalf of, any political party, party committee, or candidate for elective office; or
- (E) for any other use as may be prohibited by the Administrator.

Shuttered Venue Loan Recipients Ineligible for PPP Loans

Recipients of Shuttered Venue grants are ineligible to receive PPP loans.

(b) EXCLUSION OF ENTITIES RECEIVING SHUTTERED VENUE OPERATOR GRANTS.—Section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)), as amended by subsection (a) of this section, is amended by adding at the end the following:

(U) EXCLUSION OF ENTITIES RECEIVING SHUTTERED VENUE OPERATOR GRANTS.—An eligible person or entity (as defined under of section 24 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act) that receives a grant under such section 24 shall not be eligible for a loan under this paragraph.”.

The “Necessity” Requirement

An “eligible recipient” will also still need to satisfy the “Necessity Test”

Some may remember that borrowers were required to certify in good faith on their initial PPP loan application that the loan is “necessary to support the on-going operations of the applicant.” Notably, this “necessity requirement” still appears to be in place following the passage of this Act. The necessity requirement is interesting because it was never fully defined which left many borrowers wondering just how much economic harm had to be inflicted upon their business before they could certify in good faith that the loan was “necessary.”

It may be hard for businesses that have survived one or two hard quarters but are now making ends meet to honestly certify that the loan is “necessary” for the ongoing operation of the business, even though the business could reasonably argue that they need the loan. The test will present a very important issue to be carefully addressed with the borrower’s CPA, financial and legal advisors.

While the SBA has announced that it will not question the necessity certification for those whose loans did not exceed \$2 million, other agencies (such as the IRS), or even whistleblowers, may. Additionally, reception of a second loan will not be kept confidential so borrowers may have to endure harsh public scrutiny.

SBA Issued FAQ 46

“Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.”



SBA Issued FAQ 46

46. Question: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

Answer: *When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.*

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns...

SBA Issued FAQ 46, Cont.

46. **Question:** *How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?*

Answer: ...Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. **If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request.** SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

Supreme Court Interpretations of the Meaning of the Word Necessary

What Is the Meaning of the Word “Necessary”?

To further this discussion, it is necessary to consider the word “necessary,” and to what extent a court or jury would find that a business or professional practice did not have sufficient need for a PPP loan because it was not “necessary.” Guidance may be found from past and current interpretations of the word “necessary,” and more pointed updates have been provided recently relating to this issue.

Courts' Interpretations of “Necessary”

In 1819, the fourth - and perhaps most famous - Chief Justice of the U.S. Supreme Court, John Marshall, issued a monumental Constitution-based decision defining the word necessary as it appears in the Necessary and Proper clause of the United States Constitution.

In *McCulloch v. State*, the Supreme Court considered whether the word necessary must “always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other.” The Court concluded that it does not, and explained the word necessary “frequently imports no more than that one thing is convenient, or useful, or essential to another.”

Notably, Black's Law Dictionary uses the same definition of "necessary" as Chief Justice Marshall did in his opinion in *McCulloch*.

In 1933, the meaning of "necessary" was analyzed by the Supreme Court again in *Welch v. Helvering*, where a taxpayer attempted to take a deduction on expenses that he claimed fell within the test now found at Internal Revenue Code (IRC) Section 162 as being "ordinary and necessary" business expenses. Here, the Court determined that the expenses in the case were necessary because "they were appropriate and helpful," but they were not ordinary.

"Appropriate and helpful" is certainly a lower standard than "essential." Since *Welch*, a number of cases have found that items that many would consider to be "luxury" items and services have qualified as "reasonable and necessary" business expenses, including the expense of paying for limousines to take key executives to work, taking spouses on business trips to make a good impression, and paying large salaries to key executives whose work could be performed by competent replacements for much less.

Necessity and the PPP Loan

- It is unclear what circumstances a business must be subject to in order for a PPP loan to be “necessary.”
- While there is very little guidance in relation to what would be considered “necessary,” there are other interpretations that one may be able to look at for some guidance.
- The term “necessary” was considered by the Supreme Court in 1933 in the case of *Welch v. Helvering*. A taxpayer claimed a deduction for ordinary and necessary business expenses and the court held that to deduct the expenses, the expenses merely had to be “appropriate and helpful.”
- In *M’Cullough v. State*, the court held that the word “necessary” generally “imports no more than one thing is convenient, or useful, or essential to another.”

Guidance From IRC Section 531 – Accumulated Earnings Tax



Necessity and the PPP Loan

- BNA Portfolio 796-3rd states that the accumulation earnings tax is imposed when accumulated earnings are in “excess of those considered necessary for the reasonable business needs of the business.”
- It may be possible to look at the application of the accumulated earnings tax as a guide for what would be “necessary” for a business.
- Although cases involving accumulated earnings may not be binding in relation to the interpretation of the rules and regulations applicable to PPP loans, it may be considered as persuasive.

Section 531

(a) GENERAL RULE

The accumulated earnings tax imposed by [section 531](#) shall apply to every corporation (other than those described in subsection (b)) formed or availed of for the purpose of avoiding the income tax with respect to its shareholders or the shareholders of any other corporation, by permitting earnings and profits to accumulate instead of being divided or distributed.

(b) EXCEPTIONS

The accumulated earnings tax imposed by [section 531](#) shall not apply to—

- (1) a personal holding company (as defined in [section 542](#)),
- (2) a corporation exempt from tax under subchapter F (section 501 and following), or
- (3) a passive foreign investment company (as defined in [section 1297](#)).

(c) APPLICATION DETERMINED WITHOUT REGARD TO NUMBER OF SHAREHOLDERS

The application of this part to a corporation shall be determined without regard to the number of shareholders of such corporation.

Former Section 531 Audit Guidelines

The former Section 531 Audit Guidelines recognized the following as acceptable reasons to accumulate earnings:

1. An actual or potential lawsuit;
2. A possible liability arising out of some contractual obligation;
3. A possible business reversal resulting from the loss of a customer;
4. Accumulations to guard against competition have been justified in some cases;
5. An accumulation to provide funds to finance a self-insurance plan (including key man life insurance, as well as the more common types of risk insurance; and
6. Accumulations to provide a retirement plan for employees

Application of Section 531

- Generally, a ratio of current assets to current liabilities of approximately 2.5 to 1, or less, is considered to be reasonable, pursuant to *John P. Scripts Newspapers*, 44 T.C. 453(1965)
- In order to accumulate excess earnings, the present or pending issue must not be merely a remote possibility, or constitute an unrealistic hazard *Gordon Turnbull, Inc.*, 41 T.C. 358 (1963)
- In *Cheyenne Newspapers, Inc. v. Commissioner*, T.C. Memo 1973-52, affirmed, 494 F.2d 429 (10th Cir. 1974), a taxpayer claimed that it needed additional capital reserves to cover losses and expenses that could occur as a result of an unspecified future blizzard shutting the business down for an extended time. Because the last time the company experienced such a shutdown was 33 years ago, the possibility of such a shutdown was too remote.

Application of Section 531, *Cont'd*

- In *Northwestern Indiana Tel. Co. v. Commissioner*, 71 T.C.M. 2674, the Tax Court found that a company held excessive accumulated earnings because it was holding capital for the potential future upgrade to fiber optic cables, which were not economically feasible at the time. Accumulating earnings for a project that may never become economically feasible is not reasonable.
- In *Dielectric Materials Co.*, 57 T.C. 587 (1972), the Tax Court held that accumulating earnings to buy additional copper used to manufacture products was a valid reason to accumulate earnings because a strike that would affect the availability of copper was expected.
- It is important to note that a potential strike could have resulted in the company being unable to purchase enough copper to continue its business in an economically feasible way.
- It is good to have a projection of the potential economic harm that a company may face given a certain contingency, and to show that the contingency is reasonably anticipated to happen.

Quotes from Dielectric Materials Co.

- In *Dielectric Materials*, the court looked at whether it was reasonable and necessary to accumulate additional earnings for an anticipated strike that would limit the ability of copper.
- The court stated “In 1966, an actual strike in foreign copper mines had occurred and, as of the close of the year, there existed the prospect of a domestic copper strike, the length and impact of which defied any precise prediction. The resulting economic turmoil in the copper industry and its potential effect upon petitioner's business in terms of availability of supplies, ability to satisfy customers, and prices of both purchases and sales seem obvious.”
- In its holding the court provided deference to the company, stating “[U]nder the circumstances herein, we will not substitute our business judgment for that of corporate management to hold that petitioner did not require an additional \$20,531 of accumulated earnings.”

