

January 6th SBA Regulations Help Solidify PPP And EIDL Changes

Presented by:

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Saturday, January 9, 2021
10 to 10:30 AM EST (30 minutes)



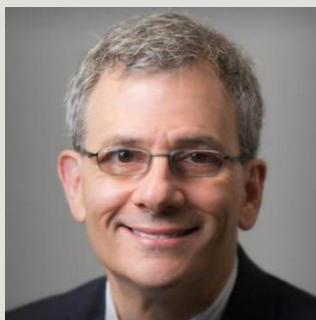
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SBA ISSUES GUIDANCE ON NEW CARES ACT CHANGES FOR PPP, PPP ROUND 2, EIDL AND OTHER PROGRAMS: WHAT ADVISORS NEED TO KNOW NOW!

<https://leimbergservices.com/wdev/register.cfm?id=952>

**Tuesday, January 12, 2021
1 – 2:30 PM EST (90 minutes)**



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NEW PPP LOAN EXPENSE TRACKER AND FORGIVENESS CALCULATOR OFFERED EXCLUSIVELY BY LISI



CPAs and tax advisors throughout the United States thought tax season and the 199A calculation was challenging, but what about the PPP Loan season! Now, the best way to help clients plan for, understand and report their PPP loans is finally here: the PPP Loan Expense Tracker and Forgiveness Calculator (TM) for CPA's and Other Financial Professionals.

The SBA has issued the Forgiveness Application and Instructions just in time to allow PPP borrowers to plan to know how much of their loans may be forgiven and what the best strategies are to balance the utility of bringing employees back and against associated costs and forgiveness. Now, you can handle your clients' PPP loan planning and calculations efficiently, effectively, and accurately in accordance with SBA guidelines and applicable law.

The PPP Loan Expense Tracker and Forgiveness Calculator allows you to input expenses and payroll costs data for the 8 week period and automatically populates forgiveness calculations

If you are not a LISI member please use the Buy Now Button below to pay the non-member price of \$179.

Registrant Email:

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C&L Value Advisors, LLC Kevin A. Cameron, CPA Phone 813-286-7373 kcameron@clvalue.com											
Paycheck Protection Loan Forgiveness Expense Tracker <i>Hover over yellow cells for tips</i> <i>Enter data in the light blue cells only</i>											
Enter Company name:											
Covered Period: What date did your loan fund (money was released to you)? <input type="text"/> This is the start of your 8 week period This is the end date you use for measuring loan forgiveness: 2/24/1900 This is the end of your 8 week period											
For borrowers with bi-weekly or more frequent payroll (using this Alternative Payroll Covered Period is optional) Alternative Payroll Covered Period (optional): Enter first date of the first pay period AFTER the loan funding date <input type="text"/> This is the start of your Alternative Payroll 8 week period This is the end date you use for Payroll expenses only 2/24/1900 This is the end of your Alternative Payroll 8 week period											
Enter the above dates/time periods on your Loan Forgiveness Application with your Lender											
Enter the amount of loan received \$ -											
Enter the amount of your EIDL Advance (Grant) \$ - This amount should not exceed \$10,000											
<div style="display: flex; justify-content: space-between;"> <div> (Click on cell for instructions) </div> <div> Payroll Costs </div> <div> Nonpayroll Costs </div> </div>											
DESCRIPTION	DATE EXPENSE INCURRED	DATE EXPENSE PAID OR PAY PERIOD DATE	TOTAL	GROSS PAYROLL	HEALTH INSURANCE	STATE & LOCAL PAYROLL TAXES	RETIREMENT PLAN CONTRIBUTIONS	INTEREST ON MORTGAGES IN PLACE BEFORE 02/15/2020	RENT OR LEASE PAYMENTS	UTILITIES	SUPPORTING DOCUMENTS ATTACHED? Yes or No (Click here to access the Instructions)
			0.00								
			0.00								
			0.00								
			0.00								

PPP LOAN EXPENSE TRACKER AND FORGIVENESS SPREADSHEET CALCULATOR

Includes Instructional Webinar
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GASSMAN CROTTY DENICOLOPA
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Kevin Cameron MBA CPA



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4 minute summary video at <https://youtu.be/mN8O5ViHVk0>
46+ minute walkthrough video at <https://youtu.be/pBCtAP0LVyw>

Spreadsheet Calculator Available at:

www.PPPExcel.com

"A man is only as good as his tools." -Emmert Wolf

WARNING TO ATTENDEES:

This explanation and interpretation of the CARES Act and it's 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.

NOTE TO ATTENDEES:

For your convenience, everything that was included in this presentation following the SBA's release of two Interim Final Rules on January 6th, 2021 will be colored in **LIGHT GREEN.**

Everything colored **PURPLE** will indicate items that went unchanged by the January 6th, 2021 Interim Final Rules.

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

Key Takeaways

Selected changes:

Stimulus Checks For Those Earning More Than \$75,000/\$150,000 - How It Works

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.
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.

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!

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. The Act provided that, upon pronouncement by the SBA, bankruptcy judges could permit debtors to apply for PPP loans, but the 01/06/21 IFRs make clear that the SBA does not intend to exercise this authority.
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 of calendar year 2019, 2020, or the 12 month period immediately preceding the date of the loan.
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.
4. Eligible EIDL loans made between January 31st, 2020 and April 3rd, 2020 may be refinanced into PPP loans. Borrowers will not be allowed to refinance an EIDL loan into a second draw PPP loan.

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”

“If you're not confused, you're not paying attention.” – Tom Peters

SBA and Treasury Announce PPP Re-Opening

On January 8th, the SBA announced that the Paycheck Protection Program (PPP) will re-open the week of January 11 for new borrowers and certain existing PPP borrowers.

To promote access to capital, initially only community financial institutions will be able to make First Draw PPP Loans on Monday, January 11, and Second Draw PPP Loans on Wednesday, January 13.

The SBA also announced that the following would be coming soon:

- New application forms for PPP Second Draw Loans
- Updated forms 2483 and 2484 for PPP First Draw Loans
- New forgiveness application forms
- Additional IFRs, procedural notices and resources regarding PPP forgiveness process, EIDL grants, and Sheltered Live Venues grants

SBA January 6th IFRs Key Takeaways

1. The SBA is planning to issue a comprehensive set of interim final rules that would cover all aspects of loan forgiveness and the loan review process under one document.
2. The provisions of these interim final rules do not affect loans in which forgiveness has been issued and closed by the SBA unless specifically stated otherwise.
3. The SBA is referring to the new act as the Economic Aid Act, enacted December 27, 2020.
4. The Rules specifically state that “these rules should be interpreted consistently with the sets of frequently asked questions regarding the PPP that are posted on SBA’s and Treasury’s websites in the interim final rules posted separately providing guidance on second draw PPP loans and the consolidated guidance on loan forgiveness and the loan review process; however, the Economic Aid Act overrides any conflicting guidance in the FAQs, and SBA will be revising the FAQs to fully conform to the Economic Aid Act as quickly as feasible.
5. **The interim final rules specify that borrowers can use either 2019 or 2020 as the base period for calculating their maximum loan amount including farmers and ranchers. Therefore, farmers and ranchers could use either of their 2019 or 2020 Schedule F gross income to calculate their maximum loan.**
6. If you have over 500 employees you could still qualify the applicable revenue base size standard established by the SBA for your industry or an alternative SBA size standard. The alternative SBA size standard is a business together with its affiliates that (i) has a maximum tangible net worth of not more than \$15,000,000 and (ii) average net income after federal income taxes excluding any carryover losses for the two full fiscal years before the date of the application of note more than \$5,000,000. Info is in the footnote.

SBA January 6th IFRs Key Takeaways

7. The seasonal business will be considered as operating as of February 15, 2020 so long as the business was in operation for any 12 week period between February 15, 2019 and February 15, 2020. This applies even if the business was dormant or not fully operating as of the exact date of February 15, 2020.
8. Businesses that receive revenue from legal gaming activities are not rendered ineligible for PPP loans to which receipt of legal gaming revenues, provided however that the receipt of illegal gaming revenues renders a business categorically ineligible for a PPP loan.
9. An entity is ineligible if a 20% or more owner of equity of the applicant is any of the following: (i) they are presently incarcerated or for any felony presently subject to an indictment, criminal information, arraignment or other means by which formal criminal charges are brought in any jurisdiction; (ii) has been convicted of or pleaded guilty or nolo contendere to or commenced any form of parole or probation for a felony involving fraud, bribery, embezzlement or a false statement on the loan application or an application for federal financial assistance within the last 5 years; (iii) has been convicted of or pleaded guilty or nolo contendere to or commenced any form of parole or probation for any other felony within the last year.
10. **If your business is permanently closed then you may not receive a PPP loan. The rules provide in footnote 34 that an entity that has gone out of business and has no intention of reopening is prohibited from receiving a PPP loan. It further provides that a borrower that has temporarily closed or temporarily suspended its business, but intends to reopen remains eligible for a PPP loan.**
11. Businesses in bankruptcy are ineligible for PPP loans.
12. SBA Form 2483 will assist borrowers with determining whether they are under common management.



SBA January 6th IFRs Key Takeaways

13. Faith based organizations are exempted from the affiliation rules and therefore would not have to aggregate employees across related churches.
14. **Borrowers who apply for PPP loans in 2021 who are not self-employed (i.e. Schedule C taxpayers) are permitted to use the precise one year period before the date on which the loan is made to calculate payroll costs if they choose not to use the 2019 or 2020 calendar years.**
15. You can refinance an EIDL loan made between January 31, 2020 and April 3, 2020 into a PPP loan.
16. **The rules confirm that you do not include any amount of any advance under an EIDL Covid-19 loan and specify that it does not have to be repaid.**
17. If you do have an outstanding EIDL loan and refinance it into the PPP loan, it appears that the EIDL loan can actually exceed the maximum loan amount of 2-1/2 your average monthly payroll cost. For example, average monthly payroll costs of \$10,000 multiplied by 2-1/2 is \$25,000. In example 3, the borrower had an EIDL loan of \$10,000 and was able to refinance the same to a PPP loan for a maximum loan amount of \$35,000.
18. **The interim final rules specify that a Schedule C borrower can use 2019 or 2020 Form 1040 Schedule C Line 31 net profit amount to complete their maximum loan calculation.**
19. **Page 37 defines seasonal employer as (i) the business does not operate for more than 7 months in any calendar year; or (ii) during the preceding calendar year that had gross receipts for only 6 months of that year that were not more than 33.33% of the gross receipts for the other 6 months of that year.**



SBA January 6th IFRs Key Takeaways

21. **Schedule F farmers can use a year, the 2019 or 2020 IRS Form 1040 Schedule F Line 9 gross income to calculate their maximum loan amount. Apparently it was not just a typo in the Statute and farmers are allowed to use gross income rather than net income which conflicts with previous guidance issued by the SBA, so farmers get an additional loan amount as compared to their Schedule C counterparts.**
22. **Partners in a partnership can compute their maximum loan amount using either the 2019 or 2020 net earnings from self employment as reported on the IRS Form 1065 K-1 and are still reduced by the following: (i) Section 179 expense deduction claim; (ii) unreimbursed partnership expenses; and (iii) depletion on oil and gas properties. This is totaled and multiplied by .9235 which is intended to remove the employer share of self employment taxes consistent without payroll costs for employees in the partnership is determined.**
23. **Businesses that are part of a single corporate group are capped at \$20,000,000 of total PPP loans in the aggregate for the First Draw.** A single corporate group is a group that is majority owned directly or indirectly by a common parent. If a corporate group has loans in excess of the \$20,000,000 limitation then it is the responsibility of the applicant that has applied for or received PPP loans in excess of the amount permitted herein to withdraw or request cancellation of any pending PPP loan application or approved PPP loan not in compliance with this limitation. The Rules specify that the failure to do so will be regarded as ineligible use of PPP funds and therefore the entire loan amount will not be eligible for forgiveness.
24. The interest rate on PPP loans is 1% non-compounding and non-adjustable. The revision to non-compounding, non-adjustable interest only applies to loans made on or after December 27, 2020, but may apply with respect to loans made prior to this date upon mutual agreement of the lender and the borrower.
25. The regulations still include the provision related to Schedule C taxpayers that they can deduct the gas used driving your business vehicle as a business utility payment.



SBA January 6th IFRs Key Takeaways

26. **The SBA eliminated the “alternative covered period” which allowed borrowers to start their covered period on the start date of a payroll period for payroll cost purposes. The covered period is now strictly any date between 8 and 24 weeks after receipt of the loan.**
27. **An eligible borrower that received a loan of \$150,000 or less shall not at the time of its application for loan forgiveness, be required to submit any application or documentation in addition to the certification and information required by paragraph 7(a) L1(a) of the Small Business Act. Even though the documentation is not required to be submitted with the loan amount, the SBA can audit loans of \$150,000 or less and access any records the borrower is required to retain.**
28. **Interim final rules say any EIDL advance and not previously deducted from a borrower’s forgiveness amount will be remitted to the lender together with interest to the remittance state which will allow borrowers to request the repayment from the lender along with interest.**
29. Interim final rules retain the provision that specifies that independent contractor payments are not considered to be payroll costs and does not count towards loan forgiveness since they can apply for the loan on their own, with the exception of fishing boat crew members
30. Agent fees may not be paid out of a PPP loan. If a borrower has knowingly retained an agent, then such fees will be paid by the borrower, and a lender is only responsible for paying fees that the lender directly contracts with the agent amount. Further, the rules provide that the limit on agent fees are limited to (i) 1% for loans of not more than \$350,000; and (ii) .5% if the loans are more than \$350,000 and less than \$2,000,000; (iii) .25% if the loans are at least \$2,000,000.
31. Partnerships that did not include partner compensation in the initial loan amount can reapply but the request must be submitted on or before March 31, 2021 for additional amounts and these additional amounts are subject to the availability of funds. The same rules as mentioned above also applies for seasonal employers.
32. Page 76 lists other circumstances in which a PPP borrower can reapply or request an increase in their loan amount.

