PPP Loans and What's Next:

Best Practices to Obtain Loan Forgiveness and Avoid Pitfalls

Jeffrey M. Sklarz, Esq.
Eric L. Green, Esq.

GREEN & SKLARZ LLC

1

Housekeeping

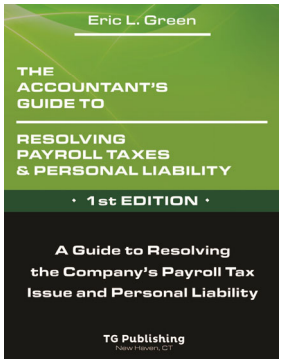
- 12 Attendance Check Words
- Please write them down
- Look for an email link within an hour of this program
- Submit your information and the words
- Your CE/CPE certificate will be email to you automatically
- If you do not receive it check your spam folder
- If it is not there by tomorrow am email us

GREEN & SKLARZ LLC

2

2

Release of the New Accountant's Guide



Payroll taxes are the number one reason why small businesses get into tax trouble. In addition, the IRS will begin pursuing the owner and other responsible employees personally for the trust fund portion of the taxes! Payroll Tax cases also are an opportunity for practitioners to make money while saving businesses, their owners and hundreds or even thousands of employee jobs.

Pick up the newest guide and learn how to add this service to your practice and make money helping businesses turn things around and solve their most vexing payroll issues!

www.TGPublish.com

GREEN & SKLARZ LLC

3

3

Special on the Accountant's Guides!

Use Discount Code GS10 and save 10% on any or all of the books!

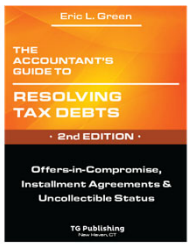
www.TGPublish.com

GREEN & SKLARZ LLC

4

4

The Ultimate Offer-in-Compromise Workshop



- Tuesday May 26th, 1pm – 5pm, 4 ce/cpe hours
- Offers from start to finish
- Including case studies with all the forms completed, downloadable letters and checklists to use in your practice
- Limited to 100 attendees so all questions can be answered
- Early bird $199 until 5/20, after that $299
- Register by 5/20 and get the digital edition of the Accountants Guide to Resolving Tax debts FREE!
- Use discount code **GS10 and save 10% until 5/20**!

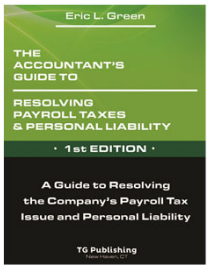
Register here: https://taxrepllc.com/program-20200515-ultimate-oic-workshop/

GREEN & SKLARZ LLC

5

5

The Ultimate Payroll Tax Resolution Workshop



- Tuesday June 2nd, 1pm – 5pm, 4 ce/cpe hours
- How to resolve your client's worst payroll tax case
- Including case studies with all the forms completed, downloadable letters and checklists to use in your practice
- Limited to 100 attendees so all questions can be answered
- Early bird $199 until 5/27, after that $299
- Register by 5/27 and get the digital edition of the Accountants Guide to Resolving Payroll Tax Debts FREE!
- Use discount code **GS10 and save 10% until 5/27**

Register Here: https://taxrepllc.com/program-20200602-payroll-tax-train-wreck/

GREEN & SKLARZ LLC

6

6

Housekeeping

- We will take a 10 minute break about half way through the program
- Please try and stay with us so you don't miss the attendance check words

GREEN & SKLARZ LLC

7

7

Disclaimer

This program was put together to provide information and our personal opinion on what might happen surrounding the current federal loan programs. The situation surrounding the PPP and other loan programs is very fluid and may change daily. Given this situation, we want to be clear that the information provided in this presentation is not legal advice you or your clients can rely on, and each client's situation must be considered based upon the facts and circumstances. *Hence we would advise you to seek a legal opinion if you have a situation where you need advice that you can rely upon.*

GREEN & SKLARZ LLC

8

8

Agenda

Part 1

- Overview of CARES Act financial programs
- PPP loan availability
- Spending your PPP loan
- PPP Loan forgiveness
- Main Street Loan Facilities

Part 2

- Tax considerations
- Administrative oversight
- Criminal Enforcement

GREEN & SKLARZ LLC

9

9

Summary of Financing Options Under CARES Act

- EIDL Loans
  - Not specifically created by Act, but expanded
- PPP Loans
- Main Street Lending Program ("MSLP")
  - Not up and running yet

GREEN & SKLARZ LLC

10

10

EIDL Loans

- Direct from SBA, following disaster declaration
- $2 million cap
- 3.75% interest rate (2.75% for NFPs)
- Up to 30 years to repay
- Underwriting, collateral, PG
- Proof of ability to repay
- ~30 days to get money
- $10,000 grant available within 48 hours
- Cannot obtain credit elsewhere

GREEN & SKLARZ LLC

11

11

PPP Loans

- Generally 500 of fewer employees (exception: NFPs that are Medicaid funded are still eligible even if they have more than 500 employees)
  - For the hospitality industry (NAICS Code 72, Accommodation and Food Services) the 500 employee cap applied *per location*, so large companies that own hotels or restaurants with multiple locations may still qualify as small businesses if each location has less than 500 employees.
    - Otherwise apply SBA affiliation/size rules
  - Franchises qualify as well.
  - The terms "employee" is defined broadly and includes full and part-time. But not independent contractors.
- **Loan Amount**: 2.5x the average total monthly payments for payroll; capped at $10 million.
- Loan guarantees by government, but funded through private lenders.
- Independent contractors and sole proprietors may apply.