Application of Section 531, *Cont'd*

- Pursuant to the above cases, it appears that virtually every company in operation today would have a valid reason to accumulate earnings that would generally be in excess of what the company reasonably needs to operate.
- With businesses closed, customers struggling to pay their bills, and the general uncertainty, it is easy to argue that holding extra capital is a necessity.
- We know that the coronavirus has disrupted, and will continue to disrupt businesses, the extent of such disruption is currently unknown.
- It would be a good idea for companies taking PPP loans to create projections showing probable economic outcomes based upon the expected effect of the coronavirus.

The language and application of the Accumulated Earnings Tax may provide valuable guidance. This portion of the Internal Revenue Code imposes a tax on corporations (other than S corporations) that are found to have a net worth exceeding "the reasonable needs of the business."

The regulations under IRC Section 537 make clear that the "reasonable needs of the business" can include "product liability loss reserves," and can include moneys set aside for possible future expenses that would be "directly connected with the needs of the corporation" and are "for bona fide business purposes."

The above quoted language comes from the following portion of IRC Section 537. These regulations include discussion that confirms that it is necessary to have capital for the "reasonable future needs" of the business based upon what "a prudent businessman would consider appropriate for the present business purposes and for the reasonably anticipated future needs of the business."

It certainly seem that this is analogous to what is "necessary to support the operations of the business."



Below is an excerpt from Treasury Regulation Section 1.537-1:

§ 1.537-1 Reasonable needs of the business.

(a) *In general.* The term *reasonable needs of the business* includes (1) the reasonably anticipated needs of the business (including product liability loss reserves, as defined in paragraph (f) of this section), (2) the section 303 redemption needs of the business, as defined in paragraph (c) of this section, and (3) the excess business holdings redemption needs of the business as described in paragraph (d) of this section. See paragraph (e) of this section for additional rules relating to the section 303 redemption needs and the excess business holdings redemption needs of the business. **An accumulation of the earnings and profits (including the undistributed earnings and profits of prior years) is in excess of the reasonable needs of the business if it exceeds the amount that a prudent businessman would consider appropriate for the present business purposes and for the reasonably anticipated future needs of the business.** The need to retain earnings and profits must be directly connected with the needs of the corporation itself and must be for bona fide business purposes. ,,,. See § 1.537-3 for a discussion of what constitutes the business of the corporation... See § 1.537-2, relating to grounds for accumulation of earnings and profits.

(b) *Reasonable anticipated needs.*

(1) In order for a corporation to justify an accumulation of earnings and profits for reasonably anticipated future needs, **there must be an indication that the future needs of the business require such accumulation, and the corporation must have specific, definite, and feasible plans for the use of such accumulation.** Such an accumulation need not be used immediately, nor must the plans for its use be consummated within a short period after the close of the taxable year, provided that such accumulation will be used within a reasonable time depending upon all the facts and circumstances relating to the future needs of the business. Where the future needs of the business are uncertain or vague, where the plans for the future use of an accumulation are not specific, definite, and feasible, or where the execution of such a plan is postponed indefinitely, an accumulation cannot be justified on the grounds of reasonably anticipated needs of the business.

(2) **Consideration shall be given to reasonably anticipated needs as they exist on the basis of the facts at the close of the taxable year.** Thus, subsequent events shall not be used for the purpose of showing that the retention of earnings or profits was unreasonable at the close of the taxable year if all the elements of reasonable anticipation are present at the close of such taxable year. However, subsequent events may be considered to determine whether the taxpayer actually intended to consummate or has actually consummated the plans for which the earnings and profits were accumulated. In this connection, projected expansion or investment plans shall be reviewed in the light of the facts during each year and as they exist as of the close of the taxable year. If a corporation has justified an accumulation for future needs by plans never consummated, the amount of such an accumulation shall be taken into account in determining the reasonableness of subsequent accumulations.

(f) *Product liability loss reserves.*

(1) The term ***product liability loss reserve*** means, with respect to taxable years beginning after September 30, 1979, reasonable amounts accumulated for the payment of reasonably anticipated product liability losses, as defined in section 172(j) and § 1.172-13(b)(1).

(2) For purposes of this paragraph, **whether an accumulation for anticipated product liability losses is reasonable in amount and whether such anticipated product liability losses are likely to occur shall be determined in light of all facts and circumstances of the taxpayer making such accumulation.** Some of the factors to be considered in determining the reasonableness of the accumulation include the taxpayer's previous product liability experience, the extent of the taxpayer's coverage by commercial product liability insurance, the income tax consequences of the taxpayer's ability to deduct product liability losses and related expenses, and the taxpayer's potential future liability due to defective products in light of the taxpayer's plans to expand the production of products currently being manufactured, provided such plans are specific, definite and feasible. Additionally, a factor to be considered in determining whether the accumulation is reasonable in amount is whether the taxpayer, in accounting for its potential future liability, took into account the reasonably estimated present value of the potential future liability.

(3) Only those accumulations made with respect to products that have been manufactured, leased, or sold shall be considered as accumulations made under this paragraph. Thus, for example, accumulations with respect to a product which has not progressed beyond the development stage are not reasonable accumulations under this paragraph.



SBA Form 3509 – Loan Necessity Questionnaire

PAYCHECK PROTECTION PROGRAM
LOAN NECESSITY QUESTIONNAIRE (FOR-PROFIT BORROWERS)

The purpose of this form is to facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate the good-faith certification that you made on your PPP Borrower Application (SBA Form 2483 or Lender's equivalent form) that economic uncertainty made the loan request necessary. Each for-profit Borrower that, together with its affiliates,¹ received PPP loans with an original principal amount of \$2 million or greater is required to complete this form and submit it, along with the required supporting documents, to the Lender servicing Borrower's PPP loan. **The completed form is due to the Lender servicing your PPP loan within ten business days of receipt from your Lender.**

SBA is reviewing these loans to maximize program integrity and protect taxpayer resources. The information collected will be used to inform SBA's review of your good-faith certification that economic uncertainty made your loan request necessary to support your ongoing operations. Receipt of this form does not mean that SBA is challenging that certification. After this form is submitted, SBA may request additional information, if necessary, to complete the review. SBA's determination will be based on the totality of your circumstances.

Failure to complete the form and provide the required supporting documents may result in SBA's determination that you were ineligible for either the PPP loan, the PPP loan amount, or any forgiveness amount claimed, and SBA may seek repayment of the loan or pursue other available remedies.

Within five business days after you provide a complete form with all required responses, supporting documents, and signatures and certifications, the Lender servicing your loan is required to upload the form and documents to the SBA PPP Forgiveness Platform (forgiveness.sba.gov) and separately input your responses to each question into the web form available in the platform.

Part A – Borrower Information

Business Legal Name (“Borrower”)	DBA or Tradename, if applicable	
Business Address	Business TIN (EIN, SSN)	Business Phone
	Primary Contact	E-mail Address
SBA PPP Loan Number	Original Principal Amount of PPP Loan (\$)	

Part B – For-Profit Borrower Questionnaire

Eligible types of for-profit borrowers include sole proprietors, partnerships, C-corporations, S-corporations, limited liability companies, independent contractors, eligible self-employed individuals, Tribal businesses (sec. 31(b)(2)(C) of Small Business Act), and electric and telephone cooperatives exempt from federal income taxation under section 501(c)(12) of the Internal Revenue Code.

Instructions:

- For the Business Activity Assessment section below, you must include supporting documentation for your answers to question #1 as part of your submission.
- For the Liquidity Assessment section below, you must include supporting documentation for your answers to questions #1, 2.B, 3.B, 4.C, and 5.C as part of your submission.
- For each question, in the right-hand column (labeled “Confidential?”), select “YES” or “NO” to indicate whether your answers or information provided in response to the question are customarily kept confidential.
- SBA may request additional supporting documentation as part of the loan review.