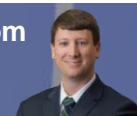
SBA January 6th IFRs Key Takeaways

- 33. Borrowers must have spent the full amount of its first draw of the PPP loan on eligible expenses in order to be eligible for a second draw PPP loan.
- 34. **Page 7 of the IFR provides that if the borrower is in operation for all four quarters of 2019 and it had an annual drop of 25% or more in 2020 compared to 2019, then they will be deemed to have met the revenue reduction requirement and will just have to submit a copy of its annual tax form substantiating the revenue decline.**
- 35. **Gross receipts does not include the forgiveness amount of a first draw PPP loan that a borrower received in calendar year 2020. What about other CARES ACT Grants such as HHS Provider Relief Funds?**
- 36. You are not allowed to refinance an EIDL loan into a second draw PPP loan.
- 37. **Businesses that are a part of a single corporate group are limited to \$4,000,000 second draw PPP loan in the aggregate.**
- 38. **Additional documentation is not required to substantiate payroll costs if the applicant used 2019 figures to determine its first draw PPP loan and also used 2019 figures to determine its second draw PPP loan and the lender for the second draw is the same lender as the first draw.**
- 39. **For loans greater than \$150,000 the applicant is required to submit documentation to establish a 25% reduction in revenue in 2020 relevant to 2019.**
- 40. **For loans of \$150,000 or less the documentation is not required when you are applying for the loan but is required prior to applying for loan forgiveness.**



SBA January 6th IFRs Key Takeaways

- 41. **Gross receipts is calculated in accordance with the entity's accounting method.**
- 42. **Gross receipts for a non profit means gross receipts as defined by Section 6033 of the IRS Code.**
- 43. **Schedule C taxpayer can use a 2019 or 2020 line 31 net profit amount to calculate their loan for the second round.**
- 44. **Partners in a partnership can include the self employment income of an individual general partner in 2019 or 2020 at the election of the borrower that is reported on the IRS Form 1065 K-1.**
- 45. **Page 34 confirms that applicants must make the certifications list in Subsection B12 of the consolidated first draw PPP IFRs which includes Subsection 2 that provides that "the current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant."**
- 46. **Another certification that has to be made by an authorized representative of the applicant is that if the applicant received a first draw paycheck protection program loan then before the second draw PPP loan is disbursed the applicants will have used the full loan amount "including any increase" of the first draw PPP loan only for eligible expenses.**





Paycheck Protection Program Second Draw Borrower Application Form

OMB Control No.: 3245-0417
Expiration Date: 7/31/2021

Check One: <input type="checkbox"/> Sole Proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC <input type="checkbox"/> Independent Contractor <input type="checkbox"/> Self-Employed Individual <input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(6) organization <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Housing cooperative <input type="checkbox"/> Tribal Business <input type="checkbox"/> Other	DBA or Tradename (if applicable) 	Year of Establishment (if applicable)
Business Legal Name		NAICS Code
Business Address (Street, City, State, Zip Code - No P.O. Box addresses allowed)		Business TIN (EIN, SSN)
		Business Phone
		Primary Contact
		Email Address

Average Monthly Payroll:	\$	x 2.5 (or x 3.5 for NAICS 72 applicants) equals Loan Request Amount (may not exceed \$2,000,000):	\$	Number of Employees (including affiliates, if applicable; may not exceed 300):
Purpose of the loan (select all that apply):	<input type="checkbox"/> Payroll Costs	<input type="checkbox"/> Rent / Mortgage Interest	<input type="checkbox"/> Utilities	<input type="checkbox"/> Covered Operations Expenditures
	<input type="checkbox"/> Covered Property Damage	<input type="checkbox"/> Covered Supplier Costs	<input type="checkbox"/> Covered Worker Protection Expenditures	<input type="checkbox"/> Other (explain): _____
PPP First Draw SBA Loan Number: _____				

Reduction in Gross Receipts of at Least 25% (Applicants for loans of \$150,000 or less may leave blank but must provide upon or before seeking loan forgiveness or upon SBA request):	2020 Quarter (e.g., 2Q 2020):		Reference Quarter (e.g., 2Q 2019):	
	Gross Receipts:	\$	Gross Receipts	\$

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN, SSN)	Address

If questions (1), (2), (4), or (5) are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?		
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is (a) currently delinquent, or (b) has defaulted in the last 7 years and caused a loss to the government?		
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management (including a management agreement) with any other business? If yes, list all such businesses (including their TINs if available) and describe the relationship on a separate sheet identified as addendum A.		
4. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant presently incarcerated or, for any felony, presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction? Initial here to confirm your response to question 4 → _____		
5. Within the last 5 years, for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, or within the last year, for any other felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; or 4) commenced any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 5 → _____		
6. Is the United States the principal place of residence for all employees included in the Applicant's payroll calculation above?		
7. Is the Applicant a franchise?		
8. Is the franchise listed in SBA's Franchise Directory? If yes, enter SBA Franchise Identifier Code here: _____		



Paycheck Protection Program Second Draw Borrower Application Form

By Signing Below, You Make the Following Representations, Authorizations, and Certifications

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) and the Department of the Treasury (Treasury) implementing Second Draw Paycheck Protection Program Loans under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the Paycheck Protection Program Rules).
- The Applicant, together with its affiliates (if applicable), (1) is an independent contractor, self-employed individual, or sole proprietor with no employees; (2) employs no more than 300 employees; or (3) if NAICS 72, employs no more than 300 employees per physical location; (4) if a news organization that is majority owned or controlled by a NAICS code 511110 or 5151 business or a nonprofit public broadcasting entity with a trade or business under NAICS code 511110 or 5151, employs no more than 300 employees per location.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rules including the prohibition on using loan proceeds for lobbying activities and expenditures. If Applicant is a news organization that became eligible for a loan under Section 317 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, proceeds of the loan will be used to support expenses at the component of the business concern that produces or distributes locally focused or emergency information.
- I understand that SBA encourages the purchase, to the extent feasible, of American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.

For Applicants who are individuals: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

_____ The Applicant was in operation on February 15, 2020, has not permanently closed, and was either an eligible self-employed individual, independent contractor, or sole proprietorship with no employees, or had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

_____ Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

_____ The Applicant has realized a reduction in gross receipts in excess of 25% relative to the relevant comparison time period. For loans greater than \$150,000, Applicant has provided documentation to the lender substantiating the decline in gross receipts. For loans of \$150,000 or less, Applicant will provide documentation substantiating the decline in gross receipts upon or before seeking loan forgiveness for the Second Draw Paycheck Protection Program Loan or upon SBA request.

_____ The Applicant received a First Draw Paycheck Protection Program Loan and, before the Second Draw Paycheck Protection Program Loan is disbursed, will have used the full loan amount (including any increase) of the First Draw Paycheck Protection Program Loan only for eligible expenses.

_____ The funds will be used to retain workers and maintain payroll; or make payments for mortgage interest, rent, utilities, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures as specified under the Paycheck Protection Program Rules; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

_____ I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, covered utilities, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures, and not more than 40% of the forgiven amount may be for non-payroll costs. If required, the Applicant will provide to the Lender and/or SBA documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of eligible expenses for the covered period following this loan.

_____ The Applicant has not and will not receive another Second Draw Paycheck Protection Program Loan.

_____ The Applicant has not and will not receive a Shuttered Venue Operator grant from SBA.

_____ The President, the Vice President, the head of an Executive department, or a Member of Congress, or the spouse of such person as determined under applicable common law, does not directly or indirectly hold a controlling interest in the Applicant, with such terms having the meanings

provided in Section 322 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act.

_____ The Applicant is not an issuer, the securities of which are listed on an exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f).

_____ The Applicant is not a business concern or entity (a) 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 (b) 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.

_____ The Applicant is not required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612).

_____ The Applicant is not a business concern or entity primarily engaged in political or lobbying activities, including any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public documents.

_____ I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 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.

_____ I acknowledge that the Lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge, and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Signature of Authorized Representative of Applicant

Date

Print Name

Title



Paycheck Protection Program Second Draw Borrower Application Form

Purpose of this form:

This form is to be completed by the authorized representative of the Applicant and *submitted to your SBA Participating Lender*. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to “purpose of the loan,” payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave (except those paid leave amounts for which a credit is allowed under FFCRA Sections 7001 and 7003); allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage (including insurance premiums), group life, disability, vision, or dental insurance, and retirement benefits; payment of state and local taxes assessed on compensation of employees; and, for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating “Average Monthly Payroll,” most Applicants will use the average monthly payroll for 2019 or 2020, excluding costs over \$100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred, for each employee. For seasonal businesses, the Applicant may elect to instead use average total monthly payroll for any twelve-week period selected by the Applicant between February 15, 2019 and February 15, 2020, excluding costs over \$100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred, for each employee. For new businesses without 12 months of payroll costs but that were in operation on February 15, 2020, average monthly payroll may be calculated based on the number of months in which payroll costs were incurred, excluding costs over \$100,000 on an annualized basis for each employee, as prorated for the period during which the payments are made or the obligation to make the payments is incurred, for each employee. For farmers and ranchers that operate as a sole proprietorship or as an independent contractor, or who are eligible self-employed individuals and report farm income or expenses on a Schedule F (or any equivalent successor IRS form), payroll costs are computed using eligible payroll costs for employees, if any, plus the lesser of \$100,000 and the difference between gross income and any eligible payroll costs for employees, as reported on a Schedule F. For Applicants that file IRS Form 1040, Schedule C, payroll costs are computed using line 31 net profit amount, limited to \$100,000, plus any eligible payroll costs for employees. For Applicants that are partnerships, payroll costs are computed using net earnings from self-employment of individual general partners, as reported on IRS Form 1065 K-1, reduced by section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties, multiplied by 0.9235, that is not more than \$100,000, plus any eligible payroll costs for employees.

In determining whether the Applicant experienced at least a 25% reduction in gross receipts, for loans above \$150,000, the Applicant must identify the 2020 quarter meeting this requirement, identify the reference quarter, and state the gross receipts amounts for both quarters, as well as provide supporting documentation. For loans of \$150,000 and below, these fields are not required and the Applicant only must certify that the Applicant has met the 25% gross receipts reduction at the time of application; however, upon or before seeking loan forgiveness (or upon SBA request) the Applicant must provide documentation that identifies the 2020 quarter meeting this requirement, identifies the reference quarter, states the gross receipts amounts for both quarters, and supports the amounts provided. For all loans, the appropriate reference quarter depends on how long the Applicant has been in operation:



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ATTORNEYS AT LAW

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(Jan 6 SBA - 1.9.2021)

Brandon@gassmanpa.com



- For all entities other than those satisfying the conditions set forth below, Applicants must demonstrate that gross receipts in any quarter of 2020 were at least 25% lower than the same quarter of 2019. Alternatively, Applicants may compare annual gross receipts in 2020 with annual gross receipts in 2019; Applicants choosing to use annual gross receipts must enter “Annual” in the 2020 Quarter and Reference Quarter fields and, as required documentation, must submit copies of annual tax forms substantiating the annual gross receipts reduction.
- For entities not in business during the first and second quarters of 2019 but in operation during the third and fourth quarters of 2019, Applicants must demonstrate that gross receipts in any quarter of 2020 were at least 25% lower than either the third or fourth quarters of 2019.
- For entities not in business during the first, second, and third quarters of 2019 but in operation during the fourth quarter of 2019, Applicants must demonstrate that gross receipts in any quarter of 2020 were at least 25% lower than the fourth quarter of 2019.
- For entities not in business during 2019 but in operation on February 15, 2020, Applicants must demonstrate that gross receipts in the second, third, or fourth quarter of 2020 were at least 25% lower than the first quarter of 2020.

Gross receipts includes all revenue in whatever form received or accrued (in accordance with the entity’s accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered “total income” (or in the case of a sole proprietorship “gross income”) plus “cost of goods sold” and excludes net capital gains or losses as these terms are defined and reported on IRS tax return forms. Gross receipts do not include the following: taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer’s request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts. Gross receipts of a borrower must be aggregated with gross receipts of its affiliates. For a nonprofit organization, veterans organization, nonprofit news organization, 501(c)(6) organization, and destination marketing organization, gross receipts has the meaning in section 6033 of the Internal Revenue Code of 1986.

For purposes of reporting Number of Employees, sole proprietors, self-employed individuals, and independent contractors should include themselves as employees (i.e., the minimum number in the box “Employees” is one). For NAICS 72 or eligible news organizations, applicants may not exceed 300 per physical location.

For purposes of reporting Year of Establishment, self-employed individuals and independent contractors may enter “NA”.

For purposes of reporting NAICS Code, applicants must match the business activity code provided on their IRS income tax filings, if applicable. For purposes of calculating an Applicant’s maximum payroll costs, an Applicant may multiply its average monthly payroll costs by 3.5 only if the Applicant is in the Accommodation and Food Services sector and has reported a NAICS code beginning with 72 as its business activity code on its most recent IRS income tax return.

All parties listed below are considered owners of the Applicant as well as “principals”:

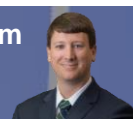
- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

Paperwork Reduction Act – You are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated time for completing this application, including gathering data needed, is 8 minutes. Comments about this time or the information requested should be sent to: Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Washington DC 20503. **PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.**

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below.) Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person’s integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act.

Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain “routine uses” of information protected by that Act. One such routine use is the disclosure of information maintained in SBA’s system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies’ function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Program using the Taxpayer Identification Number (TIN) assigned to the borrower.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) – SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice, or (6) take other action permitted in the loan instruments.



Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) – This law provides, with some exceptions, that SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that is generally released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers, the amount of the loan, and the type of the loan. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined and required to abate the hazards in their workplaces. They may also be ordered to cease operations posing an imminent danger of death or serious injury until employees can be protected. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) – Creditors are prohibited from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Debarment and Suspension Executive Order 12549 (2 C.F.R. Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

PPP Borrower Demographic Information Form (Optional)

Instructions

1. **Purpose.** Veteran/gender/race/ethnicity data is collected for program reporting purposes only.
2. **Description.** This form requests information about each of the Borrower's Principals. Add additional sheets if necessary.
3. **Definition of Principal.** The term "Principal" means:
 - For a self-employed individual, independent contractor, or a sole proprietor, the self-employed individual, independent contractor, or sole proprietor.
 - For a partnership, all general partners and all limited partners owning 20% or more of the equity of the Borrower, or any partner that is involved in the management of the Borrower's business.
 - For a corporation, all owners of 20% or more of the Borrower, and each officer and director.
 - For a limited liability company, all members owning 20% or more of the Borrower, and each officer and director.
 - Any individual hired by the Borrower to manage the day-to-day operations of the Borrower ("key employee").
 - Any trustor (if the Borrower is owned by a trust).
 - For a nonprofit organization, the officers and directors of the Borrower.
4. **Principal Name.** Insert the full name of the Principal.
5. **Position.** Identify the Principal's position; for example, self-employed individual; independent contractor; sole proprietor; general partner; owner; officer; director; member; or key employee.

Principal Name		Position
Veteran	1=Non-Veteran; 2=Veteran; 3=Service-Disabled Veteran; 4=Spouse of Veteran; X=Not Disclosed	
Gender	M=Male; F=Female; X=Not Disclosed	
Race (more than 1 may be selected)	1=American Indian or Alaska Native; 2=Asian; 3=Black or African-American; 4=Native Hawaiian or Pacific Islander; 5=White; X=Not Disclosed	
Ethnicity	H=Hispanic or Latino; N=Not Hispanic or Latino; X=Not Disclosed	

Disclosure is voluntary and will have no bearing on the loan application decision

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

The January 6th Interim Final Rules further provides that the following borrowers can reapply or request an increase for their first round loan:

- Borrowers who returned all of their initial PPP loan amount
- Borrowers who returned part of their initial PPP loan amount
- Borrowers who did not accept the full amount of their initial PPP loan

It is unclear if a borrower will need to satisfy the “necessity requirement” as of the date they reapply for increased amounts.

A borrower will not be permitted to apply for a loan increase simply because they made a mistake in calculating their maximum loan amount. Further, any amendment to a loan application or request for additional amounts must be submitted on or before March 31, 2021. These additional amounts will subject to the availability of funds.

4 Ways to Increase Your Initial PPP Loan

01/06/21 IFRs now provide that a borrower's lender may submit an electronic request through the SBA's E-Tran Servicing site to increase the PPP loan amount. The borrower will be required to provide the lender with documentation to support the calculation of the increase.

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 for 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 Now Required To Expend Full Amount Before Second Round Loan Disbursement

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.

Interim Final Rule RIN 3245-AH63 (page 6, 20-21) clarifies that, to be eligible for a Second Draw PPP Loan:

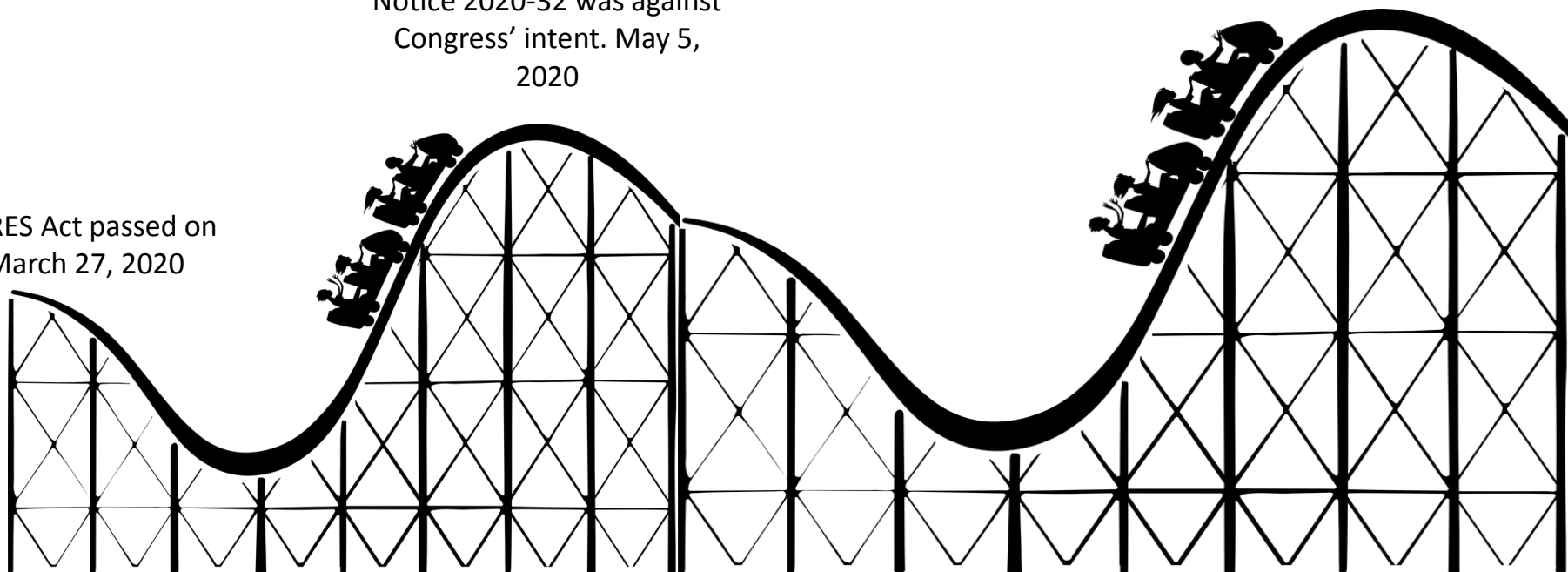
- On or before the expected dated on which the Second Draw PPP Loan will be disbursed to the borrower, the borrow must have used, or will use the, the full amount of its First Draw PPP Loan on eligible expenses under the PPP rules.
 - “The full amount” of the borrower’s First Draw PPP Loan includes the amount of any increase on such First Draw PPP Loan made pursuant to the new Act.

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

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).”

This rule was confirmed by the 01/06/21 IFRs, and the IRS has subsequently issued Revenue Ruling 2021-2 which obsoletes the multiple Notices and Rulings in which the IRS took the position that forgiven loans would not be tax deductible.

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?

IRS Revenue Ruling 2020-27 indicated as follows: “A and B each have a reasonable expectation of reimbursement. At the end of 2020, the reimbursement of A’s and B’s eligible expenses, in the form of covered loan forgiveness, is reasonably expected to occur – rather than being unforeseeable – such that a deduction is inappropriate.”

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 - *Is there any risk that they will apply?*

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

The Act and 01/06/21 IFRs define an “eligible recipient” as any “business, independent contractor, eligible self-employed individual, sole proprietor, nonprofit organization eligible for a First Draw PPP Loan, veteran’s organization, Tribal business concern, housing cooperative, small agricultural cooperative, eligible 501(c)(6) organization or eligible nonprofit news organization” that meets the following requirements

1. Meets the necessity requirement
2. Employs not more than 300 employees;
3. Has or will use the full amount of their first PPP loan; and
4. 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

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.

Second Draw Eligibility Requirements Following 01/06/21 IFRs

The borrower must demonstrate that they suffered a 25% reduction in gross receipts during one quarter in calendar year 2020 when compared to the corresponding quarter in calendar year 2019. For the purposes of this 25% rule, gross receipts will include all revenues from the normal operation of the business before subtraction of expenses but will not include amounts borrowed, including amounts received and forgiven for PPP loans.

The January 6th Interim Final Rules further provide that borrowers who were in operation for all 4 quarters in 2019 may compare their calendar year 2019 gross receipts to calendar year 2020 gross receipts in order to determine if they satisfy the 25% reduction test. This addition won't help anyone in any substantive way except to make documentation of such a reduction easier for borrowers. After all, it would be mathematically impossible for a borrower who experienced a 25% reduction in revenues for a full year to not suffer at least a 25% reduction in any quarter.

The borrower must certify that they have already used or will use the full amount of any PPP loan previously received.

The January 6th Interim Final Rules confirmed that a borrower applying for a second draw loan must certify that, before the Second Draw Loan is disbursed (but not necessarily at the time of application), they will have used the full loan amount (including any increase) of the First Draw Paycheck Protection Program Loan only for eligible expenses.

The borrower must employ no more than 300 employees, or 500 for a business with multiple physical locations.

The January 6th Interim Final Rules further clarified that North American Industry Classification System ("NAICS") Code 72 entities (food service providers) and eligible news organizations with more than one physical location may have up to 500 employees.

Alternative Testing Periods for Borrowers Not in Business For Entire 2019 Calendar Year

1. If the applicant was not in business during the first or second quarter of 2019, but was in business during the third and fourth quarters of 2019, the applicant had gross receipts during the first, second, third, or fourth quarter of 2020 that demonstrate at least a 25 percent reduction from the applicant's gross receipts during the third or fourth quarter of 2019.
2. If the applicant was not in business during the first, second, or third quarter of 2019, but was in business during the fourth quarter of 2019, the applicant had gross receipts during the first, second, third, or fourth quarter of 2020 that demonstrate at least a 25 percent reduction from the fourth quarter of 2019.
3. If the applicant was not in business during 2019, but was in operation on February 15, 2020, the applicant had gross receipts during the second, third, or fourth quarter of 2020 that demonstrate at least a 25 percent reduction from the gross receipts of the entity during the first quarter of 2020.

“Gross Receipts” Defined for Purposes of Determining Whether There Has Been a 25% Drop in Revenues to Qualify for Second Draw

Gross receipts includes all revenue in whatever form received or accrued (in accordance with the entity’s accounting method) from whatever source, including:

1. Receipts from the sales of products or services (reduced by returns and allowances)
2. Interest
3. Dividends
4. Rents
5. Royalties
6. Fees
7. Commissions
8. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts

“Gross Receipts” Defined for Purposes of Determining Whether There Has Been a 25% Drop in Revenues to Qualify for Second Draw

Gross receipts **do not** include the following:

1. Taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees).
2. Proceeds from transactions between a concern and its domestic or foreign affiliates.
3. Amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker.

Calculation for “Gross Receipts” of Affiliates

Interim Final Rule RIN 3245-AH63 (page 23) provides that gross receipts of affiliates are calculated as follows:

- (A) Gross receipts of a borrower with affiliates is calculated by adding the gross receipts of the business concern with the gross receipts of each affiliate.
- (B) If a borrower has acquired an affiliate or been acquired as an affiliate during 2020, gross receipts includes the receipts of the acquired or acquiring concern. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose. However, if a concern acquired a segregable division of another business concern during 2020, gross receipts do not include the receipts of the acquired division prior to the acquisition.
- (C) The gross receipts of a former affiliate are not included. This exclusion of gross receipts of such former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a borrower sold a segregable division during 2020, the gross receipts will continue to include the receipts of the division that was sold.
- (D) All terms in this subsection shall have the meaning attributed to them by the IRS.

“Gross Receipts” of Tax Exempt and Nonprofit Organizations

26 C.F.R. § 1.6033-1 provides the following definition of gross receipts:

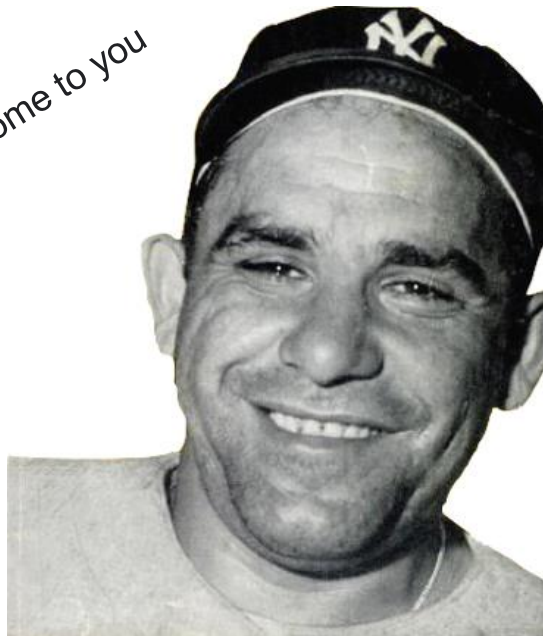
"Gross receipts" means the gross amount received by the organization during its annual accounting period from all sources without reduction for any costs or expenses including, for example, cost of goods or assets sold, cost of operations, or expenses of earning, raising, or collecting such amounts. Thus, "gross receipts" includes, but is not limited to:

- (a) the gross amount received as contributions, gifts, grants, and similar amounts without reduction for the expenses of raising and collecting such amounts,
- (b) the gross amount received as dues or assessments from members or affiliated organizations without reduction for expenses attributable to the receipt of such amounts,
- (c) gross sales or receipts from business activities (including business activities unrelated to the purpose for which the organization received an exemption, the net income or loss from which may be required to be reported on Form 990–T),
- (d) the gross amount received from the sale of assets without reduction for cost or other basis and expenses of sale, and
- (e) the gross amount received as investment income such as interest, dividends, rents, and royalties.

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. . .

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



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 . . .

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



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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.

01/06/21 IFR RIN 3245-AH62 reaffirms the SBA’s position taken under FAQ #46 that they will not question a borrower’s good faith certification that a loan is “necessary” for loans under \$150,000 and all borrowers of less than \$2,000,000 will automatically be deemed to have made the certification in good faith.

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.

The “Necessity” Requirement As It Appears On Loan Applications

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

_____ The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

_____ Current economic uncertainty makes this loan request **necessary** to support the ongoing operations of the Applicant.

_____ The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

_____ The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant’s payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the 24-week period following this loan.

_____ I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 40% of the forgiven amount may be for non-payroll costs.

_____ During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.

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

_____ I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA’s authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

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.

01/06/21 IFR RIN 3245-AH62 reaffirms the SBAs position taken under FAQ #46 that they will not question a borrower’s good faith certification that a loan is “necessary” for loans under \$150,000 and all borrowers of less than \$2,000,000 will automatically be deemed to have made the certification in good faith.