GREEN & SKLARZ LLC

12

12

PPP Loans

- Loan proceeds can be used for: "payroll costs" (a defined term under the Act), mortgage interest, rent, utilities, and other debt obligations incurred before the covered period. Tipped employees payroll can be included.
- Payroll amount is capped at $100,000 per employee pro rated for the covered period (February 15 – June 30, 2020).
- Ex patriot workers are excluded.
- K-1s: Self-employed owners who receive a K-1 have their compensation included in the calculation (up to $100,000).
- Schedule C: 2019 Net Profit (Line 31 of Sch. C).

GREEN & SKLARZ LLC

13

13

PPP Loans

Additional Elements

- No requirement to seek credit elsewhere *this is different than typical SBA loans, which require borrower to show lack of access to other credit*
  - But see, FAQ 31, 37, 46 – *does this read back in "no credit elsewhere" rule?*
  - $2 million safe harbor for good faith certification
  - Companies with access to capital may not be eligible
- Maximum maturity of 10 years
  - SBA decided it would be a 2 year loan
- Interest rate not to exceed 4%
  - SBA fixed rate at 1%
- At least 6 months deferral of P&I (up to 1 year)
  - SBA decided it would be only 6 months of forbearance
- No prepayment penalties

GREEN & SKLARZ LLC

14

14

PPP Loans

Permitted Uses

- Owner compensation replacement based on 2019 net profits, capped at $100,000 per partner. *Not guaranteed payments or draw!*
- Employee payroll costs.
- Costs related to the continuation of group healthcare benefits during paid leave (sick, family or medical).
- Business rent and utilities.
- Mortgage interest (not principal).
  - Note: if you work out of your home, you cannot deduct home mortgage payments (although home mortgage interest is generally otherwise deductible).
- Interest payments on other debt incurred prior to 2/15/20 (such amounts are not eligible for loan forgiveness).
- Refinancing an SBA EIDL loan made between 1/31/20 and 4/3/20.

GREEN & SKLARZ LLC

15

15

PPP Loans: Good Faith Certification

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

- FAQ 31, 37: "Borrowers must make this certification… taking into account… their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business."
- FAQ 46: Companies that receive less than $2 million are deemed to meet the good faith requirement
- What does this mean for companies that borrow *more* than $2 million?

GREEN & SKLARZ LLC

16

16

PPP Loans: Good Faith Certification

- What are "other sources of liquidity"?
- What does it mean to use "other sources of liquidity" to "support ongoing operations that is not detrimental to the business"?
- What does "necessary" mean?
- What are "ongoing business activities"
- What is "access to capital market"
- FAQ 31 refers to "large companies" and "public company[ies]"
- FAQ 37 says the same rules apply to "private companies with adequate sources of liquidity"
- FAQ 43 indicated the SBA would provide additional guidance regarding "review of [good faith] certifications"

GREEN & SKLARZ LLC

17

17

PPP Loans: Good Faith Certification

- Nothing in the FAQs released so far address any of these questions
- Likely a breeding ground for litigation
- FAQ 46 does create a safe harbor:

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.

GREEN & SKLARZ LLC

18

18

PPP Loans: Good Faith Certification

- No "administrative" enforcement
- Likely have to repay, with interest immediately
- Unclear whether criminal authorities can pursue

GREEN & SKLARZ LLC

19

19

PPP Loans: Good Faith Certification

"[O]ther sources of liquidity" / "access to capital market"

- Capital markets
- Deep pocketed owner
- Other credit facilities

"Necessary"

- In whose eyes
- When determined

"[S]upport ongoing operations that is not detrimental to the business"

- Maintain pre-COVID operations
- Not fire people
- Not close
- Not bankrupt owner

"[O]ngoing business activities"

GREEN & SKLARZ LLC

20

20

PPP Loans: Good Faith Certification

- What about small public companies?

> "It's sort of been poisoned by certain companies that have taken advantage where they shouldn't have taken advantage, but we have a need… We're out of business without that money."
>
> - *Small-Business Loan Deadline Poses Test for Mnuchin,* NYT 5/13/2020

- There is still $100 billion plus available for PPP loans – has uncertainty concerning good faith certification cause businesses to pull back?

GREEN & SKLARZ LLC

21

21

PPP Loans: Good Faith Certification

Zumasys, Inc.v. SBA, Case No. 8:20-cv-851-KES (C.D. Cal.)

- Zumasys is a small private company with less than 50 employees
- Zumasys (and affiliates) received less than $1 million of PPP loans
- Zumasys has access to other credit
- Seeks declaratory judgment that Zumasys' PPP loans were received in good faith and FAQ 31 and 37 do not create a "no credit elsewhere" requirement
- *Is this lawsuit moot after the enactment of FAQ 46?*

GREEN & SKLARZ LLC

22

22

PPP Loans: How to use the money

- Goal is forgiveness
- Must be used for covered expenses to be forgivable
- Can the funds but used for other purposes and repaid?
  - Is it illegal to use the funds other than as directed by statute

GREEN & SKLARZ LLC

23

23

PPP Loans: How to use the money

- Section 1102(36)(F) identifies "allowable uses"
- Section 1102(36)(G)(i)(II) requires a certification "acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments."