Business Activity Assessment		Confidential?
1.	Provide answers and supporting documentation for questions 1.A and either 1.B or 1.C:	
A.	What was Borrower's gross revenue in the second calendar quarter (Q2) of 2020? <i>Seasonal borrowers may provide gross revenue in the third calendar quarter (Q3) of 2020 instead of Q2 2020.</i>	Select
B.	If Borrower existed in Q2 2019, what was Borrower's gross revenue in Q2 2019? <i>Seasonal borrowers that entered gross revenue in Q3 2020 for question 1.A must enter gross revenue in Q3 2019.</i>	Select
C.	If Borrower did not exist in Q2 2019, what was Borrower's gross revenue in the first calendar quarter (Q1) of 2020? <i>Seasonal borrowers that entered gross revenue in Q3 2020 for question 1.A must enter gross revenue in Q3 2019.</i>	Select
2.	A. Since the COVID-19 National Emergency Declaration issued by President Trump on March 13, 2020, has Borrower been ordered to shut down by a state or local authority due to COVID-19? <input type="checkbox"/> YES <input type="checkbox"/> NO	Select
B.	If the answer to 2.A is YES, which state or local authority issued the shutdown order?	Select
C.	If the answer to 2.A is YES, provide start and end dates of the shutdown order (if ongoing, write "present" under "End").	Select

3. A. At any time since March 13, 2020, has Borrower been ordered to significantly alter its operations by a state or local authority due to COVID-19?	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
B. If the answer to 3.A is YES, provide start and end dates of the order to alter its operations (if ongoing, write "present" under "End").	Start _____ End _____	Select
C. If the answer to 3.A is YES, how were Borrower's operations altered due to the order? (select all that apply)		
i. The number of people permitted in a location at one time was reduced or capped.	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
ii. Service was restricted to outdoors.	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
iii. Employee workspaces were reconfigured.	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
iv. Other (please describe) [1,000-character max].		Select
D. If the answer to 3.A is YES, what were Borrower's approximate additional cash outlays for these mandatory alterations?	\$ _____	Select



4. A. At any time since March 13, 2020, has Borrower voluntarily ceased or reduced its operations due to COVID-19?	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
B. If the answer to 4.A is YES, provide start and end dates when Borrower voluntarily ceased or reduced operations (if ongoing, write "present" under "End").	Start End	Select
C. If the answer to 4.A is YES, why did Borrower voluntarily cease or reduce operations? (select all that apply)	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
i. Employee(s) contracted COVID-19.		
ii. COVID-19 significantly disrupted Borrower's supply chain (e.g., a supplier of goods or services that are essential to Borrower's operations was unable to deliver due to COVID-19).	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
iii. Other (please describe) [1,000-character max].		Select

5. A. At any time since March 13, 2020, has Borrower voluntarily altered its operations due to COVID-19 (other than ceasing or reducing operations)?	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
B. If the answer to 5.A is YES, provide start and end dates when the voluntary alterations were in place (if ongoing, write "present" under "End"; if staggered, provide multiple start and end dates).	Start End	Select
C. If the answer to 5.A is YES, how were Borrower's operations voluntarily altered? (select all that apply)		
i. The number of people permitted in a location at one time was reduced or capped.	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
ii. Service was restricted to outdoors.	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
iii. Employee workspaces were reconfigured.	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
iv. Other (please describe) [1,000-character max].		Select
D. If the answer to 5.A is YES, what were Borrower's approximate additional cash outlays for these voluntary alterations?	\$	Select



<p>6. A. Between March 13, 2020 and the end of the loan forgiveness covered period of the PPP loan, did Borrower begin any new capital improvement projects not due to COVID-19?</p> <p style="text-align: center;"><input type="checkbox"/> YES <input type="checkbox"/> NO</p>	<p>Select</p>
<p>B. If the answer to 6.A is YES, what were Borrower's approximate cash outlays for those projects?</p> <p style="text-align: center;">\$</p>	<p>Select</p>
<p>7. What is Borrower's primary six-digit NAICS code?</p>	<p>Select</p>
<p>8. Optional – provide additional comments on any question in this Business Activity Assessment section [1,000-character max].</p>	<p>Select</p>



Liquidity Assessment		Confidential?
1.	A. As of the last day of the calendar quarter immediately before the date of Borrower's PPP loan application, how much did Borrower own in cash and cash equivalents? Provide supporting documentation. \$	Select
2.	A. Between March 13, 2020 and the end of the loan forgiveness covered period of the PPP loan, has Borrower paid any dividends or other capital distributions (other than for pass-through estimated tax payments ²) to its owners? <input type="checkbox"/> YES <input type="checkbox"/> NO	Select
	B. If the answer to 2.A is YES, what was the total amount of all dividends or other capital distributions between March 13, 2020 and the end of the loan forgiveness covered period of the PPP loan? Provide supporting documentation. \$	Select
3.	A. Between March 13, 2020 and the end of the loan forgiveness covered period of the PPP loan, has Borrower prepaid any outstanding debt (i.e., paid before contractually due)? <input type="checkbox"/> YES <input type="checkbox"/> NO	Select
	B. If the answer to 3.A is YES, what was the total amount of all debt prepayments between March 13, 2020 and the end of the loan forgiveness covered period of the PPP loan? Provide supporting documentation. \$	Select



<p>4. A. During the loan forgiveness covered period of the PPP loan, were any of Borrower's employees compensated in an amount that exceeds \$250,000 on an annualized basis? (Compensation for this purpose covers gross salary, gross wages, gross tips, gross commissions, and allowances for dismissal or separation.)</p> <p style="text-align: right;"><input type="checkbox"/> YES <input type="checkbox"/> NO</p>	<p>Select</p>
<p>B. If the answer to 4.A is YES, how many employees?</p>	<p>Select</p>
<p>C. If the answer to 4.A is YES, what was the total amount of compensation during the loan forgiveness covered period of all of those employees included in the answer to 4.B? Provide supporting documentation.</p> <p style="text-align: right;">\$</p>	<p>Select</p>
<p>5. A. During the loan forgiveness covered period of the PPP loan, were any of Borrower's owners who work at Borrower compensated by Borrower in an amount that exceeds \$250,000 on an annualized basis? (Compensation for this purpose covers gross salary, gross wages, gross tips, gross commissions, and allowances for dismissal or separation.)</p> <p style="text-align: right;"><input type="checkbox"/> YES <input type="checkbox"/> NO</p>	<p>Select</p>
<p>B. If the answer to 5.A is YES, how many owners?</p>	<p>Select</p>
<p>C. If the answer to 5.A is YES, what was the total amount of compensation during the loan forgiveness covered period of all of those owners included in the answer to 5.B? Provide supporting documentation.</p> <p style="text-align: right;">\$</p>	<p>Select</p>



6.	A.	On the date of Borrower's PPP loan application, were any of Borrower's equity securities listed on a national securities exchange?	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
	B.	If the answer to 6.A is YES, what was Borrower's market capitalization on the date of Borrower's PPP loan application?	\$	Select
7.	A.	On the date of Borrower's PPP loan application, did any publicly traded company own 20 percent or more of any class of Borrower's outstanding equity securities?	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
	B.	If the answer to 7.A is YES, what was the name and market capitalization of the publicly traded company on the date of Borrower's PPP loan application?		
		Company A (name):	\$	Select
		Company B (name):	\$	Select
		Company C (name):	\$	Select
		Company D (name):	\$	Select
		Company E (name):	\$	Select
8.		If the answer to 6.A is NO, what was the book value (shareholders' equity value) of Borrower as of the last day of the calendar quarter immediately before the date of Borrower's PPP loan application?	\$	Select

<p>9. A. On the date of Borrower's PPP loan application, was Borrower a subsidiary of (i.e., was at least 50 percent of Borrower's common equity, or equivalent equity interest, owned by) another company (the parent company)?</p>	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
<p>B. If the answer to 9.A is YES, what was the name of the parent company?</p>		Select
<p>C. If the answer to 9.A is YES, was the parent company organized or incorporated under the laws of a jurisdiction outside the U. S.?</p>	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
<p>D. If the answer to 9.A is YES, and if any of the equity securities of Borrower's parent company are listed on a national securities exchange or on a securities exchange in a non-U.S. jurisdiction, what was the market capitalization of the parent company on the date of Borrower's PPP loan application?</p>	\$	Select
<p>10. On the date of Borrower's PPP loan application, was 20 percent or more of any class of Borrower's outstanding equity securities owned by a private equity firm, venture capital firm, or hedge fund (including a fund managed by any such firm)?</p>	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select

<p>11. A. On the date of Borrower's PPP loan application, was Borrower an affiliate³ or a subsidiary (i.e., was at least 50 percent of Borrower's common equity, or equivalent equity interest, directly or indirectly owned or controlled by) of a foreign, state-owned enterprise (i.e., a company at least 50 percent owned by a foreign state) or of a department, agency, or instrumentality of a foreign state?</p>	<p><input type="checkbox"/> YES <input type="checkbox"/> NO</p>	<p>Select</p>
<p>B. If the answer to 11.A is YES, what was the name of the foreign, state-owned enterprise or of the foreign state's department, agency, or instrumentality?</p>		<p>Select</p>
<p>12. A. Did Borrower directly receive any funds from any CARES Act program other than PPP, excluding tax benefits?</p>	<p><input type="checkbox"/> YES <input type="checkbox"/> NO</p>	<p>Select</p>
<p>B. If the answer to 12.A is YES, please provide funding amount.</p>	<p>\$</p>	<p>Select</p>
<p>C. If the answer to 12.A is YES, please provide the program name or describe the funding source. [1,000-character max]</p>		
<p>13. Optional – provide additional comments on any question in this Liquidity Assessment section[1,000-character max].</p>		<p>Select</p>

CERTIFICATIONS

The Authorized Representative of Borrower must certify to all of the below by initialing next to each item:

_____ I certify that I have the authority to sign and submit this questionnaire on behalf of the Borrower.

_____ I certify that the information provided in this questionnaire and in all supporting documentation is true and correct in all material respects. I make this certification after reasonable inquiry of people, systems, and other information available to the Borrower.