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



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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? <div style="display: inline-block; margin-left: 20px;"> <input type="checkbox"/> YES <input type="checkbox"/> NO </div>		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"). <div style="display: flex; justify-content: space-between; width: 100%;"> Start End </div>		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



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? <input type="checkbox"/> YES <input type="checkbox"/> NO	Select
B. If the answer to 6.A is YES, what were Borrower's approximate cash outlays for those projects? \$	Select
7. What is Borrower's primary six-digit NAICS code?	Select
8. Optional – provide additional comments on any question in this Business Activity Assessment section [1,000-character max].	Select



Liquidity Assessment		Confidential?
1. 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.) <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>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.) <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>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> <p><input type="checkbox"/> YES <input type="checkbox"/> NO</p>	<p>Select</p>
<p>B. If the answer to 9.A is YES, what was the name of the parent company?</p>	<p>Select</p>
<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> <p><input type="checkbox"/> YES <input type="checkbox"/> NO</p>	<p>Select</p>
<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> <p>\$</p>	<p>Select</p>
<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> <p><input type="checkbox"/> YES <input type="checkbox"/> NO</p>	<p>Select</p>

<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>	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
<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>	Select	
<p>12. A. Did Borrower directly receive any funds from any CARES Act program other than PPP, excluding tax benefits?</p>	<input type="checkbox"/> YES <input type="checkbox"/> NO	Select
<p>B. If the answer to 12.A is YES, please provide funding amount.</p>	\$	Select
<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>	Select	

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

Can you still get a PPP loan even if you did not receive an initial PPP loan?

YES and you do not have to meet the revenue reduction test!

The Second Draw Rules only apply to entities that received an initial loan as per the below:

“(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

NOTE – 01/06/21 IFRs clarify that if you did not apply for a first draw loan before the first application window closed on 08/08/20 then you will not be eligible to receive a second draw loan, but you may still be eligible to receive a first draw loan when the application window reopens on the week of 01/11/21.

First Round Borrowers Now Required To Expend Full Amount Before Second Round Loan Disbursement

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.

Interim Final Rule RIN 3245-AH63 (page 6, 20-21) clarifies that, to be eligible for a Second Draw PPP Loan:

- On or before the expected dated on which the Second Draw PPP Loan will be disbursed to the borrower, the borrow must have used, or will use the, the full amount of its First Draw PPP Loan on eligible expenses under the PPP rules.
 - “The full amount” of the borrower’s First Draw PPP Loan includes the amount of any increase on such First Draw PPP Loan made pursuant to the new Act.

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”;

NOTE – 01/06/21 IFRs clarify that if you did not apply for a first draw loan before the first application window closed on 08/08/20 then you will not be eligible to receive a second draw loan but you may still be eligible to receive a first draw loan when the application window reopens on the week of 01/11/21.

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*

NOTE – The 01/06/21 IFRs do not affect loan forgiveness rules or loans which have already been forgiven unless specifically stated otherwise.

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 based upon a contract order or purchase order “in effect at any time before the covered period”
- 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



SBA Meets Its Deadline to Issue Guidance

The Economic Aid Act provided the following:

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 meant the SBA and Treasury were required to 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. In the 01/06/21 IFRs the SBA announced that it intends to release a comprehensive set of interim final rules that would cover all aspects of loan forgiveness and the loan review process under one document

Hats off to the SBA for meeting this deadline under extraordinary circumstances!

Independent Contractor/Sole Proprietor Rules Reviewed



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(Jan 6 SBA - 1.9.2021)

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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 **or 2020** 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 **or 2020** 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 **or** 2020 payroll costs by adding the following:*
 - *2019 **or** 2020 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 **or** 2020 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 **or** 2020 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 **or** 2020 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 **or** 2020 employer contributions for employee health insurance (portion of IRS Form 1040 Schedule C line 14 attributable to health insurance);*
 - *2019 **or** 2020 employer contributions to employee retirement plans (IRS Form 1040 Schedule C line 19);*
 - *2019 **or** 2020 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 **or** 2020 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	
9	Car and truck expenses (see instructions).	9	
10	Commissions and fees	10	
11	Contract labor (see instructions)	11	
12	Depletion	12	
13	Depreciation and section 179 expense deduction (not included in Part III) (see instructions).	13	
14	Employee benefit programs (other than on line 19)	14	
15	Insurance (other than health)	15	
16	Interest (see instructions):		
a	Mortgage (paid to banks, etc.)	16a	
b	Other	16b	
17	Legal and professional services	17	
18	Office expense (see instructions)	18	
19	Pension and profit-sharing plans	19	
20	Rent or lease (see instructions):		
a	Vehicles, machinery, and equipment	20a	
b	Other business property	20b	
21	Repairs and maintenance	21	
22	Supplies (not included in Part III)	22	
23	Taxes and licenses	23	
24	Travel and meals:		
a	Travel	24a	
b	Deductible meals (see instructions)	24b	
25	Utilities	25	
26	Wages (less employment credits)	26	
27a	Other expenses (from line 48)	27a	
b	Reserved for future use	27b	
28	Total expenses before expenses for business use of home. Add lines 8 through 27a	28	
29	Tentative profit or (loss). Subtract line 28 from line 7	29	
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	30	
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.

For Paperwork Reduction Act Notice, see the separate instructions.

Cat. No. 11334P

Schedule C (Form 1040 or 1040-SR) 2019

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 draw 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.**

Apparently it was not just a typo... The 01/06/21 IFRs provide that Schedule F farmers can use a year, the 2019 or 2020 IRS Form 1040 Schedule F Line 9 gross income to calculate their maximum loan amount.

Special Considerations for Schedule F Filers – Calculating the Maximum Loan

SCHEDULE F (Form 1040)		Profit or Loss From Farming ▶ 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.		OMB No. 1545-0074 <div style="font-size: 2em; font-weight: bold;">2020</div> 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	3b	
4a Agricultural program payments (see instructions)	4a		4b Taxable amount	4b	
5a Commodity Credit Corporation (CCC) loans reported under election				5a	
b CCC loans forfeited	5b		5c Taxable amount	5c	
6 Crop insurance proceeds and federal crop disaster payments (see instructions):					
a Amount received in 2020	6a		6b Taxable amount	6b	
c If election to defer to 2021 is attached, check here		<input type="checkbox"/>	6d Amount deferred from 2019	6d	
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 or 2020 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	
11	Chemicals	11	
12	Conservation expenses (see instructions)	12	
13	Custom hire (machine work) . . .	13	
14	Depreciation and section 179 expense (see instructions)	14	
15	Employee benefit programs other than on line 23	15	
16	Feed	16	
17	Fertilizers and lime	17	
18	Freight and trucking	18	
19	Gasoline, fuel, and oil	19	
20	Insurance (other than health) . .	20	
21	Interest (see instructions):		
a	Mortgage (paid to banks, etc.) . .	21a	
b	Other	21b	
22	Labor hired (less employment credits)	22	
23	Pension and profit-sharing plans . .	23	
24	Rent or lease (see instructions):		
a	Vehicles, machinery, equipment . .	24a	
b	Other (land, animals, etc.)	24b	
25	Repairs and maintenance	25	
26	Seeds and plants	26	
27	Storage and warehousing	27	
28	Supplies	28	
29	Taxes	29	
30	Utilities	30	
31	Veterinary, breeding, and medicine .	31	
32	Other expenses (specify):		
a		32a	
b		32b	
c		32c	
d		32d	
e		32e	
f		32f	
33	Total expenses. Add lines 10 through 32f. If line 32f is negative, see instructions ▶	33	
34	Net farm profit or (loss). Subtract line 33 from line 9	34	
If a profit, stop here and see instructions for where to report. If a loss, complete lines 35 and 36.			
35	Reserved for future use.		
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 or 2020 payroll costs by adding the following:*
 - *2019 or 2020 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 or 2020 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 or 2020 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 or 2020 employer contributions for employee health insurance, if any (portion of IRS Form 1065 line 19 attributable to health insurance);*
 - *2019 or 2020 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 or 2020 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 or 2020 payroll costs by adding the following:*
 - *2019 or 2020 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 or 2020 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 or 2020 employer health insurance contributions (portion of IRS Form 1120 line 24 or IRS Form 1120-S line 18 attributable to health insurance);*
 - *2019 or 2020 employer retirement contributions (IRS Form 1120 line 23 or IRS Form 1120-S line 17);*
 - *2019 or 2020 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 or 2020 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



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”

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.

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

- *Step 1: Compute 2019 **or** 2020 payroll costs by adding the following:*
 - *2019 **or** 2020 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 **or** 2020 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 **or** 2020 employer health insurance contributions (portion of IRS Form 990 Part IX line 9 attributable to health insurance);*
 - *2019 **or** 2020 employer retirement contributions (IRS Form 990 Part IX line 8); and*
 - *2019 **or** 2020 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 or 2020 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 **or** 2020 payroll costs by adding the following:*
 - *2019 **or** 2020 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 **or** 2020 employer health insurance contributions;*
 - *2019 **or** 2020 employer retirement contributions and*
 - *2019 **or** 2020 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 or 2020 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.

The 01/06/21 IFRs recognizes that there may be some overlap between seasonal employers and NAICS Code 72 entities and clarified that a business that qualifies as both a seasonal employer and an NAICS Code 72 entity may calculate their payroll costs used to determine their loan amount based upon either the seasonal employer payroll costs formula, or the standard formula used to calculate payroll costs for every other type of borrower, while still being allowed to utilize the 3.5 times multiplier that is applied to NAICS Code 72 entities under the new Act.



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—

“(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) 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)
- The 01/06/21 IFR RIN 3245-AH63 also now permits a borrower to use the precise 365 days prior to the date the loan is made

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.



Politicians Are Ineligible For Second Draw PPP Loans

The 01/06/21 IFRs provide the following:

The Economic Aid Act also prohibits several additional categories of borrowers from receiving a Second Draw PPP Loan under section 7(a)(37) of the Small Business Act . . . :

- entities in which the President, the Vice President, the head of an Executive department, or a Member of Congress, or the spouse of such person owns, controls, or holds at least 20 percent of any class of equity

As an example, this rule will not apply to Hunter or any of the other Biden children unless they marry one of the prohibited individuals described above- nor will it apply to President Trump or his family assuming he will no longer be president 11 days from the date of this presentation.

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;

The 01/06/21 IFRs further eliminated the "alternative covered period" which allowed borrowers to start their covered period on the start date of a payroll period for payroll cost purposes rather than on the date the loan was received. The covered period is now strictly any date between 8 and 24 weeks after receipt of the loan.

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 Now Amend Their 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. 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. Borrowers may also amend to request increased loan amount for group life, dental, and vision insurance.

The January 6th Interim Final Rules further provide that the following borrowers can reapply or request an increase for their first round loan:

- Borrowers who returned all of their initial PPP loan amount
- Borrowers who returned part of their initial PPP loan amount
- Borrowers who did not accept the full amount of their initial PPP loan

A borrower will not be permitted to apply for a loan increase simply because they made a mistake in calculating their initial maximum loan amount.

Any amendment to a loan application or request for additional amounts must be submitted on or before March 31, 2021. These additional amounts will subject to the availability of funds.

4 Ways to Increase Your Initial PPP Loan

01/06/21 IFRs now provide that a borrower's lender may submit an electronic request through the SBA's E-Tran Servicing site to increase the PPP loan amount. The borrower will be required to provide the lender with documentation to support the calculation of the increase.

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 for 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.

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 who was fired for cause.
5. Any employee who voluntarily resigned
6. Any employee who 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*

An employee who <u>requested and received a reduction in work hours</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 change. Written documentation of the request for the reduction in hours.
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	06/05/2020 - PPP Flexibility Act of 2020 (PPPFA)	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.	Records documenting the offer and its rejection. Must inform the state unemployment office of employee's rejected offer within 30 days of the rejection.
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	06/05/2020 - PPP Flexibility Act of 2020 (PPPFA)	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.	Payroll documents showing the change. The applicable federal guidance document(s) that affected the borrower.



When a CPA or Attorney is Considered an “Agent” for PPP Loan Purposes:

- 13 C.F.R. § 103.1(a) provides that the definition for “**Agent**” is as follows:
 - (a) *Agent* means an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other person representing an Applicant or Participant by conducting business with SBA.
- 13 C.F.R. § 103.1(b) provides that the term “**conducting business with SBA**” includes the following:
 - (b) The term *conduct business with SBA* means:
 - (1) Preparing or submitting on behalf of an applicant an application for financial assistance of any kind, assistance from the Investment Division of SBA, or assistance in procurement and technical matters;
 - (2) Preparing or processing on behalf of a lender or a participant in any of SBA's programs an application for federal financial assistance;
 - (3) Participating with or communicating in any way with officers or employees of SBA on an applicant's, participant's, or lender's behalf;
 - (4) Acting as a lender service provider; and
 - (5) Such other activity as SBA reasonably shall determine.



Compensation for Agents – The Total Amount an Agent may Collect from the Lender:

- **SBA Interim Final Rule – April 15, 2020**

c. Who pays the fee to an agent who assists a borrower?

Agent fees will be paid by the lender out of the fees the lender receives from SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed:

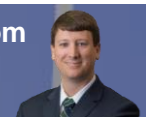
i. One (1) percent for loans of not more than \$350,000;

ii. 0.50 percent for loans of more than \$350,000 and less than \$2 million;

and

iii. 0.25 percent for loans of at least \$2 million.

The Act authorizes the Administrator to establish limits on agent fees. The Administrator, in consultation with the Secretary, determined that the agent fee limits set forth above are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans.



Compensation for Agents – Fee Limits

- Sec. 340(b) of the new Act amends the CARES Act to establish that lenders are not required to pay agent fees for preparing PPP loan applications if there is not a written agreement with the agent that provides for such.
 - This amendment applies retroactively and comes after class action lawsuits were brought against lenders for their alleged failure to pay agent fees of borrowers' agents.
- **Prior to the new Act, 15 U.S.C. § 636(a)(36)(P)(ii) stated the following:**
 - (ii) Fee limits

An agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator.
- **Sec. 340(b) of the new Act amends § 636(a)(36)(P)(ii) as follows:**
 - (b) FEE LIMITS.—
 - (1) IN GENERAL.—Section 7(a)(36)(P)(ii) of the Small Business Act (15 U.S.C. 636(a)(36)(P)(ii)) is amended by adding at the end the following: “If an eligible recipient has knowingly retained an agent, such fees shall be paid by the eligible recipient and may not be paid out of the proceeds of a covered loan. A lender shall only be responsible for paying fees to an agent for services for which the lender directly contracts with the agent.”.
 - (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.