GREEN & SKLARZ LLC

24

24

PPP Loans: How to use the money

- Maintain a separate account – keep it simple
- Make payment of covered expenses from the PPP account
- Transfer funds from the PPP account to payroll accounts, if needed
  - Only transfer funds for covered expenses
- Burden is on the borrower to provide documentation to support forgiveness
- Documentation standards have not been released

GREEN & SKLARZ LLC

25

25

PPP Loans: How to use the money

- Nothing in the CARES Act identified how money must be spent on covered expenses
- Interim Rule 1, 85 Fed. Reg. 73, 20814 (Apr. 15, 2020) requires that no more than 25% of PPP loan proceeds be spent on non-payroll expenses
- This means:
  - If your business is shuttered, you must pay employees not to work
  - 25% must be spent on other covered costs

GREEN & SKLARZ LLC

26

26

PPP Loans: How to use the money

- Funds must be spent in the 8 weeks from the day the bank deposits money in your account. FAQ 20.
- No guidance on what happens if you can't spend the money
- Best practice would be to return the funds, but you will have to pay some interest.
- Some legislative effort to modify this requirement given many business are shut and cannot use the money
  - Counter-point: the purpose of the program was to hand out money. Not necessarily important whether people were actually working

GREEN & SKLARZ LLC

27

27

PPP Loans: How to use the money

- What happens if I spend the money on something other than covered expenses?
- What if I just take the money? I always wanted a vacation home.
- What if my bank sweeps the money and pays other debt I owe?
- What if I get the money and file for bankruptcy?

GREEN & SKLARZ LLC

28

28

PPP Loans: Loan Forgiveness

- 75% of loan proceeds must go toward payroll costs
  - For purposes of determining percentage of use (but not for forgiveness), the amount of any refinanced EIDL loan will be included
- Up to the full principal amount of the loan plus accrued interest may be forgiven.
- Expenses must be "incurred"
- Expenses must be "paid"
- Thus, if the 8 week period ends in between payrolls – cut an extra payroll to ensure the expense is "paid" during the 8 week period

GREEN & SKLARZ LLC

29

29

PPP Loans: Loan Forgiveness

Actual amount of loan forgiveness will depend, in part, on amount spent over the covered period on:

- Payroll costs up to $100,000 per employee (8-week max. per employee is $15,385), as well as covered benefits for employee, including health care costs, retirement contributions, and SUTA.
  - Benefit costs for owners are NOT forgivable.
- Owner compensation (limited to 8/52 of 2019 net profit, per owner).
- Payment of mortgage interest for obligations incurred prior to 2/15/20.
- Rent payment on lease agreement in force prior to 2/15/20, to the extent deductible as business rent expense.
- Utility payments under service agreements dated prior to 2/15/20.

GREEN & SKLARZ LLC

30

30

PPP Loans: Loan Forgiveness

Documentation for Forgiveness

- Form 941 and state quarterly wage unemployment insurance tax reporting forms (or equivalent payroll processing reports).
- Supporting documentation evidencing claimed business expenses (mortgage interest, rent, utilities, etc.)
- 2019 Form 1040 Schedule C that was provided with the PPP Loan application.
- Payroll ledgers
- Comparable financial statements
  - Pre-COVID projections vs. actual
- Narrative explanation of why loan was needed
  - Explanation for harm to pipe-line, WIP, etc.
- *By keeping a separate account the accounting will be far simpler*

GREEN & SKLARZ LLC

31

31

PPP Loans: Loan Forgiveness

- What if you have excess funds that could not be used for covered expenses?
- Can I pre-pay expenses?
- Can I pay bonuses to employees to use up excess funds?
- If another entity I own is my landlord, can I pay it rent?

GREEN & SKLARZ LLC

32

32

PPP Loans: Loan Forgiveness

Reduction in Forgiveness

- Forgiveness is reduced *pro rata* based on:
  - Failure to rehired FTEs
  - More than 20% reduction of salaries
- FTEs are based on headcount, not specific people
- FAQ 40 – no reduction if employer makes a written offer of reemployment which is refused
- If FTEs are rehired prior to June 30th, no reduction (but you still have to spend the money during the 8 week period)

GREEN & SKLARZ LLC

33

33

PPP Loans: Loan Forgiveness

Reductions Based on Number of Employees
The amount of loan forgiveness equal

Amount of loan
Multiplied by Quotient of
Average # of FFTE (f/t equivalent EE's per month) for one month of covered period
Divided by Either (at the election of the employer/borrower)
Average #FFTE/month employed from 2/15/2019 – 6/30/2019; or
Average #FFTE/month employed from 1/1/2020 – 2/29/2020; or
if seasonal employees
Average #FFTE/month employed from 2/15/2019 – 6/30/2019

GREEN & SKLARZ LLC

34

34

PPP Loans: Loan Forgiveness

Calculating the Eligible Amount

- Eric's Café applies for a paycheck protection loan.
- The business had $2,000,000 in payroll costs for the 1-year period, for a monthly average of $166,667.00.
- Eric's Café is entitled to loan equal to the lesser of (a) $416,667.50 ($166,667 in average payroll costs * 2.5), or (b) $10 million.