_____ I understand that knowingly making a false statement to obtain a guaranteed loan or forgiveness of an SBA-guaranteed loan is punishable under the law, including under 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 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 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

Signature of Authorized Representative of Borrower

Print Name

Title

Date

Further on Necessity

You Can't Always Get What You Want

From the 1969 Rolling Stones album Let It Bleed
Written by Mick Jagger and Keith Richards

You can't always get what you want
You can't always get what you want
You can't always get what you want
But if you try sometimes you just might find
You just might find
You get what you need.

Originally released as the B side to Honky Tonk Women in July of 1969, which did not get into the top 100 songs, it was released again in 1973 as an A side and reached number 42 on the Billboard charts. It was later named the 100th Best Song in Rock and Roll by *Rolling Stone Magazine*.

The 4 Surviving Rolling Stones perform this song from four social distanced locations on YouTube at <https://www.youtube.com/watch?v=N7pZgQepXfA>



Mick Jagger

Graduate of London School of
Economics and Political Science

PPP Borrowers In Bankruptcy May Receive Court Permission To File For And Receive PPP Loans

This is effective for bankruptcies filed . . .

“(g)(1) The court . . . may authorize a debtor in possession or a trustee that is authorized to operate the business of the debtor under section 1183, 1184, 1203, 1204, or 1304 of this title to obtain a loan under paragraph (36) or (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), and such loan shall be treated as a debt to the extent the loan is not forgiven in accordance with section 7A of the Small Business Act or subparagraph (J) of such paragraph (37), as applicable, with priority equal to a claim of the kind specified in subsection (c)(1) of this section.”

PPP Bankruptcy Provisions

SEC. 320. BANKRUPTCY PROVISIONS.

(a) IN GENERAL.—Section 364 of title 11, United States Code, is amended by adding at the end the following:

“(g)(1) The court, after notice and a hearing, may authorize a debtor in possession or a trustee that is authorized to operate the business of the debtor under section 1183, 1184, 1203, 1204, or 1304 of this title to obtain a loan under paragraph (36) or (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), and such loan shall be treated as a debt to the extent the loan is not forgiven in accordance with section 7A of the Small Business Act or subparagraph (J) of such paragraph (37), as applicable, with priority equal to a claim of the kind specified in subsection (c)(1) of this section.

“(2) The trustee may incur debt described in paragraph (1) notwithstanding any provision in a contract, prior order authorizing the trustee to incur debt under this section, prior order authorizing the trustee to use cash collateral under section 363, or applicable law that prohibits the debtor from incurring additional debt.

“(3) The court shall hold a hearing within 7 days after the filing and service of the motion to obtain a loan described in paragraph (1). Notwithstanding the Federal Rules of Bankruptcy Procedure, at such hearing, the court may grant relief on a final basis.”.

PPP Bankruptcy Provisions cont'd

(b) ALLOWANCE OF ADMINISTRATIVE EXPENSES.—

Section 503(b) of title 11, United States Code, is amended—

- (1) in paragraph (8)(B), by striking “and” at the end;
- (2) in paragraph (9), by striking the period at the end and inserting “; and”; and
- (3) by adding at the end the following:

“(10) any debt incurred under section 364(g)(1) of this title.”.

(c) CONFIRMATION OF PLAN FOR REORGANIZATION.—Section 1191 of title 11, United States Code, is amended by adding at the end the following:

“(f) SPECIAL PROVISION RELATED TO COVID–19 PANDEMIC.—Notwithstanding section 1129(a)(9)(A) of this title and subsection (e) of this section, a plan that provides for payment of a claim of a kind specified in section 503(b)(10) of this title may be confirmed under subsection (b) of this section if the plan proposes to make payments on account of such claim when due under the terms of the loan giving rise to such claim.”.

(d) CONFIRMATION OF PLAN FOR FAMILY FARMERS AND FISHERMEN.—Section 1225 of title 11, United States Code, is amended by adding at the end the following:

“(d) Notwithstanding section 1222(a)(2) of this title and subsection (b)(1) of this section, a plan that provides for payment of a claim of a kind specified in section 503(b)(10) of this title may be confirmed if the plan proposes to make payments on account of such claim when due under the terms of the loan giving rise to such claim.”.

(e) CONFIRMATION OF PLAN FOR INDIVIDUALS.—

Section 1325 of title 11, United States Code, is amended by adding at the end the following: “(d) Notwithstanding section 1322(a)(2) of this title and subsection (b)(1) of this section, a plan that provides for payment of a claim of a kind specified in section 503(b)(10) of this title may be confirmed if the plan proposes to make payments on account of such claim when due under the terms of the loan giving rise to such claim.”.

PPP Bankruptcy Provisions cont'd

(f) EFFECTIVE DATE; SUNSET.—

(1) EFFECTIVE DATE.—The amendments made by subsections (a) through (e) shall—

(A) take effect on the date on which the Administrator submits to the Director of the Executive Office for United States Trustees a written determination that, subject to satisfying any other eligibility requirements, any debtor in possession or trustee that is authorized to operate the business of the debtor under section 1183, 1184, 1203, 1204, or 1304 of title 11, United States Code, would be eligible for a loan under paragraphs (36) and (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)); and

(B) apply to any case pending on or commenced on or after the date described in sub paragraph (A).

(2) SUNSET.—

(A) IN GENERAL.—If the amendments made by subsections (a) through (e) take effect under paragraph (1), effective on the date that is 2 years after the date of enactment of this Act—

(i) section 364 of title 11, United States Code, is amended by striking subsection (g); (ii) section 503(b) of title 11, United States Code, is amended—

(I) in paragraph (8)(B), by adding “and” at the end; (II) in paragraph (9), by striking “; and” at the end and inserting a period; and (III) by striking paragraph (10); (iii) section 1191 of title 11, United States Code, is amended by striking subsection (f); (iv) section 1225 of title 11, United States Code, is amended by striking subsection (d); and (v) section 1325 of title 11, United States Code, is amended by striking subsection (d).

(B) APPLICABILITY.—Notwithstanding the amendments made by subparagraph (A) of this paragraph, if the amendments made by subsections (a) through (e) take effect under paragraph (1) of this subsection, such amendments shall apply to any case under title 11, United States Code, commenced before the date that is 2 years after the date of enactment of this Act.

Subchapter V Bankruptcy

The Small Business Reorganization Act (SBRA) of 2019, enacted what is now known as a Subchapter V, which changed the bankruptcy law to be more debtor friendly by increasing the amount of debt that a small business debtor can have while qualifying in a Chapter 11 bankruptcy, and making the further change described below.

Effective February 2020 a small business debtor could have had up to \$2,725,625 in debt and qualify to file a Subchapter V bankruptcy.

The CARES Act increased the threshold from \$2,725,625 to \$7,500,000, effective for cases filed after Friday, March 27, 2020.

In addition, the CARES Act eliminated the former requirement that any class or classes of unsecured creditors would have to vote on a plan in order to have the court approve the reduction or restructuring of debt.

After the CARES Act, unsecured creditors cannot vote, and secured creditors will be required to be subject to bankruptcy plan terms approved by the court, which will generally provide that a secured creditor's claim cannot exceed the value of collateral secured by the applicable debt on the date that a Chapter 11 bankruptcy petition is filed.



When to File a Chapter 11 Bankruptcy

Typically, a Chapter 11 bankruptcy should not be filed immediately before any creditor may act or refuse to act in any way that would have a catastrophic impact on the business.

In addition, a Chapter 11 bankruptcy should typically not be filed unless a plan of reorganization and a source of future revenue and income will be identifiable and in place within approximately 90 days of the filing of the Chapter 11 bankruptcy petition.

But on the other hand, if the collateral that secures the debt that is held by a creditor who will not be cooperative is lower now than it will be later, it can make sense to file a bankruptcy petition sooner than would otherwise be the case.

For example, where the collateral is accounts receivable and the Coronavirus business shutdown is still in effect, the value of such accounts receivable may be much lower than what it will be once the virus freeze lifts and things hopefully go back to some semblance of “business as normal.”

When Does Conduct in Contemplation of Bankruptcy Become Criminal?