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 draw 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.

Throughout the rest of this section, items notated in **YELLOW** will indicate rules for 2020 and items notated in **BLUE** will indicate rules for 2021.


Economic Recovery Wage Credit

2020 Compared to 2021

Definitions	3/12 to 12/31/2020	1/1 to 7/1/2021
"Qualified Wages"	Wages (as defined in section 3121(a) of the Internal Revenue Code (the "Code")) and compensation (as defined in section 3231(e) of the Code) paid by an Eligible Employer to some or all employees after March 12, 2020, and before January 1, 2021. Also include the Eligible Employer's qualified health plan expenses even if wages have not been paid to employee.	Same as 2020. New Act allows qualified health plan expenses to count even if wages have not been paid to employee, and is retroactive to 2020.
"ERC"	Employee Retention Credit	Same as 2020
"FTEs"	Full-Time Equivalent Employees	Same as 2020

Economic Recovery Wage Credit

2020 Compared to 2021

Business Owner Questions	3/12 to 12/31/2020	1/1 to 7/1/2021
<p>Can ERC be taken in addition to PPP Loan?</p> 	<p>Was not allowed under the CARES Act, but is now applied retroactively.</p> <p>But if application for forgiveness used wages and health plan costs that would have been used for credit, is it too late or can the application be amended? What is the presumed allocation for an EZ or under \$150,000 borrower?</p>	<p>Yes, however, the same wages and healthcare costs cannot be used for ERC credit and PPP forgiveness.</p>
<p>Does a business qualify for ERC if the business was "fully or partially suspended" due to "orders from" a "governmental authority limiting commerce, travel or group meetings (for commercial, social, religious or other purposes, due to COVID-19."?</p>	<p>Yes, if a business qualifies for ERC because their business was suspended or partially suspended by court order, they are eligible to receive credit <u>ONLY</u> for the time that operations were suspended</p>	<p>Same as 2020</p>

Economic Recovery Wage Credit

2020 Compared to 2021

Business Owner Questions	3/12 to 12/31/2020	1/1 to 7/1/2021
Are healthcare costs included in qualified wages?	Yes, the term qualified wages includes amounts paid by the eligible employer to provide and maintain a group health plan. Allocated healthcare costs are included in the computation of qualified wages to the extent that they are excluded from an employee's gross income.	Yes, healthcare costs are included the same as they were in 2020.
Does a business qualify for ERC if they experienced a large drop in gross receipts?	Yes, a company is ERC eligible beginning with the quarter of 2020 that produced 50% less gross receipts than the corresponding quarter in 2019. Eligibility continues until the END of a quarter where gross receipts have increased to at least 80% of that same quarter in 2019.	Yes, a company is ERC eligible for all quarters of 2021 that produced less than 80% of the gross receipts in the corresponding quarter in 2019. Alternatively, an employer can also satisfy the gross receipts requirement in 2021 by looking at the previous quarter and comparing that to its corresponding quarter in 2019. (i.e. if a business is trying to qualify for Q1 in 2021, they can compare Q4 in 2020 to Q4 in 2019).

Economic Recovery Wage Credit

2020 Compared to 2021

Business Owner Questions	3/12 to 12/31/2020	1/1 to 7/1/2021
How does the number of FTEs impact available ERC credit?	If a business averaged less or equal to 100 monthly FTEs in 2019, then all wages paid to an employee during an eligible time period are eligible for ERC. If a business averaged more than 100 monthly FTEs in 2019, only wages paid to a non-working employee during eligible time periods may be claimed. You must be paying the employee NOT to work in order to be eligible.	The rule is the same as in 2020, except the threshold number of FTEs is increased to 500 before there is a change in ERC eligibility.
If a business has eligible time periods, how much of paid qualified wages are eligible for credit?	Employers are eligible to receive a credit equal to 50% of wages paid per employee (including healthcare costs) up to \$10,000 of wages paid for the year . After receiving \$5,000, an employee is no longer eligible for ERC credit.	Employers are eligible to receive 70% of wages paid per employee (including healthcare costs) up to \$10,000 for any quarter . After receiving \$7,000 in a quarter, an employee is still eligible in the next quarter to receive ERC credit.

Business Owner Questions	3/12 to 12/31/2020	1/1 to 7/1/2021
How does a business navigate which payroll costs should be used for ERC credit and which should be reserved for PPP forgiveness?	If a business owner has ERC eligible time periods, the general rule is that ERC takes priority over PPP. However, employer can elect out of ERC credit to preserve use of wages and health care costs for PPP loan, and then “unelect” and qualify for credit if PPP forgiveness is not received.	Same as 2020.
Will countable wages include raises or bonuses given to employees that exceed pay rate existing more than 30 days before the beginning of the applicable quarter?	If a business averaged less or equal to 100 monthly FTEs in 2019, then all wages paid to an employee during an eligible time period are eligible for ERC. If a business averaged more than 100 monthly FTEs in 2019, pay raises and bonuses will not increase wages for purposes of the credit.	Yes, it is fine to raise salary or pay rates and to pay bonuses and include as wages, subject to \$10,000 per quarter limitation regardless of number of employees if reasonable in amount.
<i>Advance credit application for employers with fewer than 500 FTE’s. May elect to receive an advance for a quarter based upon 70% of the average quarterly wages paid by the applicant in 2019.</i>	N/A	Yes, qualifying employers can elect to receive an advance of the ERC credit. The advance credit is then reconciled against the actual credit. If the advance credit is greater than the actual credit, the employer’s payroll tax is increased for the calendar quarter by the difference.

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

How To Determine Eligibility for 2020

For Businesses That Were Open All of 2019 And 2020

IF

Gross
Receipts
From any
Quarter in
2020

Suffer more than 50% reduction

The Same Quarter in
2019

For Businesses That Opened During 4th Quarter 2019

IF

Gross
Receipts
From any
Quarter in
2020

Suffer more than 50% reduction

Quarter 4 in 2019

Employee Retention Credit

How To Determine Eligibility for 2020

For Businesses That Opened During 3rd Quarter 2019

IF

Gross
Receipts
From 1st, 2nd
or 3rd
Quarter in
2020

Suffer more than 50% reduction

3rd Quarter 2019

OR

IF

Gross
Receipts
From 4th
Quarter of
2020

Suffer more than 50% reduction

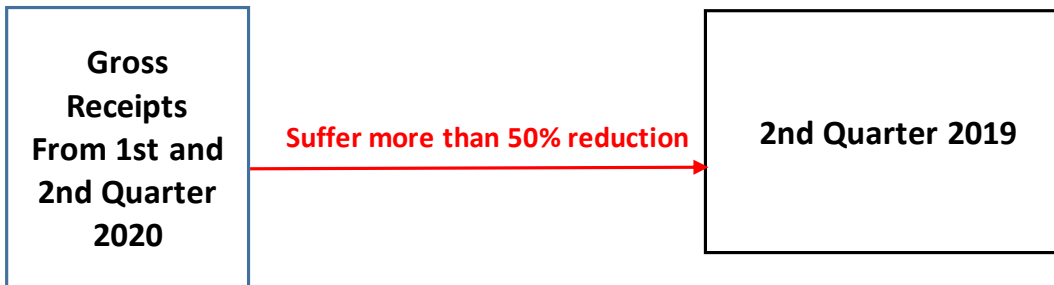
4th Quarter 2019

Employee Retention Credit

How To Determine Eligibility for 2020

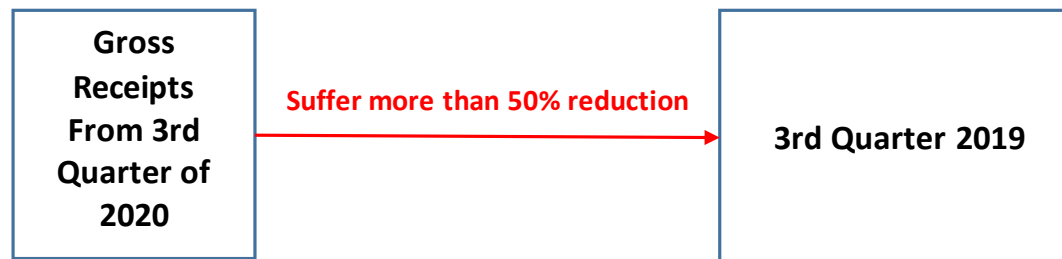
For Businesses That Opened During 2nd Quarter 2019

IF



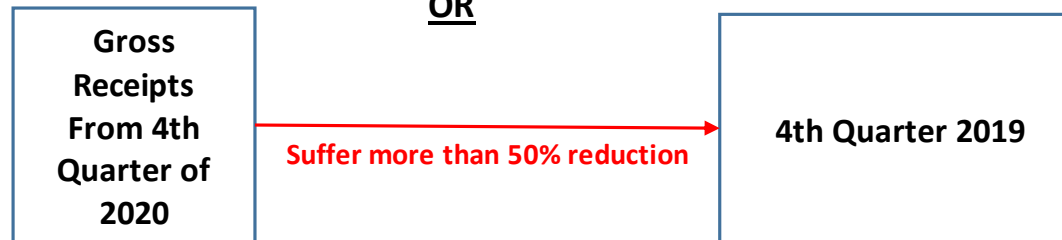
OR

IF



OR

IF



Employee Retention Credit

How To Determine Eligibility for 2021

For Businesses That Were Open All of 2019

IF

Gross
Receipts
From Quarter
in 2021

Suffer at least a 20% reduction

The Same Quarter in
2019

OR

IF

Gross Receipts
From the
Previous Quarter
(Like 4th Quarter
of 2020)

Suffer at least a 20% reduction

The Quarter in 2019
That Corresponds to
the Previous Quarter
That Was Selected
(Like 4th Quarter of
2019)

Employee Retention Credit

How To Determine Eligibility for 2021

For Businesses That Opened During 3rd or 4th Quarter 2019

IF

Gross
Receipts
From any
Quarter in
2021

Suffer at least a 20% reduction

The Same Quarter in
2020

For Businesses That Opened During 2nd Quarter 2019

IF

Gross
Receipts
From 2nd
Quarter 2021

Suffer at least a 20% reduction

2nd Quarter 2019

OR

IF

Gross
Receipts
From 1st
Quarter 2021

Suffer at least a 20% reduction

1st Quarter 2020

Employee Retention Credit

How To Determine Eligibility for 2021

For Businesses Not In Existence in 2019

IF

**Gross
Receipts
From 1st or
2nd Quarter
2021**

Suffer at least a 20% reduction

**The Same Quarter in
2020**

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 ($\$29,000 \times 50\%$)

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 ($\$40,000 \times 70\%$)

Employee Retention Credit FAQs

6. What are "qualified wages"?

Qualified wages are wages (as defined in section 3121(a) of the Internal Revenue Code (the "Code")) and compensation (as defined in section 3231(e) of the Code) paid by an Eligible Employer to some or all employees after March 12, 2020, and before January 1, 2021. Qualified wages include the Eligible Employer's qualified health plan expenses that are properly allocable to the wages.

The definition of qualified wages depends, in part, on the average number of full-time employees (as defined in section 4980H of the Code) employed by the Eligible Employer during 2019.

If the Eligible Employer averaged more than 100 full-time employees in 2019, qualified wages are the wages paid to an employee for time that the employee is not providing services due to an economic hardship, specifically, either (1) a full or partial suspension of operations by order of a governmental authority due to COVID-19, or (2) a significant decline in gross receipts. For these employers, qualified wages taken into account for an employee may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship described in (1) or (2) above.

If the Eligible Employer averaged 100 or fewer full-time employees in 2019, qualified wages are the wages paid to any employee during any period of economic hardship described in (1) or (2) above.

Employee Retention Credit FAQs

7. What are "qualified health plan expenses"?

Qualified health plan expenses are amounts paid or incurred by an Eligible Employer that are properly allocable to employees' qualified wages to provide and maintain a group health plan, but only to the extent that these amounts are excluded from the employees' gross income.

11. Against what employment taxes does the Employee Retention Credit apply?

The credit is allowed against the employer's share of social security taxes under section 3111(a) of the Internal Revenue Code (the "Code"), and the portion of taxes imposed on railroad employers under section 3221(a) of the Railroad Retirement Tax Act (RRTA) that corresponds to the social security taxes under section 3111(a) of the Code.

23. Are self-employed individuals eligible for the Employee Retention Credit?

Self-employed individuals are not eligible for the Employee Retention Credit with respect to their own self-employment earnings. However, a self-employed individual who employs individuals in its trade or business and who otherwise meets the requirements to be an Eligible Employer may be eligible for the Employee Retention Credit with respect to qualified wages paid to the employees.

Employee Retention Credit FAQs

25. Which related employers are aggregated and treated as a single employer for purposes of the Employee Retention Credit?

For purposes of determining an employer's eligibility for and the amount of the Employee Retention Credit, all entities that are treated as a single employer under section 52(a) or (b) of the Internal Revenue Code (the "Code") or section 414(m) or (o) of the Code are considered one employer for purposes of the Employee Retention Credit. The section 52(a) and (b) aggregation rules generally apply to determine when related entities are treated as a single employer for purposes of the application of tax credits available to an employer under section 51 of the Code, as well as for other Code provisions. The section 414(m) and (o) rules generally apply to determine when related entities, including affiliated service groups, are treated as a single employer for purposes of retirement and other employee benefit rules under the Code, as well as for other Code provisions.