GREEN & SKLARZ LLC

35

35

PPP Loans: Loan Forgiveness

Loan Forgiveness

- If the $416,667.50 is used for "covered expenses," the loan is forgivable, and the COD will not be income. Forgiveness amount will be reduced (see next slide) if employer either reduces workforce or employer cuts salary by more than 25% for those making less than $100,000.

GREEN & SKLARZ LLC

36

36

PPP Loans: Loan Forgiveness

Example 1

- "Covered Period" mean February 15 – June 30, 2020
- Assume Eric's Café had 10 full time equivalent employees (FTE) on average each month between February 15 – June 30, 2019
- Assume Eric's Café has 7 FTEs during the covered period

Thus: $416,667.50 x 7 / 10 = $291,667.30 [disallowed amount]
→ **$125,000.25 [amount forgiven]**

*Note: There may be a technical error that needs correction. The Act seems to have it backwards. Why is there a 70% forgiveness reduction for a 30% workforce reduction? Further, Senate guidance indicates that the loan will be forgiven in proportion to the employees not

GREEN & SKLARZ LLC

37

37

PPP Loans: Loan Forgiveness

Example 2: Loan not used entirely for covered expenses

- Instead of using the entire loan for covered expenses, Eric's uses $50,000 to purchase equipment or supplies. [*more to come on this*]
- Then, only $366,667.50 is subject to forgiveness. The $50,000 must be repaid over not more than 10 years, but the first payment is not due until between 6-12 months after the loan is advanced.
- Also, payments of salary in excess of $100,000 are not covered expenses. Thus, while a business can borrow based on salaries in excess of $100,000, it cannot seek forgiveness on such amounts.
- *Practice Tip:* If loan will not be forgivable consider applying for EIDL loans as the business can borrow up to $2 million

GREEN & SKLARZ LLC

38

38

PPP Loans: Loan Forgiveness

Example 3: Borrowing based on compensation greater than $100,000

- Eric's has 4 workers:
  - Eric, owner: K-1, $200,000 guaranteed payment in 2019)
  - Dena, silent partner: K-1, received $300,000 in distributions in 2019
  - Jeff, the scone pusher: 1099, paid a commission, received $110,000 last year
  - Jay, W-2: $50,0000/year
  - Amanda, W-2: $125,000/year

What is the maximum amount of the loan?
Likely exclude Dena's distribution, but include Eric's guaranteed payment, thus average of $29,167/month X 2.5 = $72,917.50.

What is the maximum amount of forgiveness allowed?
Cap compensation at $100,000 for Eric, Jeff, and Amanda; thus: $29,167/month X 2.5 = $72,917.50, if used for covered costs. If payments go to compensation in excess of the $100,000 cap, Eric, Jeff, or Amanda receive more than 8/52nds during the covered period, the balance must be repaid over 2 years, but there is a 6 month payment deferral.

GREEN & SKLARZ LLC

39

39

PPP Loans: Loan Forgiveness

Reductions in Wages

- If employer reduced salary/wages in excess of 25% during covered period and did not cure the reduction by June 30, 2020, then reduce forgiveness of loan by the amount of the salary/wage reduction in excess of 25%.
- Use employee's salary/wages for most recent full quarter of employment when calculating whether reduction is in excess of 25%.

GREEN & SKLARZ LLC

40

40

PPP Loans: Loan Forgiveness

Example

- Eric reduces Amanda's salary from $50,000 to $30,000, a 40% reduction.
- This exceeds the 25% floor. 25% of $50,000 = $37,500
- Thus, loan forgiveness is reduced by $7,500

GREEN & SKLARZ LLC

41

41

PPP Loans: Loan Forgiveness

Rehiring Employees

- If employees were laid off between February 15th and 30 days after enactment of the Act, so long as they are rehired by June 30th
- These provisions remain unclear and no guidance has been issued
- Presumably I cannot layoff employees, hire them back June 29th and fire them July 10th

GREEN & SKLARZ LLC

42

42

PPP Loans: Loan Forgiveness

Additional Matters

- If a business has received an EIDL loan, it may refinance it with a paycheck protection loan.
- Businesses may not receive multiple paycheck protection loans.
- However, as of May 13, 2020, the SBA will now allow loan increases where a partnership received a PPP loan that did not include a component for partner compensation.

GREEN & SKLARZ LLC

43

43

PPP Loans: Affiliation Rules

- The CARES Act adopts SBA terminology and allows businesses that are a "small business concern" as defined by § 3 of the Small Business Act, 15 U.S.C. § 636 and its regulations, and other "business concerns" to obtain PPP loans.
- The SBA determines whether a business is a "small business concern" by looking to regulations defining the number of employees or gross revenue. Pursuant to 13 C.F.R. § 120.100: "To be eligible for an SBA business loan, a small business applicant must: (a) Be an operating business (except for loans to Eligible Passive Companies); (b) Be organized for profit; (c) Be located in the United States; ***(d) Be small under the size requirements of part 121 of this chapter (including affiliates). See subpart H of this part for the size standards of part 121 of this chapter which apply only to 504 loans***; and (e) Be able to demonstrate a need for the desired credit."

GREEN & SKLARZ LLC

44

44

PPP Loans: Affiliation Rules

- 13 C.F.R. § 120.201 sets forth the size limits for companies, based on NAICS code.
- Size limits can be *head count based* or *revenue based*
- For example:
  - A company with the NAICS code of 314110 (carpet and rug mills), may have as many as 1,500 employees and still qualify as a small business.
  - A company with the NAICS code of 115114 (postharvest crop activities, except cotton ginning) may have gross revenues of $30 million.
- Thus, if the borrower would qualify under regular SBA rules as a "small business concern," it can obtain a PPP loan even though it employee more than 500 FTEs.