- Intent to evade payment to the Internal Revenue Service (IRS), the Federal Trade Commission (FTC), the Federal Deposit Insurance Corporation (FDIC), and other governmental agencies in or out of bankruptcy.
- Concealment - dishonesty with respect to ownership or disposition of assets in bankruptcy, or in violation of anti-fraud laws that prohibit dishonesty with financial institutions and otherwise.
- Engaging in any illegal conduct whatsoever, no matter how minor, as part of a conspiracy that involves a greater crime, whether the participant is aware or not.
- And much more - consult with an ethical and well-qualified debtor/creditor bankruptcy law specialist in any questionable situation.

Lawyer/Client Privilege...But No CPA/Client Privilege?

1. The Trustee in Bankruptcy may step into the shoes of your client and have access to all of your files.
2. There is no CPA evidential evidentiary privilege in federal court/bankruptcy.
3. Your files may become accessible under the crime/fraud exception under the rules of evidence.

Crime/Fraud Exception to Attorney/Client Privilege

- Under the US Supreme Court case of *US v Zolin*, 491 U.S. 554 (1989), the attorney client privilege is lost if the lawyer actively assisted the client in making a transfer for the purpose of avoiding a creditor. The court determined that making a transfer to avoid creditors is a "bad act."
- Normally, to invoke the crime-fraud exception to the attorney client privilege, a party must:
 - (1) make a prima facie evidence showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice, and;
 - (2) then show that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it. There is a distinction between advice sought prior to a fraudulent undertaking and advice obtained after a fraud has been committed. Advice obtained after a fraud has been committed is not subject to the crime-fraud exception.

Preferential Transfers and Guarantors – What Can Be Worse?

Under the Bankruptcy Code, a transfer made within ninety days before filing bankruptcy may be “clawed back” from the payee, even if it was appropriately paid to satisfy a preexisting (antecedent) debt.

A one-year look-back will apply to any transfer made to an “insider.”

The most notable exception is that a transfer made in exchange for good and valid “contemporaneous” consideration will not necessarily be set aside.

Another exception applies for payments made in the “ordinary course of business.”

Recent bankruptcy law changes require that facts be stated to support a good faith belief that a preferential transfer claim exists.

Fiduciary Liability with Respect to Insolvent Entities

Under state law, the officers, directors and managers of an “insolvent entity” owe a duty to creditors of the entity to reasonably administer the company. Director, officer and manager liability may be avoided by liquidating the company under the supervision of the Bankruptcy Court, or by filing a state court action, which is known as an “Assignment for the Benefit of Creditors (“ABC”).”

Preferential Transfer Discussion

A Guarantor's Nightmare – The Preferential Transfer Rules May Be Triggered:

The preferential transfer rules can be triggered in situations where a family member or other “insider” benefits indirectly from payments made. For example, the son of a debtor in bankruptcy who had guaranteed loans that the debtor paid within one year of filing bankruptcy was required to pay the trustee in bankruptcy the amount of the loan payments, even though the son did not receive any of these monies or directly benefit. This was the result of *In re Halling*, 449 B.R. 911, 913 (Bankr. W.D. Wis. 2011) where the mother made regular payments to the bank on an installment loan.

The trustee sought to avoid the transfers as preferential, stating that the son was an insider creditor and that transfers made up to one year before bankruptcy were voidable. The Court found that guarantors are creditors within the Bankruptcy Code, and that the payments to the bank benefitted the son because each payment reduced his liability to the bank. Thus, the Court allowed the trustee to recover the amounts transferred as legitimate loan payments from the son because the preference claims against non-insiders (the bank in this case) are limited to transfers within 90 days. Transfers made more than 90 days before the filing of bankruptcy cannot be recouped from creditors who are not insiders in this situation. Thus, for transfers between 90 days and one year, the trustee can only get transfers to inside creditors (in this case the son).

Preferential Transfer Discussion

A Guarantor's Nightmare – The Preferential Transfer Rules May Be Triggered - continued:

With reference to the above, the definition of an insider can be found at 11 U.S.C. § 101(31), which defines the term “insider” as follows:

The term “insider” includes:

- (A) if the debtor is an individual - (i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control;
- (B) if the debtor is a corporation - (i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor;
- (C) if the debtor is a partnership - (i) general partner in the debtor; (ii) relative of a general partner in, general partner of, or person in control of the debtor; (iii) partnership in which the debtor is a general partner; (iv) general partner of the debtor; or (v) person in control of the debtor;
- (D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;
- (E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and
- (F) managing agent of the debtor.

Preferential Transfer Discussion

A Discussion Of Preferential Transfers By Michael Markham Is As Follows:

A preferential transfer can be either a transfer made by a debtor to an “insider” within one year of filing bankruptcy or a transfer made to any party within 90 days of the filing of a bankruptcy petition. If a Trustee discovers a preferential transfer, they will recover the assets.

- A debtor may present one of the following defenses to a preferential transfer claim:
 1. Contemporaneous exchange;
 2. Ordinary course of business; or
 3. New value.

Preferential Transfer Discussion

- **A Discussion Of Preferential Transfers By Michael Markham Is As Follows - continued:**
- **Contemporaneous exchange:**
 - If the transfer was a contemporaneous exchange, it is not a preferential transfer.
 - Ex. You deliver goods to a client and receive payment the same day because you had the client pay by COD (Cash On Delivery). You are getting paid \$10,000 for \$10,000 worth of goods – this is a contemporaneous exchange.
 - A preferential transfer occurs when you deliver \$10,000 worth of goods but the debtor pays you \$20,000 to apply to his outstanding invoices.
- **Ordinary Course of Business:**
 - This defense applies when the debtor makes payments in the “ordinary course of business.”
 - The problem is that sometimes invoice terms may state that payment is due every 30 days, but the payment history of the invoice is payment every 60 days. The Trustee will then have to do a detailed analysis of the invoices to ensure that payments were made in the ordinary course of business.
 - This can be successful, but it is very expensive to prove.

Preferential Transfer Discussion

New Value:

- The new value exception applies when the transfer was made prior to the extension of new value from the creditor, and the new value itself is not secured or offset by another transfer from the debtor.
- Example:
 - You receive a preferential transfer for shipment A on Monday and the debtor pays you \$20,000.
 - You ship shipment B on Tuesday and the debtor does not pay you.
 - You can credit shipment B, which you didn't get paid for, against your preference exposure from shipment A.

Especially Treacherous Liabilities

Liabilities generally not cancelable in bankruptcy include the following:		Liabilities generally not covered by insurance include the following:	
(i)	Government student loans	(i)	Civil rights violations committed by employees or others
(ii)	Trust fund tax liability	(ii)	Environmental liabilities, including sick building syndrome and lead paint issues
(iii)	Hazardous waste liability	(iii)	Criminal acts
(iv)	Breach of fiduciary duty liabilities	(iv)	Charitable and religious board activities
(v)	Child support and alimony	(v)	Jet skis normally cannot be insured for over \$250,000 per occurrence
(vi)	Medicare, Medicaid, and sometimes private pay refund liabilities of physicians: Carriers have been suing doctors for not following referral laws for significant refunds	(vi)	Acts of terrorism: Most casualty insurance clauses exempt acts of terrorism. The industry has been paying claims on goodwill up until now

Ownership Interest Transfer Rules

	SBA Approval Required	Lender Approval Required	Escrow Required	Documentation Required
Transfer of less than 20% of ownership interests in the entity	No.	Maybe. Check the loan documents.	No.	None.
Transfer of 20% - 50% of ownership interests in the entity	No.	Yes.	No.	<u>Lender must submit:</u> <ul style="list-style-type: none"> • Identity of new owner(s) • New ownership percentages • Tax ID Number of any owner over 20% • Location and amount of escrow account if necessary.
Transfer of more than 50% of ownership interests in the entity	Yes, if borrower does not submit forgiveness application and escrow information.	Yes.	Yes, if borrower wishes to avoid obtaining SBA approval.	<u>If borrower needs SBA approval, he or she must submit:</u> <ul style="list-style-type: none"> • Reason for requiring approval • Details of requested transaction • Copy of PPP note • Letter of intent and purchase/sale agreement • Disclosure of buyer's PPP loan status • List of all owners over 20% <p>Lender must submit info in box above.</p>

Asset Transfer Rules

	SBA Approval Required	Lender Acknowledgement Required	Escrow Required	Documentation Required
Under 50% of borrower's assets (based upon fair market value)	No.	Maybe. Check your loan documents.	No.	No.
50% or more of borrower's assets (based upon fair market value)	Yes, if borrower does not submit forgiveness application and escrow information.	Yes.	Yes, if borrower wishes to avoid obtaining SBA approval.	<p><u>If borrower needs SBA approval, he or she must submit:</u></p> <ul style="list-style-type: none"> • Reason for requiring approval • Details of requested transaction • Copy of PPP note • Letter of intent and purchase/sale agreement • Disclosure of buyer's PPP loan status • List of all owners over 20% <p>Lender must submit info in box on previous slide.</p> <p>Approval may be conditioned on purchasing entity assuming all of borrower's obligations under the PPP loan</p>

How to Gift or Sell Value Without Transferring More than 20% Ownership in an Entity and Violating PPP Loan Transfer Restrictions

1. Provide an option to purchase for valid consideration - §2703 issues:
 - a) Must be bona fide business arrangement
 - b) Cannot be a considered a device to transfer property to member's family for less than full and adequate consideration.
 - c) Terms must be comparable to similar arrangements entered into by persons in an arms' length transaction.
2. Divide into less than 20% common, 80% or more preferred and transfer common interest.
3. Sell up to 50% of assets, if this will not trigger capital gains, and 20% of ownership.
4. Set up a management company and allow personal goodwill to be locked into the management company, then sell the management company.
5. Have the entity owe a loan to its owners and then transfer the loan, if this does not violate terms of the note.