Under the section 52 rules, corporate taxpayers may be required to aggregate as a parent-subsidiary controlled group, a brother-sister controlled group, or a combined group of corporations. Section 52(a) of the Code describes a parent-subsidiary controlled group of corporations, generally, as one or more chains of corporations where the common parent corporation owns more than 50 percent of the total combined voting power of all classes of stock entitled to vote, or more than 50 percent of the value of all classes of stock of each corporation. A brother-sister controlled group of corporations, generally, is two or more corporations where: (1) five or fewer persons who are individuals, estates, or trusts own at least 80 percent of the total combined voting power of all classes of stock entitled to vote, or the total value of shares of all classes of stock of each corporation; and (2) the same five or fewer persons, taking into account ownership only to the extent that it is identical with respect to each corporation, own more than 50 percent of the total voting power of all classes of stock entitled to vote, or total value of shares of all classes of stock of each corporation. A combined group of corporations is three or more corporations, each of which is a member of either a parent-subsidiary or a brother-sister controlled group, and at least one of which is both the common parent of a parent-subsidiary controlled group and also a member of a brother-sister controlled group.

The section 52(b) aggregation rules apply to partnerships, trusts, estates, or sole proprietorships in trades or businesses under common control. Under this rule, entities are considered a single employer if they are under common control applying rules similar to the parent-subsidiary or brother-sister controlled group rules or the rules for a combined group of corporations.

Under section 414(m) of the Code, an "affiliated service group" is treated as a single employer based on rules related to the performance of services by one entity for another or by one entity in association with another for third parties, even if the entity does not have sufficient ownership or control of the other entity to form a controlled group.



Employee Retention Credit FAQs

26. What is the impact of the aggregation rules that treat related entities as a single employer?

All entities that are members of a controlled group of corporations or a group of entities under common control under section 52(a) or (b) of the Internal Revenue Code (the "Code") rules, members of an affiliated service group under section 414(m) of the Code, or otherwise aggregated under section 414(o) of the Code are considered a single employer for purposes of the application of the Employee Retention Credit rules. As a result, these employers must be aggregated for purposes of the following rules applicable to the Employee Retention Credit:

Determining whether the employer has a trade or business operation that was fully or partially suspended due to orders related to COVID-19 from an appropriate governmental authority. For more information, see *Determining When an Employer's Trade or Business Operations are Considered to be Fully or Partially Suspended Due to a Governmental Order*.

Determining whether the employer has a significant decline in gross receipts. For more information, see *Determining When an Employer is Considered to have a Significant Decline in Gross Receipts*.

Determining whether the employer has more than 100 full-time employees. For more information, see *Does an Eligible Employer Identify the average number of full-time employees based on the aggregation rule?*

The application of the rules that preclude an employer from claiming the Employee Retention Credit if any member of the aggregated group received a Paycheck Protection Program (PPP) loan under the Small Business Act. For more information, see *Interaction with Other Credit and Relief Provisions*.

Employee Retention Credit FAQs

28. What "orders from an appropriate governmental authority" may be taken into account for purposes of the Employee Retention Credit? (updated June 19, 2020)

Orders, proclamations, or decrees from the Federal government, or any State or local government are considered "orders from an appropriate governmental authority" if they limit commerce, travel, or group meetings due to COVID-19 in a manner that affects an employer's operation of its trade or business, including orders that limit hours of operation and, if they are from a State or local government, they are from a State or local government that has jurisdiction over the employer's operations (referred to as a "governmental order").

. . .

Governmental orders include:

- An order from the city's mayor stating that all non-essential businesses must close for a specified period;
- A State's emergency proclamation that residents must shelter in place for a specified period, other than residents who are employed by an essential business and who may travel to and work at the workplace location;
- An order from a local official imposing a curfew on residents that impacts the operating hours of a trade or business for a specified period;
- An order from a local health department mandating a workplace closure for cleaning and disinfecting.
- Whether the operations of a trade or business are considered essential or non-essential will often vary from jurisdiction to jurisdiction. An employer should determine whether it is an essential or non-essential business by referring to the governmental order affecting the employer's operation of its trade or business. For more information on when a business's operations are considered to be fully or partially suspended due to a governmental order, see "Determining When an Employer's Trade or Business Operations are Considered to be Fully or Partially Suspended Due to a Governmental Order."



Employee Retention Credit FAQs

29. If an employer voluntarily suspends operation of a trade or business or reduces hours due to COVID-19, even though that is not required by a governmental order, is the employer eligible to receive the Employee Retention Credit?

An employer that voluntarily suspends operation of a trade or business or reduces hours and is not subject to any governmental orders that restrict its operations is not eligible for the Employee Retention Credit on the basis of a full or partial suspension of its operations due to a governmental order. However, an employer that voluntarily suspends operations due to COVID-19 may be eligible for the Employee Retention Credit if it experiences a significant decline in gross receipts.

For more information about the application of this rule to an employer that operates a trade or business in multiple locations, see *Is an employer that operates a trade or business in multiple locations and is subject to a governmental order requiring full or partial suspension of its operations in some jurisdictions, but not in others, considered to have a suspension of operations?*. For more information on what constitutes a significant decline in gross receipts, see *Determining When an Employer is Considered to have a Significant Decline in Gross Receipts*.

Employee Retention Credit FAQs

30. If a governmental order requires non-essential businesses to suspend operations but allows essential businesses to continue operations, is the essential business considered to have a full or partial suspension of operations? (updated June 19, 2020)

... an employer that operates an essential business may be considered to have a partial suspension of operations if, under the facts and circumstances, more than a nominal portion of its business operations are suspended by a governmental order

31. If a governmental order causes the suppliers to an essential business to suspend their operations, is the essential business considered to have a suspension of operations?

... If the facts and circumstances indicate that the essential business's operations are fully or partially suspended as a result of the inability to obtain critical goods or materials from its suppliers that were required to suspend operations, then the essential business would be considered an Eligible Employer

32. If a governmental order causes the customers of an essential business to stay at home is the essential business considered to have a suspension of operations?

No. An employer that operates an essential business that is not required to close its physical locations or otherwise suspend its operations is not considered to have a full or partial suspension of its operations

33. If a governmental order requires an employer to close its workplace, but the employer is able to continue operations comparable to its operations prior to the closure by requiring employees to telework, is the employer considered to have a suspension of operations? (updated June 19, 2020)

If an employer's workplace is closed by a governmental order, but the employer is able to continue operations comparable to its operations prior to the closure by requiring its employees to telework, the employer's operations are not considered to have been fully or partially suspended

Employee Retention Credit FAQs

34. If a governmental order requires an employer to close its workplace for certain purposes, but the workplace may remain operational for limited purposes, is the employer considered to have a suspension of operations? (updated June 19, 2020)

Yes. If an employer's workplace is closed by a governmental order for certain purposes, but the employer's workplace may remain open for other purposes or the employer is able to continue certain operations remotely, the employer's operations would be considered to be partially suspended.

35. Are an employer's operations considered to be partially suspended for purposes of the Employee Retention Credit if the employer is required to reduce its operating hours by a governmental order? (updated June 19, 2020)

Yes. An employer that reduces its operating hours due to a governmental order is considered to have partially suspended its operations since the employer's operations have been limited by a governmental order.

36. Is an employer that operates a trade or business in multiple locations and is subject to a governmental order requiring full or partial suspension of its operations in some jurisdictions, but not in others, considered to have a suspension of operations?

Yes. Employers that operate a trade or business in multiple locations and are subject to State and local governmental orders limiting operations in some, but not all, jurisdictions are considered to have a partial suspension of operations.

37. If the operations of a trade or business of one member of an aggregated group are suspended by a governmental order, are the operations of that trade or business of the other members of the aggregated group considered to be fully or partially suspended for purposes of the Employee Retention Credit?

Yes. All members of an aggregated group are treated as a single employer for purposes of the Employee Retention Credit.

38. If an employer is subject to a governmental order to fully or partially suspend its business operations and the order is subsequently lifted, is the employer considered to have business operations that were suspended?

Yes, but only for periods during the calendar quarters in which the trade or business operations were fully or partially suspended.

Employee Retention Credit FAQs

40. What are "gross receipts" for an employer other than a tax-exempt organization?

“Gross receipts” for purposes of the Employee Retention Credit for an employer other than a tax-exempt organization has the same meaning as when used under section 448(c) of the Internal Revenue Code (the “Code”). Under the section 448(c) regulations, “gross receipts” means gross receipts of the taxable year and generally includes total sales (net of returns and allowances) and all amounts received for services. In addition, gross receipts include any income from investments, and from incidental or outside sources. For example, gross receipts include interest (including original issue discount and tax-exempt interest within the meaning of section 103 of the Code), dividends, rents, royalties, and annuities, regardless of whether such amounts are derived in the ordinary course of the taxpayer's trade or business. Gross receipts are generally not reduced by cost of goods sold, but are generally reduced by the taxpayer's adjusted basis in capital assets sold. Gross receipts do not include the repayment of a loan, or amounts received with respect to sales tax if the tax is legally imposed on the purchaser of the good or service, and the taxpayer merely collects and remits the sales tax to the taxing authority.

Employee Retention Credit FAQs

41. Does an employer need to prove that a significant decline in gross receipts is related to COVID-19?

No. The CARES Act does not require that the significant decline in gross receipts be related to COVID-19. However, employers should keep records for the relevant calendar quarters in 2019 and 2020 to document the significant decline in gross receipts. The records should be available for IRS review for at least four years.

45. How does an employer that acquires a trade or business during the 2020 calendar year determine if the employer had a significant decline in gross receipts?

For purposes of the Employee Retention Credit, to determine whether an employer has a significant decline in gross receipts, an employer that acquires (in an asset purchase, stock purchase, or any other form of acquisition) a trade or business during 2020 (an “acquired business”) is required to include the gross receipts from the acquired business in its gross receipts computation for each calendar quarter that it owns and operates the acquired business. Solely for purposes of the Employee Retention Credit, when an employer compares its gross receipts for a 2020 calendar quarter when it owns an acquired business to its gross receipts for the same calendar quarter in 2019, the employer may, to the extent the information is available, include the gross receipts of the acquired business in its gross receipts for the 2019 calendar quarter. Under this safe harbor approach, the employer may include these gross receipts regardless of the fact that the employer did not own the acquired business during that 2019 calendar quarter.

An employer that acquires a trade or business in the middle of a calendar quarter in 2020 and that chooses to use this safe harbor approach must estimate the gross receipts it would have had from that acquired business for the entire quarter based on the gross receipts for the portion of the quarter that it owned and operated the acquired business. However, an employer that chooses not to use this safe harbor approach is only required to include the gross receipts from the acquired business for the portion of the quarter that it owned and operated the acquired business.

Employee Retention Credit FAQs

46. What are "gross receipts" for a tax-exempt employer? (updated June 19, 2020)

Solely for purposes of determining eligibility for the Employee Retention Credit, gross receipts for a tax-exempt employer include gross receipts from all operations, not only from activities that constitute unrelated trades or businesses. For example, gross receipts for this purpose include amounts received by the organization from total sales (net of returns and allowances) and all amounts received for services, whether or not those sales or services are substantially related to the organization's exercise or performance of the exempt purpose or function constituting the basis for its exemption. Gross receipts also include the organization's investment income, including from dividends, rents, and royalties, as well as the gross amount received as contributions, gifts, grants, and similar amounts, and the gross amount received as dues or assessments from members or affiliated organizations.

To determine whether there has been a significant decline in gross receipts, a tax-exempt employer computes its gross receipts received from all of its operations during the calendar quarter and compares those gross receipts to the same gross receipts received for the same calendar quarter in 2019.

Employee Retention Credit FAQs

51. May an Eligible Employer that averaged 100 or fewer employees during 2019 treat all wages paid to employees as qualified wages?

Yes. An Eligible Employer that averaged 100 or fewer employees during 2019 may treat all wages paid to its employees after March 12, 2020, and before January 1, 2021, during any period in the calendar quarter in which the employer's business operations are fully or partially suspended due to a governmental order or a calendar quarter in which the employer experiences a significant decline in gross receipts as qualified wages, subject to the maximum of \$10,000 per employee for all calendar quarters.

52. May an Eligible Employer that averaged more than 100 full-time employees during 2019 treat all wages paid to employees as qualified wages?

No. Eligible Employers that averaged more than 100 full-time employees for 2019 may not treat the wages paid to employees for the time that they provide services to the employer as qualified wages. For these employers, only wages paid to employees, after March 12, 2020, and before January 1, 2021, for the time they are not providing services during a calendar quarter in which the employer's business operations are fully or partially suspended due to a governmental order or in which the employer experiences a significant decline in gross receipts may be treated as qualified wages.

Example: Employer Q, a local chain of full service restaurants in State X that averaged more than 100 full-time employees in 2019, is subject to a governmental order for restaurants to discontinue sit-down service to customers inside the restaurant, but may continue food or beverage sales to the public on a carry-out, drive-through, or delivery basis. Employer Q continues to pay wages to kitchen staff and certain wait staff needed to facilitate fulfillment of carry-out orders. Wages paid to these employees for the time that they provide carry-out service are not qualified wages.

Employee Retention Credit FAQs

53. May an Eligible Employer that averaged more than 100 full-time employees during 2019 claim an Employee Retention Credit for an increase in the amount of wages it paid its employees during the time that employees are not providing services?

No. For Eligible Employers that averaged more than 100 full-time employees during 2019, qualified wages paid to an employee may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the commencement of the full or partial suspension of the operation of the trade or business or the first day of the calendar quarter in which the employer experienced a significant decline in gross receipts. For a variable hour employee, the amount paid for working an equivalent duration during that 30-day period may be determined using any reasonable method. The method(s) that the Department of Labor has prescribed to determine the amount to pay an employee with an irregular schedule who is entitled to paid sick leave under the FFCRA would be considered reasonable for this purpose. For more information, see Department of Labor's Temporary Rule: Paid Leave under the Families First Coronavirus Response Act.

Example: Employer S, a grocery store chain that averaged more than 100 full-time employees in 2019, is subject to a governmental order limiting store hours. In response, Employer S has reduced the hours its employees work, but in order to incentivize those employees who continue to provide services, the employer increases the employees' rate of pay by \$1 an hour. Only the amounts paid to employees for time they are not providing services, and at the rate of pay in effect prior to the increase, would be considered qualified wages.