GREEN & SKLARZ LLC

45

45

PPP Loans: Affiliation Rules

- FAQ 5 supports this analysis:
  - Question: Are borrowers required to apply SBA's affiliation rules under 13 C.F.R. 121.301(f)?
  - Answer: Yes. Borrowers must apply the affiliation rules set forth in SBA's Interim Final Rule on Affiliation. ***A borrower must certify*** on the Borrower Application Form that the borrower is eligible to receive a PPP loan, and that certification means ***that the borrower is a small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632), meets the applicable SBA employee-based or revenue-based size standard, or meets the tests in SBA's alternative size standard,*** after applying the affiliation rules, if applicable. SBA's existing affiliation exclusions apply to the PPP, including, for example the exclusions under 13 CFR 121.103(b)(2). [Emphasis added.]

GREEN & SKLARZ LLC

46

46

Main Street Lending Program

GREEN & SKLARZ LLC

47

47

Main Street Lending Program: Background

- On April 30th, the Fed issued additional guidance concerning implementation of the program. There will be 3 primary facilities.
- As part of the CARES Act, Congress authorized the Treasury Department and Federal Reserve to establish special credit facilities to assist small and medium sized businesses, in addition to the Paycheck Protection Program loans ("PPP Loans").
- Fed will deploy up to $2.3 *trillion* together with $454 billion from Treasury to support the programs through the Main Street Lending Program ("MSLP").
- The Fed solicited comments on the MSLP and companion programs through April 16th.
- A SPV, administered by the Boston Fed, will purchase loans originated by banks.

GREEN & SKLARZ LLC

48

48

Main Street Lending Program: Background

- Treasury has released basic terms.
- Continued further guidance is needed to understand how these credit facilities will work in practice.
- Detailed FAQ released on April 30th
  https://www.federalreserve.gov/monetarypolicy/files/main-street lending-faqs.pdf
- 3 core programs:
  - New Loan Facility ("MSNLF")
  - Extended Loan Facility ("MSELF")
  - Priority Loan Facility ("MSPLF")
- Key differences are how facilities address borrower's present debt load.
- SPV may purchase up to $600 billion in loans.
- Program will stop purchasing September 30, 2020.

GREEN & SKLARZ LLC

49

49

General Borrower Eligibility Criteria

- Eligible Borrowers:
  - Established prior to March 13, 2020
  - Up to 15,000 employees; or
  - Up to $5 billion in 2019 revenue
  - For profit enterprise
  - NFPs may be allowed to participate but not yet
- Eligible Lenders: Any federally insured lending institution
- Loan Terms:
  - 4 year maturity
  - 1 year deferred P&I, with deferred interest capitalized
  - Rate: LIBOR + 3%
  - No prepayment penalty

GREEN & SKLARZ LLC

50

50

General Borrower Eligibility Criteria

- Underwriting:
  - Lender must assess each borrower with their "own underwriting standards." FAQ F.1.
  - If borrower has other loans, must meet "pass" standard under Financial Institutions Examination Council's supervisory rating system.
- Collateral Requirement: Unclear. FAQ G.6 says can be either secured or unsecured.
- Origination Fee: 1% origination fee on the principal of the loan
- Servicing Fee:
  - Up to 1% paid by borrower
  - 0.25% paid by SPV
- Other than a PPP loan, no other CARES Act support.

GREEN & SKLARZ LLC

51

51

General Borrower Certifications

- Will not pay balance of other loans until Main Street facility is repaid.
- Will not cancel existing loans.
- Can meet financial obligations for next 90 days.
- Does not expect to file for bankruptcy during next 90 days.
- Will follow other CARES Act requirements, including compensation, and conflict of interest requirements.
- Will make "commercially reasonable" efforts to retain employees.

GREEN & SKLARZ LLC

52

52

General Lender Requirements

- Proceeds will not be used to refinance old loans.
- No cancelation of outstanding loan facilities.
- Certification of methodology for calculating EBITDA (i.e. the Fed is not mandating a methodology, but lender must select an appropriate procedure).
- CARES Act conflict of interest rules have been met.

GREEN & SKLARZ LLC

53

53

Main Street New Loan Facility

- Borrower must not have existing term loan facilities.
- Loan Size:
  - Minimum: $500,000
  - Maximum: Lesser of (a) $25 million or (b) 4x EBITDA, less committed and available credit.
- No specific collateral requirement.
- MSNLF loans are *not* supposed to be for distressed businesses, grants or forgivable.

  They are for companies that were financially doing well before COVID-19 and were impacted. The intent of the program is to give otherwise healthy companies inexpensive liquidity.
- Borrowers cannot also participate in MSELF or MSPLF.
- Loan originated after April 24, 2020.
- Repayment: No payment year 1; 1/3rd P&I years 2-4.

GREEN & SKLARZ LLC

54

54

Main Street Expanded Loan Facility

- Allows borrowers to increase borrowing, with less risk to the lender.
- Borrower must be seeking to upsize a loan made prior to 4/24/2020.
- Loan Size:
  - Minimum : $10 million
  - Maximum: Lesser of (a) $200 million, (b) 35% borrowers outstanding and available credit, or (c) 6x 2019 EBITA, less committed and available credit.
- Collateral Requirements: Any collateral securing the original loan must secure the upsized loan. FAQ D.1.
- Repayment: No payment year 1
  - Interest repayment: 15% in year 2, 15% in year 3, and 70% in year 4.
  - Principal repayment: 1/3rd years 2-4.