**Excerpt from Steve Leimberg's Business Entities
Email Newsletter Archive Message #208**

Subject: Alan Gassman, Brandon Ketron & Kevin Cameron - Entity Transfer, Gift & Income Tax Planning for PPP Borrowers - New Challenges Call for Old Solutions

Sell Some Assets (Or Ownership) and Give an Option to Buy the Rest.

When a borrower wants to sell its business without receiving SBA or lender approval it may consider instead selling up to 50% of business assets and giving the purchaser an option to purchase the other 50% based upon a reasonable option payment and a reasonable exercise price that is in substance an option and not considered to be an installment sale. This may be accomplished by setting the option price high enough so that there is a substantial risk that the option holder will not exercise the option and will lose the deposit, such as if the business will not recover when the COVID-19 virus pandemic has ended.

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Use a License or Management Agreement.

Another planning idea is to license the right to use and operate the business under a license or management agreement which gives the licensee the ability to derive a reasonable profit from operations and allows for an option to purchase the business which, as indicated above, should be structured in a way that does not make the arrangement appear to be an installment sale. This means that the option payment should not be so large as compared to the exercise price that it seems extremely likely that that option will be exercised. A valuation firm should be engaged, if possible, to determine what an appropriate option price, exercise period, and exercise price should be. Under Internal Revenue Code ("IRC") section 2703, in order for an option and its exercise price to be respected for estate and gift tax purposes the following requirements must be met:

1. Must be a bona fide business arrangement
2. Cannot be considered a device to transfer property to an owner's family for less than full and adequate consideration
3. Terms must be comparable to similar arrangements entered into by a person in an arm's-length transaction



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Common/ Preferred "Partnership Freezes"

For clients who have wanted to gift or sell a significant portion of ownership of a PPP borrower entity to a grantor trust or a family member, the former objective of selling a 99% non-voting member interest may be changed so that the taxpayer sells a 49% ownership interest, and retains a 51% interest so as not to trigger the SBA approval or escrow requirements.

In that event, it may be possible to recapitalize the entity into common and preferred interest like a "partnership freeze" assuming that the entity is not an S-Corporation. If the entity is an S-Corporation then the second class of stock rules will be violated by such an arrangement. But an S-Corporation may convey its assets into a subsidiary entity and another person or entity could convey other assets, such as another business to that subsidiary entity, which may be taxed as a partnership, and a common/preferred arrangement may be established between the two entities, although this can be complicated and partnership tax rules must be carefully reviewed.

A typical recapitalization will involve having an amount equal to 90% or less of the value of the entity be considered to be a preferred return interest that might, for example, be entitled to receive 6.5% minimum annual coupon rate.



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Common/ Preferred "Partnership Freezes" (continued)

Any growth in excess of 6.5% would inure to the common interest.

For example, if an entity is now valued at \$10 million during the crisis but may bounce back to \$15 million thereafter if things go as hoped, then a 49% common interest might be sold under an installment sale, and a 51% preferred interest can be valued at \$5,100,000 with a 6.5% coupon rate. If this is to comply with IRC section 2701, then the coupon rate amount will need to be paid each year, and other requirements must be met.

If the entity springs back to a \$15 million value the common ownership interest may be worth approximately \$10 million, and the 51% preferred interest may remain valued at not much more than \$5 million.

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**Triggering A Gift Without a Gift With a Non Qualifying Partnership Freeze—
The Use It So I Won't Lose It, But May Eat My Cake Too**

Structuring must be handled very carefully with a preferred interest partnership/LLC arrangement. If the arrangement does not qualify under IRC section 2701 then any gift or transfer of the common interest may trigger a gift tax event based upon the entire value of the entity, even if the common interest transferred is 10% or less of the value of the entity.

This can be useful for taxpayers who are not certain whether they want to make an irrevocable gift in 2020 that would use their entire remaining estate tax exclusion, because the Section 2701 rules would allow the exemption used on gifting to be applied in a later year as a credit, even if the estate tax exemption is reduced.

For example, an individual with a \$9 million estate and gift tax exemption remaining could put \$10 million into an LLC that has borrowed PPP funds and recapitalize it into a 90% preferred interest that may be entitled to a 6.5% per year return, but the 6.5% may not be paid out annually, and may instead accrue to some extent. The common interest may be worth \$1 million.



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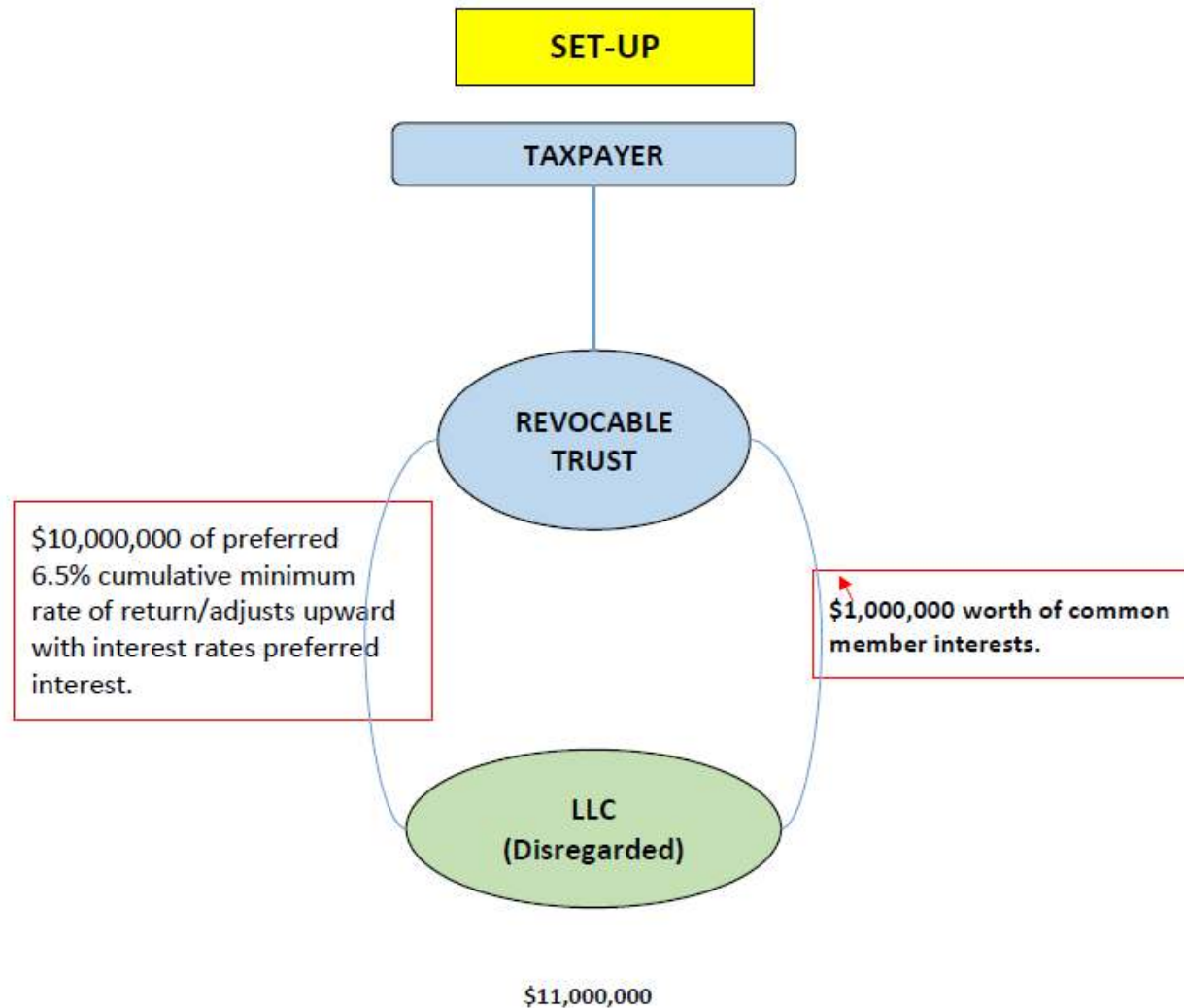
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**Triggering A Gift Without a Gift With a Non Qualifying Partnership Freeze—
The Use It So I Won't Lose It, But May Eat My Cake Too (Continued)**

If the \$1 million common interest is gifted to an irrevocable trust then the individual would be considered to have made a \$9 million gift under IRC Section 2701, and if the preferred interest is still owned by the individual upon death then the individual's estate tax exclusion allowable against the partnership interest can be as high as \$9 million, even if the exclusion has been reduced by legislation or the 2026 reduction in half, based upon the IRC Section 2701 rules.