Employee Retention Credit FAQs

59. Are wages paid by an employer to employees who are related individuals considered qualified wages?

No. Wages paid to related individuals, as defined by section 51(i)(1) of the Internal Revenue Code (the "Code"), are not taken into account for purposes of the Employee Retention Credit. A related individual is any employee who has of any of the following relationships to the employee's employer who is an individual:

- A child or a descendant of a child;
- A brother, sister, stepbrother, or stepsister;
- The father or mother, or an ancestor of either;
- A stepfather or stepmother;
- A niece or nephew;
- An aunt or uncle;
- A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

In addition, if the Eligible Employer is a corporation, then a related individual is any person that bears a relationship described above with an individual owning, directly or indirectly, more than 50 percent in value of the outstanding stock of the corporation.

If the Eligible Employer is an entity other than a corporation, then a related individual is any person that bears a relationship described above with an individual owning, directly or indirectly, more than 50 percent of the capital and profits interests in the entity.

If the Eligible Employer is an estate or trust, then a related individual includes a grantor, beneficiary, or fiduciary of the estate or trust, or any person that bears a relationship described above with an individual who is a grantor, beneficiary, or fiduciary of the estate or trust.

Employee Retention Credit FAQs

85. Does the Employee Retention Credit reduce the expenses that an Eligible Employer could otherwise deduct on its federal income tax return?

Yes. Section 2301(e) of the CARES Act provides that rules similar to section 280C(a) of the Internal Revenue Code (the "Code") shall apply for purposes of applying the Employee Retention Credit. Section 280C(a) of the Code generally disallows a deduction for the portion of wages paid equal to the sum of certain credits determined for the taxable year. Accordingly, a similar deduction disallowance would apply under the Employee Retention Credit, such that an employer's aggregate deductions would be reduced by the amount of the credit as result of this disallowance rule.

86. Does an Eligible Employer receiving an Employee Retention Credit for qualified wages need to include any portion of the credit in income?

No. An employer receiving a tax credit for qualified wages, including allocable qualified health plan expenses, does not include the credit in gross income for federal income tax purposes. Neither the portion of the credit that reduces the employer's applicable employment taxes, nor the refundable portion of the credit, is included in the employer's gross income.

Employee Retention Credit FAQs

For complete list of FAQs related to the Employee Retention Credit go to:

<https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>

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.

The 01/06/21 IFRs provide a complicated provision that may allow EIDL loans made between January 31st, 2020 and April 3rd, 2020 to be refinanced into PPP loans. We are still analyzing how this will work and what impact it will have on borrowers. That being said, we do know that borrowers will not be allowed to refinance an EIDL loan into a second draw PPP loan.



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	<p>Lesser of:</p> <ol style="list-style-type: none"> 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 <p>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.</p>
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>	<p>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.</p> <p>Loss of anticipated profits or a drop in sales is not considered substantial economic injury for this purpose</p>	NO GUIDANCE AVAILABLE	NO GUIDANCE AVAILABLE
Use of Funds	<p>1. providing paid sick leave to employees unable to work due to the direct effect of COVID-19</p> <p>2. Maintaining payroll to retain employees during business disruptions or substantial slowdowns</p> <p>3. Meeting increased costs to obtain materials unobtainable from the applicant's original source due to interrupted supply chains</p> <p>4. Making rent or mortgage payments</p> <p>5. Repaying obligations that cannot be met due to revenue losses.</p>	NO GUIDANCE AVAILABLE	<p>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.</p>	<p>1. Fixed Debts</p> <p>2. Payroll</p> <p>3. Accounts Payable</p> <p>4. Bills that could have been paid had the disaster not occurred.</p>

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.

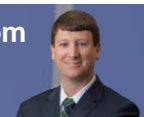
"Borrower will use all the proceeds of this Loan solely as working capital to alleviate economic injury caused by disaster occurring in the month of January 31, 2020 and continuing thereafter and for loans of more than \$25,000 to pay Uniform Commercial Code (UCC) lien filing fees and a third-party UCC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

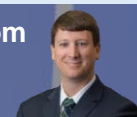
(II) administrative costs, including fees and licensing costs;

(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 01/06/21 IFRs further confirmed this rule and provided the following:

You are ineligible for a PPP loan if, for example:

You or your business received or will receive a grant under the Shuttered Venue Operator Grant program under section 324 of the Economic Aid Act

This prohibition applies to all loans made on or after 12/27/20

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

Will this help?

Section 320 establishes a special procedure in the bankruptcy process if the Administrator determines certain small business debtors are eligible for Paycheck Protection Program loans. It requires court approval for Paycheck Protection Program loans to these debtors and requires any such loan be given a super priority claim in the bankruptcy process, providing additional protection to taxpayers and participating banks. **The provisions in this section would take effect only upon a written determination by the Administrator that certain small business debtors are eligible for Paycheck Protection Program loans and would sunset two years from the date of enactment.**



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 Eligibility For Borrowers In Following 01/06/21 IFRs

It looks like Secretary Carranza may have already made her determination. The January 6th Interim Finals Rules provide the following:

“If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan.”

So now it appears that borrowers in bankruptcy will not be permitted to receive PPP loans. This hardline determination seems contrary to what Congress initially permitted under the new Act. We anticipate that this rule could change again once the next session of Congress begins and elected officials get a chance to interface with the SBA on this issue. In the past we have seen Senators draft letters to clarify their intent in the CARES Act, specifically relating to the tax treatment of PPP loans (more on that later), so it would not be hard to foresee some officials making their position on this issue known to the SBA.

The 01/06/21 IFRs also provide that if your business is permanently closed then you will not be eligible to receive a PPP loan. Should borrowers in bankruptcy ever gain the ability to apply for PPP loans, this will be another hurdle for them to clear.



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

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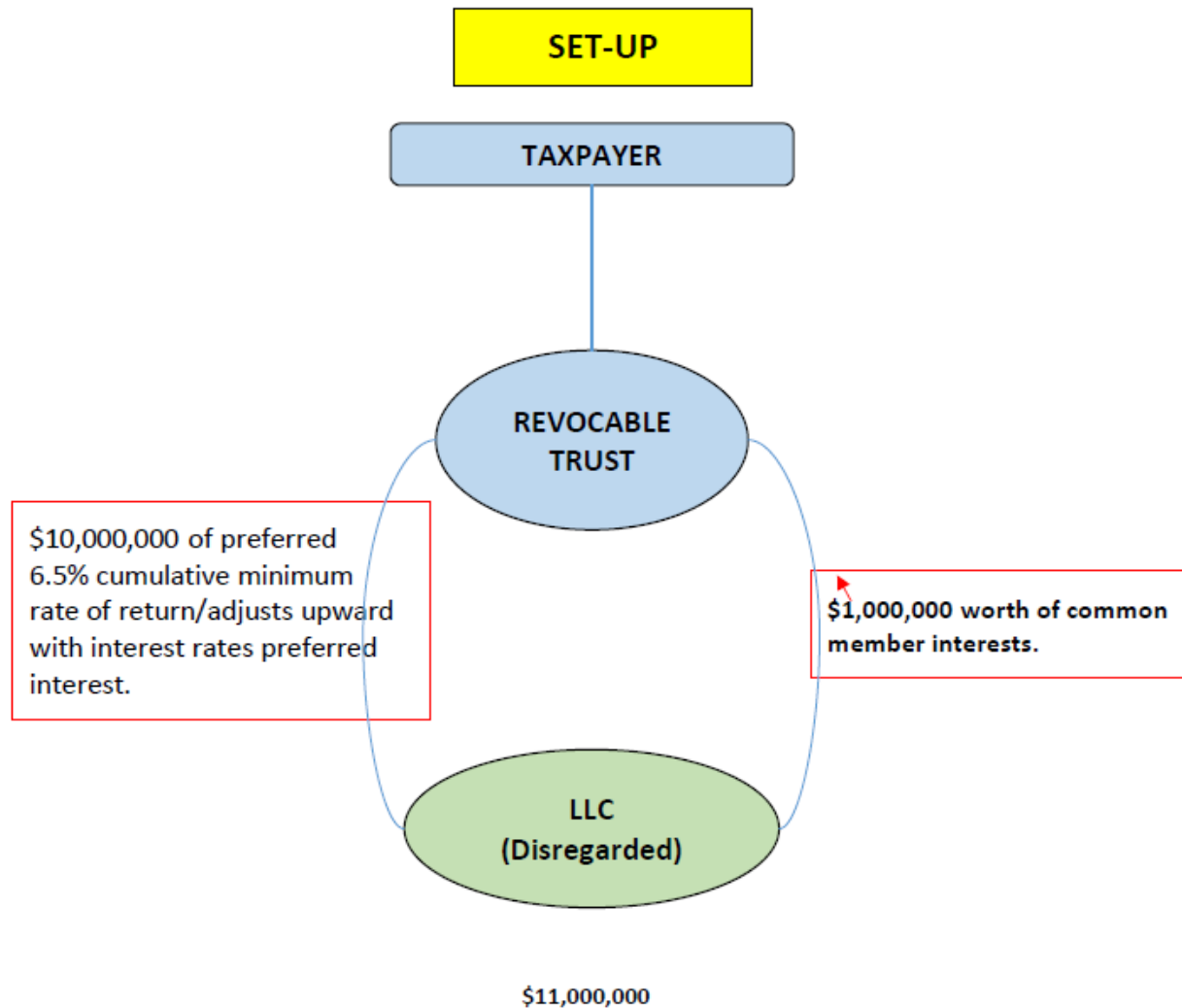
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**Triggering A Gift Without a Gift With a Non Qualifying Partnership Freeze—
The Use It So I Won't Lose It, But May Eat My Cake Too (Continued)**

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.

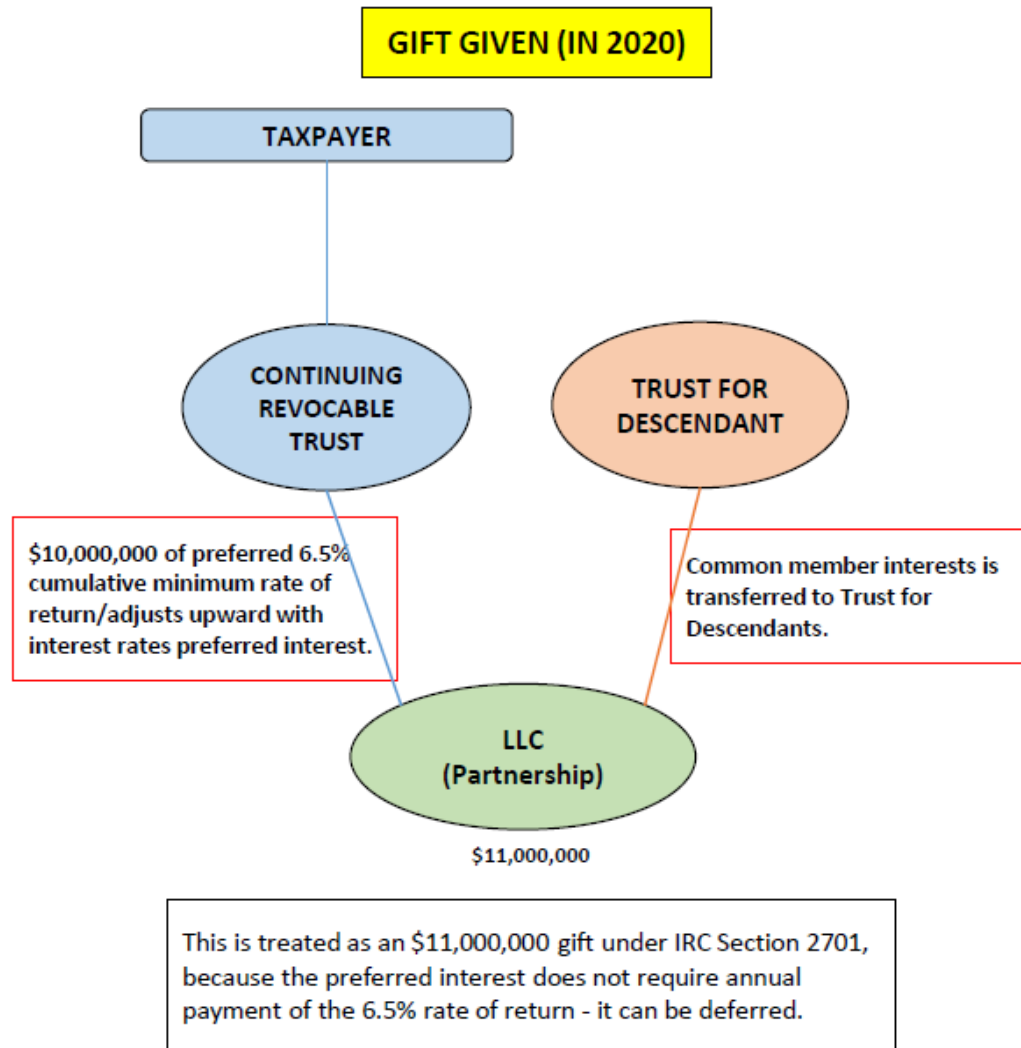
This planning technique was covered in LISI Estate Planning Newsletter #2827 by Stephen M. Breitstone, Mary P. O'Reilly & Joy Spence, and before that in LISI Estate Planning Newsletter #2820 by Jonathan Blattmachr and Carlyn McCaffery. It is somewhat likely that this technique was invented by Jonathan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