GREEN & SKLARZ LLC

55

55

Main Street Priority Loan Facility

- Can be used to refinance existing debt from a *different* lender. *See FAQ-H.3*
- Loan Size:
  - Minimum : $500,000.
  - Maximum Loan Size: Lesser of (a) $25 million, (b) 30% borrowers available credit, or (c) 6x 2019 EBITA, less committed and available credit.
- SPV will only buy 85% participation, so lender is at risk for 15% (as opposed to 5%) of the loan.
- Repayment: No payment year 1.
  - Interest repayment: 15% in year 2, 15% in year 3, and 70% in year 4.
  - Principal repayment: 1/3rd years 2-4.

GREEN & SKLARZ LLC

56

56

Feds Summary of Programs

Main Street Lending Program Loan Options	New Loans	Priority Loans	Expanded Loans
Term	4 years	4 years	4 years
Minimum Loan Size	$500,000	$500,000	$10,000,000
Maximum Loan Size*	The lesser of $25M or an amount that, when added to outstanding and undrawn available debt, does not exceed 4.0x adjusted 2019 EBITDA	The lesser of $25M or an amount that, when added to outstanding and undrawn available debt, does not exceed 6.0x adjusted 2019 EBITDA	The lesser of $200M, 35% of existing outstanding and undrawn available debt, or an amount that, when added to outstanding and undrawn available debt, does not exceed 6.0x adjusted 2019 EBITDA
Risk Retention	5%	15%	5%
Payment (year one deferred for all)	Years 2-4: 33.33% each year	Years 2-4: 15%, 15%, 70%	Years 2-4: 15%, 15%, 70%
Rate	LIBOR + 3%	LIBOR + 3%	LIBOR + 3%

**Press Release, Federal Reserve Board announces it is expanding the scope and eligibility for the Main Street Lending Program (4/30/2020)

GREEN & SKLARZ LLC

57

57

Compensation Limitations (CARES Act)

- Any non-union employee/officer with more than $425,000 in 2019 compensation cannot have their total compensation for any 12-month period exceed their 2019 compensation.
- For any employee/officer/agent with more than $3 million total compensation in 2019, the person's 12-month earnings cannot exceed $3 million plus 50% of the excess he or she earned over $3 million in 2019.

  Example: Jane Goodseller earned $5 million in 2019. For the 12-months following the extension of a MSNLF loan, she cannot earn more than $3 million + 50% of $2 million. Thus, her maximum earnings are $4 million.
- Severance payment cannot exceed two times their 2019 salary.

GREEN & SKLARZ LLC

58

58

Take Aways

- With underwriting delegated to bank, it is unclear what criteria will be used to lend.
- Not clear why the MSPLF – the only facility that allows a refinance – would require a new lender.
- Usefulness of MSNLF is unclear, given it requires payment of 1/3rd of loan in years 2-4.
- Essentially, these are all bridge facilities, that will need to be refinanced.
- Prohibition on use by chapter 11 debtors is unfortunate.

GREEN & SKLARZ LLC

59

59

Business Tax Provisions

GREEN & SKLARZ LLC

60

60

Small Business Tax Provisions

- The CARES Act clearly attempted to help businesses by allowing deductions to be accelerated or carried back and payments to be deferred.
- How much it will help is yet to be seen.
- Employee Retention Tax Credits is in the business section of the Act (Title II, Subtitle C).

GREEN & SKLARZ LLC

61

61

Employee Retention Credit

- The act creates refundable payroll tax credit for 50% of qualified wages paid from 3/13/2020 through 12/31/2020 for employers whose
  - a. operations were fully or partially suspended due to a COVID-19 related shut-down order, or
  - b. gross receipts declined by more than 50% when compared to the same quarter in the prior year.
- The credit is capped at the first $10K of compensation (including health benefits) paid to employees. (§2301)

GREEN & SKLARZ LLC

62

62

Delay of payment of employer payroll taxes

- Employers and self-employed individuals can defer payment of the employer's share (6.2%) of the Social Security payroll tax
- Amounts deferred must be repaid over two years: 50% must be repaid in 2021 and the balance in 2022.
- Any agent that defers payment of the trust funds taxes during the deferral period (2020) will be non-responsible if they do so at the owner's direction
- The owner would be solely responsible for the trust fund portion of the employment taxes deferred during 2020

GREEN & SKLARZ LLC

63

63

Net Operating Losses

- NOLs arising in tax years 2018, 2019, or 2020 may be carried back 5 years. (significant tax savings because allows carrybacks to pre-TCJA years when the top corporate tax rate was 35%)
- It removes the 80% of taxable income limitation, retroactively, so that NOLs can fully offset taxable income in 2018, 2019, and 2020, regardless of the year in which they arose (80% rule goes back into effect for 2021)
- The bill does not change the rules for capital losses, which can be carried back 3 years and forward 5 years.