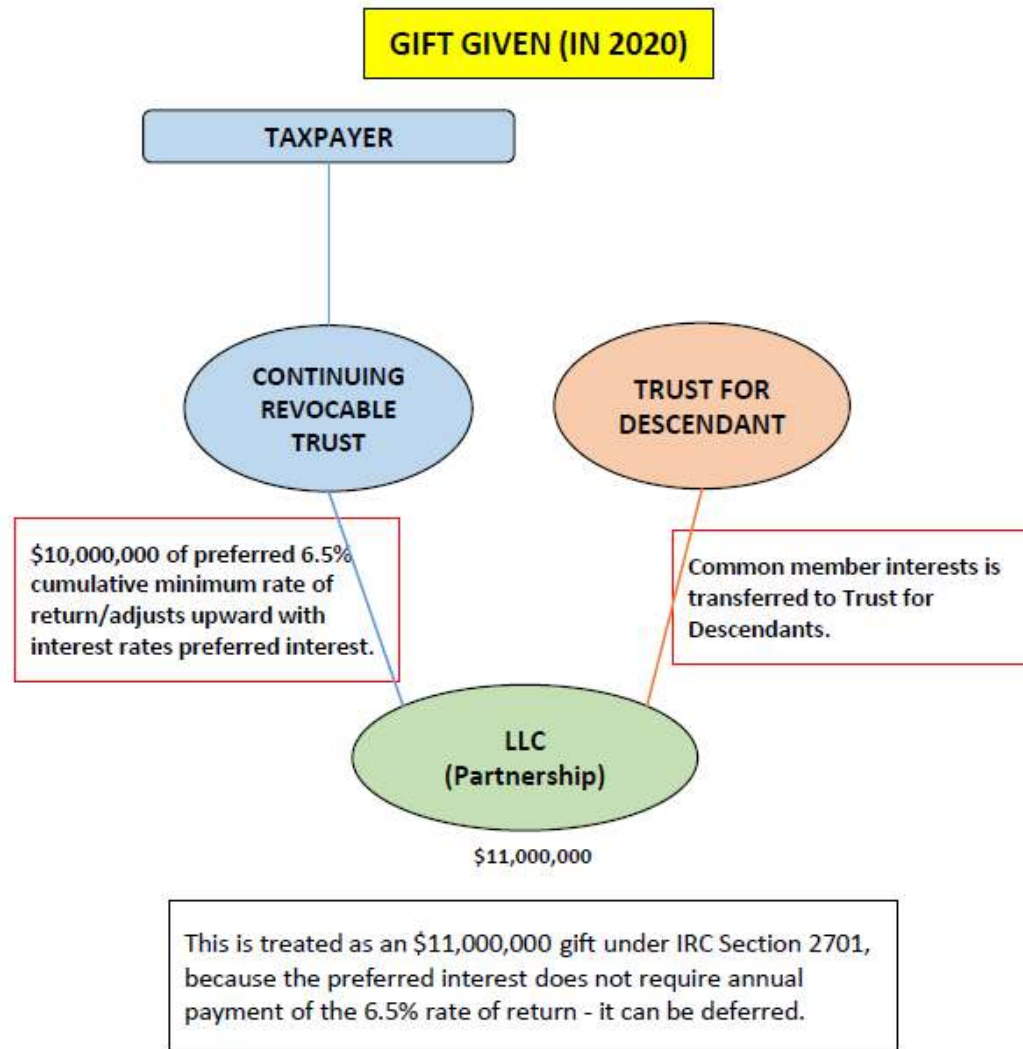
This planning technique was covered in LISI Estate Planning Newsletter #2827 by Stephen M. Breitstone, Mary P. O'Reilly & Joy Spence, and before that in LISI Estate Planning Newsletter #2820 by Jonathan Blattmachr and Carlyn McCaffery. It is somewhat likely that this technique was invented by Jonathan Blattmachr.

Flexible Preferred/Common Exemption Use Partnership



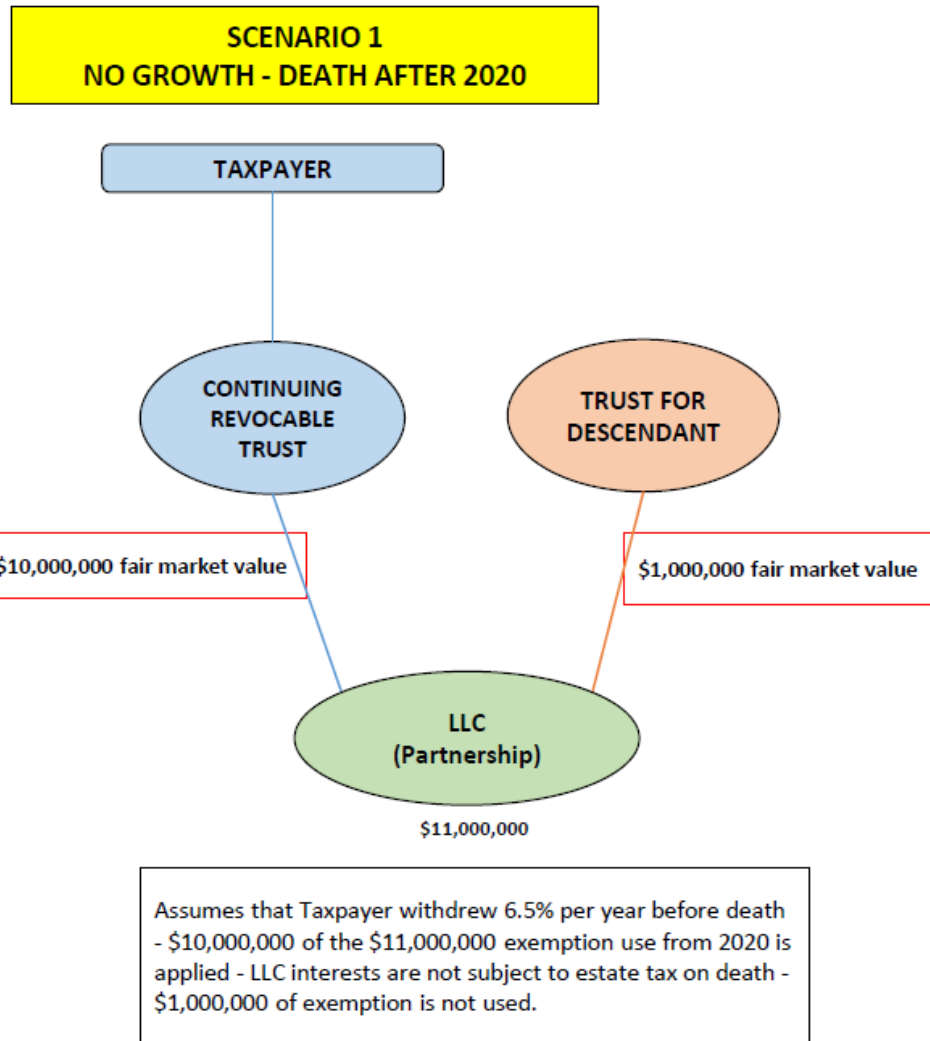
The presenters than Stephen M. Breitstone, Mary P. O'Reilly & Joy Spence for their excellent article on this – *Get A GRIP! How to Lock in the Exemption and Still Benefit from It with the Grantor Retained Interest Partnership* at Leimberg's Estate Planning Email Newsletter Archive Message #2827 9.29.2020