Flexible Preferred/Common Exemption Use Partnership



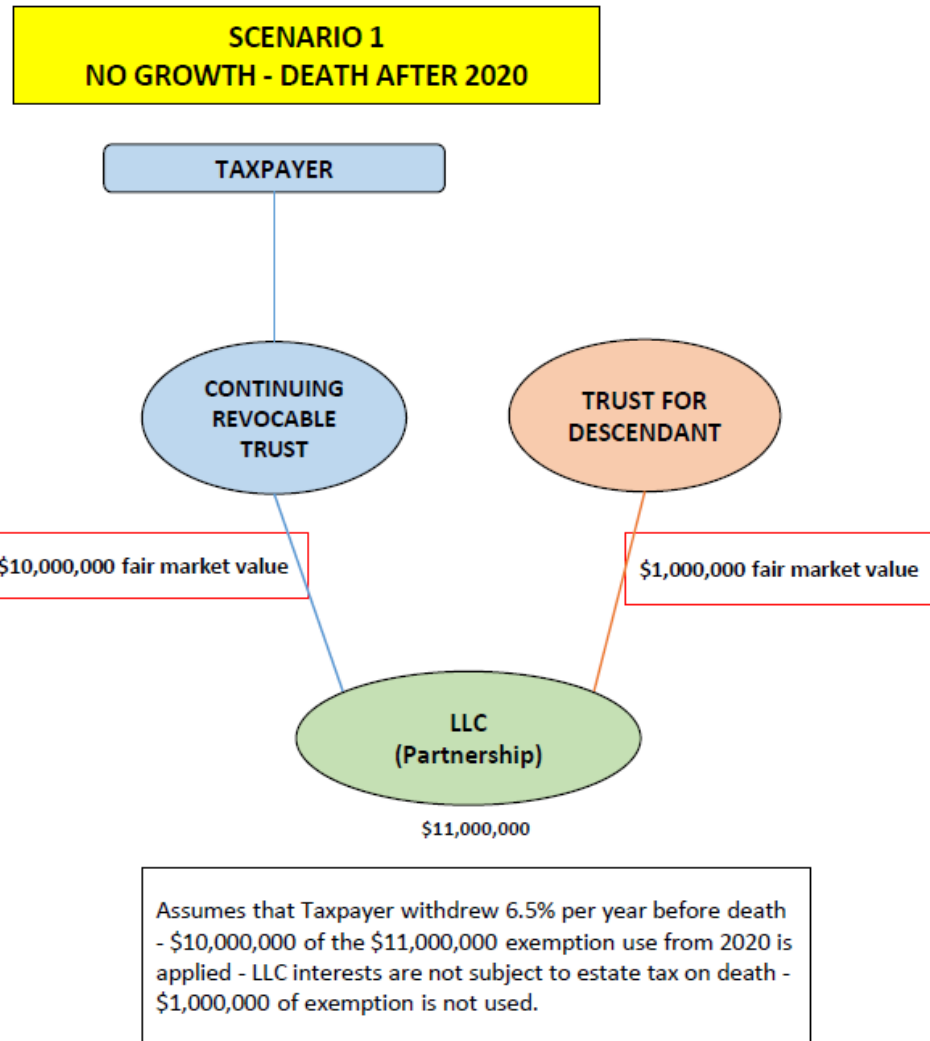
The presenters than Stephen M. Breitstone, Mary P. O'Reilly & Joy Spence for their excellent article on this – *Get A GRIP! How to Lock in the Exemption and Still Benefit from It with the Grantor Retained Interest Partnership* at Leimberg's Estate Planning Email Newsletter Archive Message #2827 9.29.2020

Flexible Preferred/Common Exemption Use Partnership



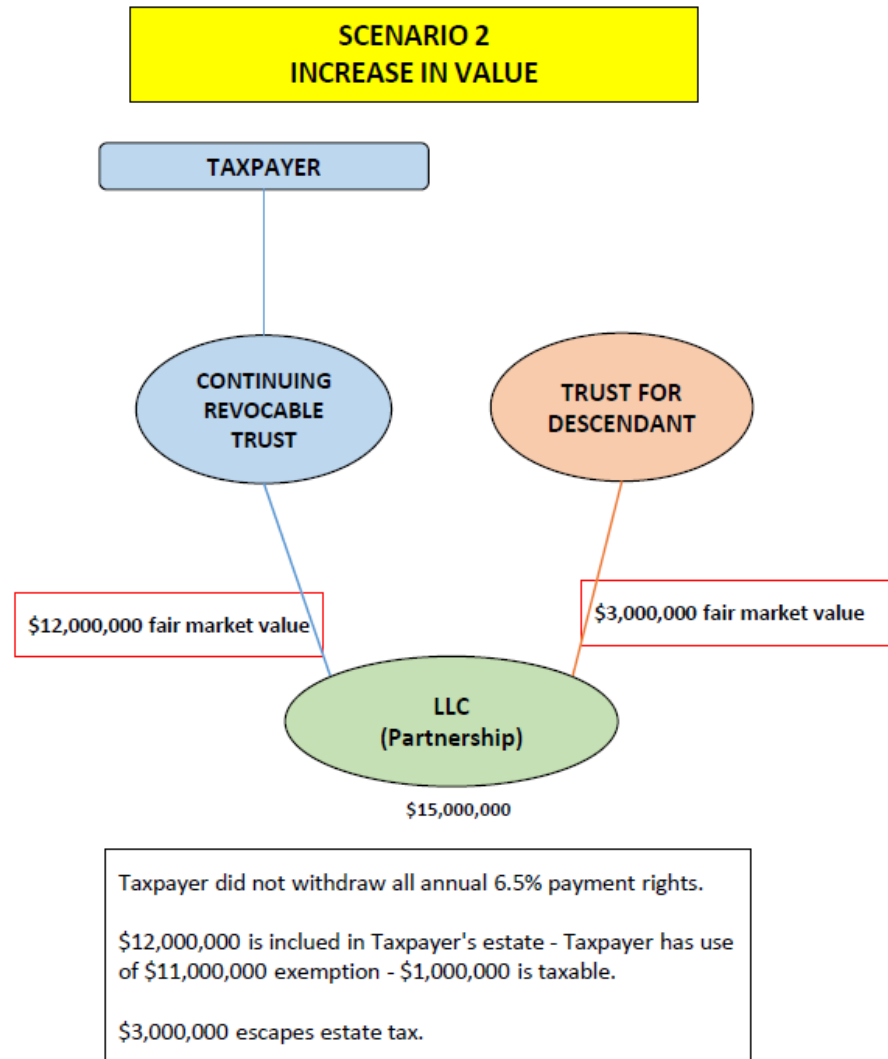
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A 60% Transfer In All.

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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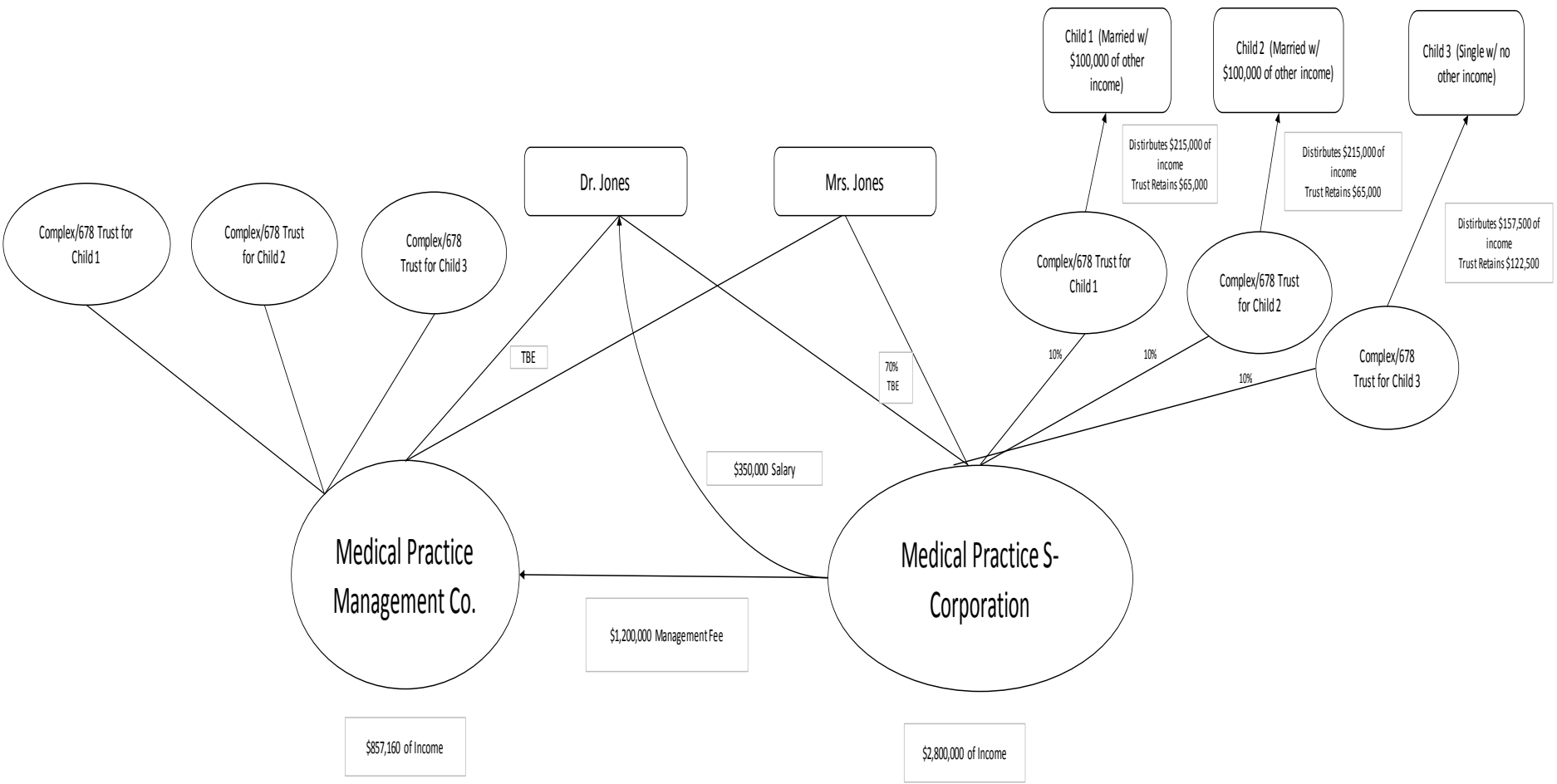
Management Companies With Significant Value, Continued

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.

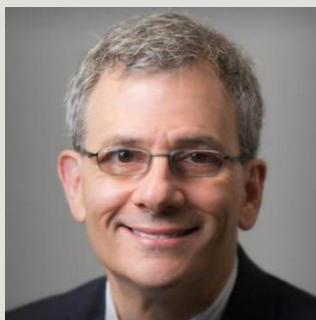
A 99% non-voting interest in the management company is sold to a defective grantor trust in exchange for a \$4 million note, and this should not be considered a transfer under the PPP rules.



SBA ISSUES GUIDANCE ON NEW CARES ACT CHANGES FOR PPP, PPP ROUND 2, EIDL AND OTHER PROGRAMS: WHAT ADVISORS NEED TO KNOW NOW!

<https://leimbergservices.com/wdev/register.cfm?id=952>

**Tuesday, January 12, 2021
1 – 2:30 PM EST (90 minutes)**



Alan S. Gassman
agassman@gassmanpa.com



Brandon Ketron
Brandon@gassmanpa.com

NEW PPP LOAN EXPENSE TRACKER AND FORGIVENESS CALCULATOR OFFERED EXCLUSIVELY BY LISI



CPAs and tax advisors throughout the United States thought tax season and the 199A calculation was challenging, but what about the PPP Loan season! Now, the best way to help clients plan for, understand and report their PPP loans is finally here: the PPP Loan Expense Tracker and Forgiveness Calculator (TM) for CPA's and Other Financial Professionals.

The SBA has issued the Forgiveness Application and Instructions just in time to allow PPP borrowers to plan to know how much of their loans may be forgiven and what the best strategies are to balance the utility of bringing employees back and against associated costs and forgiveness. Now, you can handle your clients' PPP loan planning and calculations efficiently, effectively, and accurately in accordance with SBA guidelines and applicable law.

The PPP Loan Expense Tracker and Forgiveness Calculator allows you to input expenses and payroll costs data for the 8 week period and automatically populates forgiveness calculations

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Paycheck Protection Loan Forgiveness Expense Tracker <i>Hover over yellow cells for tips</i> <i>Enter data in the light blue cells only</i>											
Enter Company name:											
Covered Period: What date did your loan fund (money was released to you)? <input type="text"/> This is the start of your 8 week period This is the end date you use for measuring loan forgiveness: 2/24/1900 This is the end of your 8 week period											
For borrowers with bi-weekly or more frequent payroll (using this Alternative Payroll Covered Period is optional) Alternative Payroll Covered Period (optional): Enter first date of the first pay period AFTER the loan funding date <input type="text"/> This is the start of your Alternative Payroll 8 week period This is the end date you use for Payroll expenses only 2/24/1900 This is the end of your Alternative Payroll 8 week period											
Enter the above dates/time periods on your Loan Forgiveness Application with your Lender											
Enter the amount of loan received \$ -											
Enter the amount of your EIDL Advance (Grant) \$ - This amount should not exceed \$10,000											
<div style="display: flex; justify-content: space-between;"> <div> (Click on cell for instructions) </div> <div> Payroll Costs </div> <div> Nonpayroll Costs </div> </div>											
DESCRIPTION	DATE EXPENSE INCURRED	DATE EXPENSE PAID OR PAY PERIOD DATE	TOTAL	GROSS PAYROLL	HEALTH INSURANCE	STATE & LOCAL PAYROLL TAXES	RETIREMENT PLAN CONTRIBUTIONS	INTEREST ON MORTGAGES IN PLACE BEFORE 02/15/2020	RENT OR LEASE PAYMENTS	UTILITIES	SUPPORTING DOCUMENTS ATTACHED? Yes or No (Click here to access the Instructions)
			0.00								
			0.00								
			0.00								
			0.00								

PPP LOAN EXPENSE TRACKER AND FORGIVENESS SPREADSHEET CALCULATOR

Includes Instructional Webinar
and Instant Delivery from



Alan Gassman J.D. LL.M

GASSMAN CROTTY DENICOLOPA
ATTORNEYS AT LAW



Kevin Cameron MBA CPA



Brandon Ketron J.D. LL.M CPA

GASSMAN CROTTY DENICOLOPA
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4 minute summary video at <https://youtu.be/mN8O5ViHVk0>
46+ minute walkthrough video at <https://youtu.be/pBCtAP0LVyw>

Spreadsheet Calculator Available at:

www.PPPExcel.com

"A man is only as good as his tools." -Emmert Wolf

January 6th SBA Regulations Help Solidify PPP And EIDL Changes

Presented by:

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Brandon Ketron
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Saturday, January 9, 2021
10 to 10:30 AM EST (30 minutes)



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