GREEN & SKLARZ LLC

64

64

§461(l) excess business loss rules

- Repeals the excess business loss ("EBL") limitation for tax years 2018 through 2020
- Allows pass-through businesses and sole proprietors to utilize losses sooner

GREEN & SKLARZ LLC

65

65

Refunds for AMT Credits

- Since the repeal of the corporate AMT, carryover AMT credits currently are refundable over several years, with the balance fully refundable in 2021.
- This provision accelerates the recovery time, enabling C corporation to obtain a refund of 50% in 2018 and the balance in 2019, unless the taxpayer elects to claim the entire refundable credit in 2018

GREEN & SKLARZ LLC

66

66

Modification of §163(j) interest deduction limitation

- This provision increases taxpayer's permitted interest deduction by increasing the 30%-of-ATI limitation to 50% (with adjustments) for 2019 and 2020.
- Taxpayers generally can elect out of the 50% rule, can elect to use their 2019 ATI in the 2020 tax year, and there are certain limitations applicable to partnerships.

GREEN & SKLARZ LLC

67

67

Technical amendment regarding qualified improvement property

- Qualified improvement property (QIP) has a recovery period of 15 years for general depreciation, and is eligible for bonus depreciation.
- If the alternative depreciation system (ADS) is used, because the real property business elected out of §163(j), for example, then QIP has a 20-year recovery period and is not eligible for bonus depreciation.
- The bill fixes this retroactively so that businesses, especially in the hospitality industry, will be able to utilize bonus depreciation and write off immediately costs associated with improving facilities instead of having to depreciate them over a 39-year period

GREEN & SKLARZ LLC

68

68

Excise tax for alcohol used to produce hand sanitizer

The provision waives in calendar year 2020 the federal excise tax on any distilled spirits used for or contained in certain FDA-compliant hand sanitizers.

GREEN & SKLARZ LLC

69

69

IRS Notice 2020-32

- A business does not get a deduction for using PPP money to pay "covered expenses".
- So if you use $100,000 of PPP money on payroll, the business cannot deduct $100,000 as a business expense too.
- IRS has received significant push back
- On May 5th S.3612 was introduced on a bipartisan basis to allow businesses to deduct such expenses (even if they were paid for with forgivable loans and no COD is recognized)

GREEN & SKLARZ LLC

70

70

Civil and Administrative Oversight

GREEN & SKLARZ LLC

71

71

Civil and Administrative Oversight

- FAQ 39 – Treasury will "review" loan applications
  - All loans over $2 million
  - Certain other loans
- FAQ 46 – limited review to loans over $2 million
  - If the borrower repays the loan, no further administrative action
  - No "review" criteria released yet
- Companies receiving PPP loans in the first tranche of funding, will be submitting applications for forgiveness in mid June.

GREEN & SKLARZ LLC

72

72

Civil and Administrative Oversight

- Lender determines whether loan is forgivable in the first instance
- Criteria for forgiveness
- Appeal rights

GREEN & SKLARZ LLC

73

73

Civil and Administrative Oversight

- Which agency will conduct the "reviews"?
- What will the reviewing agency review?
  - Eligibility
  - Good faith certification
  - Use of funds
- What information will they look at?
- How will the audit be conducted?
  - Field, correspondence, based on documents submitted to lender
- Appeal and judicial review rights

GREEN & SKLARZ LLC

74

74

Civil and Administrative Oversight

- No answers / no standards for "review" procedures.
- What are the consequences?
  - **To lender**: Appears none under FAQ 46 ("SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.")
  - **To borrower**:
    - If repaid: no administrative enforcement or referral
      - Also unclear: if "administrative enforcement or referral" precludes an independent criminal investigation (we suspect not)
    - If no repaid: unclear, but civil and criminal liability is possible

GREEN & SKLARZ LLC

75

75

Civil and Administrative Oversight

- SBA defines "good faith" under the 7(a) loan program as: "the absence of any intention to seek an unfair advantage or to defraud another party; i.e., an honest and sincere intention to fulfill one's obligations in the conduct or transaction concern." *7(a) Loan Servicing & Liquidation* at 12, Sm. Bus. Admin (Mar. 1, 2013)
- Will a different standard be applied to PPP loans?

GREEN & SKLARZ LLC

76

76

Civil and Administrative Oversight: Existing SBA Audit Standards

- Occur when loans default for unexpected reasons, concerns arise, upon request of SBA official, or randomly
- Conducted by SBA Inspector General, Audit Division
- Objectives of Audits:
  - SBA non-compliance with its policies and procedures
  - Borrower non-compliance with the loan agreement
  - Borrower misrepresentations
- Government Auditing Standards ("GAS") apply

GREEN & SKLARZ LLC

77

77

Criminal Enforcement

GREEN & SKLARZ LLC

78

78

Criminal Enforcement

- On May 4, 2020, first criminal charges brought in *U.S. v. Staveley*, 1:20-mj-34-LDA (D. RI)
  - Falsified application
  - Phantom employees
  - Non-existent businesses
- Clear claims of garden-variety fraud
- Bank fraud, 18 USC 1344
- Mail and wire fraud, 18 USC 1341, 1343
- Making false statements on a government document. 18 USC 1001

GREEN & SKLARZ LLC

79

79

Criminal Enforcement: CARES Act Specific Violations

- Most financial crimes are *specific intent*.
- Generally speaking, proof of fraudulent intent requires: "that the defendant had a conscious, knowing intent to defraud [and] that the defendant contemplated or intended some harm to the property rights of the victim." *USA v. Kenner*, 272 F. Supp. 3d 342, 405 (E.D.N.Y. 2017).
  - In other words, you intend to do something that is untrue or are trying to trick someone
  - Making a mistake is not fraud – because there is a lack of intent
  - "The mail fraud statute does not criminalize the charging of an allegedly excessive fee, where, as here, a corporate agent with at least apparent authority to do so agreed to the fee, received no personal benefit from the fee, and was not deceived by the payee. *USA v. D'Amato*, 39 F.3d 1249, 1261–62 (2d Cir. 1994).