Flexible Preferred/Common Exemption Use Partnership



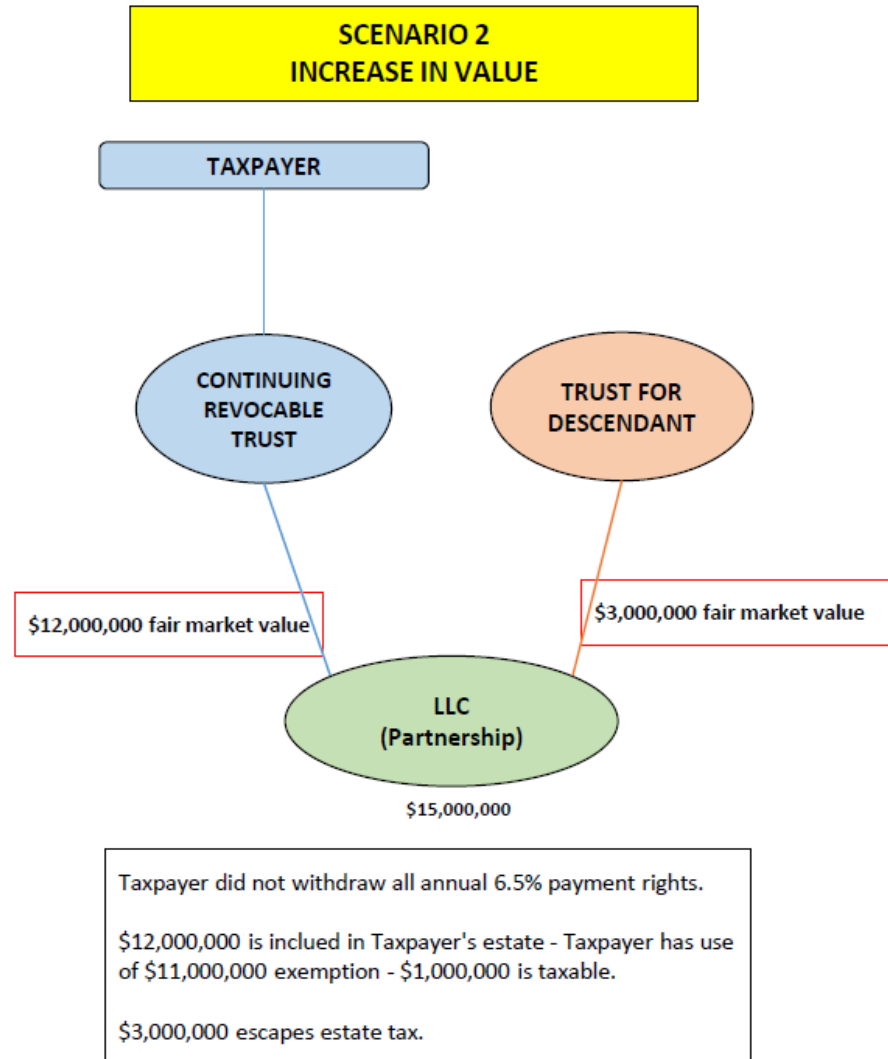
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A 60% Transfer In All.

Another planning idea to avoid having to notify the SBA would be to transfer 50% of the assets of a company and then 20% of the ownership of the post-transfer company. Those who scored over 600 in the Math SAT's will know that this constitutes a 60% transfer, but this will not be an effective planning technique if significant income taxes have to be paid on the sale of the assets of the entity.

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Management Companies With Significant Value

Another idea will be to set up a separate management company that can operate the business and receive a significant management fee.

For professional service companies and small businesses, like insurance agencies, case law has recognized that most, if not all, of the goodwill of the entity may be owned by the individual or individuals that work with the entity, assuming that there are not noncompetition covenants or long-term employment agreements that would give the entity itself the goodwill. This is called "personal goodwill" and applies notwithstanding what the business person or professional's spouse or children might think.

In these situations, the individual can establish a management company and give the management company significant rights that will allow it to manage for a long period of time and to receive profits attributable to the goodwill of the individual owner or owners. The individual owner or owners can be the initial owner of the management company and sign long-term employment agreements to give the management company contractual rights and genuine value.

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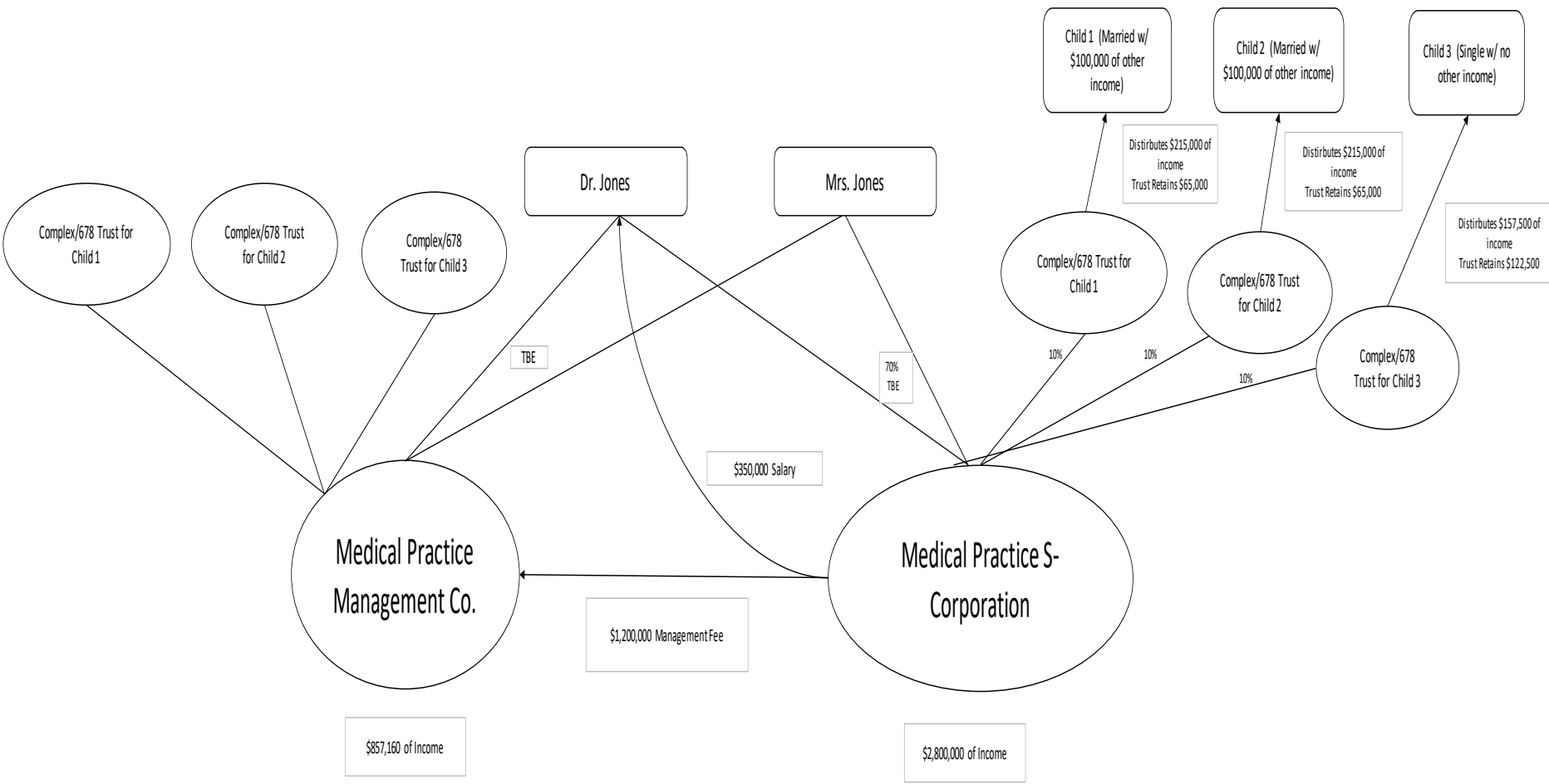
Management Companies With Significant Value, Continued

The management company can then be sold, or a 99% nonvoting interest in the management company can be sold, for an installment note in order to complete year-end planning. The buyer can be a defective grantor trust in order to avoid having to pay short term capital gains tax on the sale if the management company has not existed for a full year before the sale.

For example, a medical practice entity that typically pays its key shareholder \$500,000 a year in salary and has netted \$2 million of income each year might establish a management agreement so that the management company is expected to earn \$1 million a year, and more as the practice grows.

The doctor signs a 10-year employment agreement with a non-competition covenant and the management company is valued at \$6 million.

A 99% non-voting interest in the management company is sold to a defective grantor trust in exchange for a \$4 million note, and this should not be considered a transfer under the PPP rules.



New Stimulus Package *Explained*

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