GREEN & SKLARZ LLC

80

80

Criminal Enforcement: CARES Act Specific Violations

- This means the certifications in the PPP loan application are judges as the time the application was made
- If the borrower did not falsify information to obtain funds improperly – no crime
- *Open question*: can a borrower be prosecuted for making a false good faith certification?
  - What does "necessary" mean
  - FAQ 31, published April 23rd is what created the ambiguity
  - Difficult to prosecute
- FAQ 17 says borrowers "may rely on the laws, rules, and guidance available at the time of the relevant application" and *don't* need to change their position as guidance updates
  - Not clear what this means in light of FAQ 31, 37, and 46

GREEN & SKLARZ LLC

81

81

Criminal Enforcement: CARES Act Specific Violations

- Can you be prosecuted for using PPP loan proceeds other than for covered expenses?
- What if you use the money with the intent to repay it?

GREEN & SKLARZ LLC

82

82

Questions

Email:
Jeff: jsklarz@gs-lawfirm.com
Eric: egreen@gs-lawfirm.com

Ph. (203) 285-8545

GREEN & SKLARZ LLC

83

83

Eric L. Green

My name is Eric Green. After 20 years as a Tax Attorney and 14 years teaching and writing about tax representation, I saw the need to help CPAs and EAs learn this area.

The demand is huge – my law practice has exploded to 22 employees focusing on tax resolution. I started a program for tax professionals like you because you are uniquely qualified and accredited to do this work. And having worked several tax seasons myself at the beginning of my career, I now know there is a better way of life!

Add a Profitable New Revenue Stream to Your Tax Firm

- Earn What You're Worth
- Make More with Fewer Clients
- Benefit from Less Competition
- Get Paid in Advance
- Collect a Steady Cash Flow All Year Round
- Escape the Stress of Busy Season
- Serve Grateful Clients

Learn How with Tax Rep Network

"Eric, I took your advice and started my IRS representation practice after the course. Without any further advertising other than adding "IRS Representation Practice" to my sign, I added an immediate $18,000 to my billings on just a few client matters. Marketing to my own clients added more than $140,000 in income by the end of the first year! The workshop is straightforward and easy to follow, my only regret being that I did not do this sooner. Thank you!" - *Anthony Delucia*

"The representation side of my practice has just exploded thanks to Eric. I have added staff and now focus my business on much more lucrative representation matters. There is no way this would have happened without his expertise…" - *Dawn B.*

"I just wanted to say thank you for today's webinar. I have been doing taxes for 19 years and this was by far the best training that I have ever attended, and I attend a lot."- *Stan F.*

Find Out More: Taxrepllc.com

TRN
TAX REP NETWORK

203-285-8545 | support@taxrepllc.com

The Tax Rep Network Team

Eric L. Green
Instructor & Coach

Jeffrey Sklarz
Instructor & Coach

Amanda Evans
Coach

Sandi Leyva
Marketing Instructor

WHAT YOU GET

Two Books

Video Training Library

IRS Representation Conference

Checklists and Downloads

The 100K Challenge

Marketing Support

Advanced Training

Discussion Forum

Software Discounts

Case Studies

Q&A

Find Out More: Taxrepllc.com

TRN
TAX REP NETWORK

203-285-8545 | support@taxrepllc.com

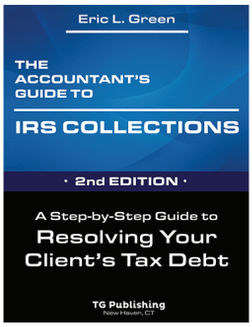
Testimonials

"Eric has done a great job outlining the steps needed to help resolve a taxpayer's IRS debt. His use of practical examples, exhibits, and clear explanations is very valuable. This book is helpful for those with little experience with the IRS collection process as well as a good review for those more experienced in IRS collection matters." *-Terry D., EA*

"Eric Green has offered a superb resource for CPAs! This book takes you by the hand and guides you step by step through the intricacies of the IRS Collection process. Eric draws on his real-life experience with clients and shares these stories for the benefit of the reader. The exhibits are super thorough. I find it very easy to follow and loved the practice tips. Keep it on your desk!" *-Allie P., ESQ*

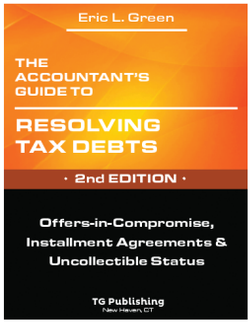
"WOW!! Eric Green's The Accountants Guide to IRS Collection covers every aspect of the Federal Collection Process. The book is filled with a HOT TIPS and is a step by step guide to various approaches the resolving your clients collection issues. A must have book in every practitioners office." *-Ray L., EA*

The Accountant's Guide to IRS Collection: A Step-by-Step Guide to Resolving Your Client's Tax Debt



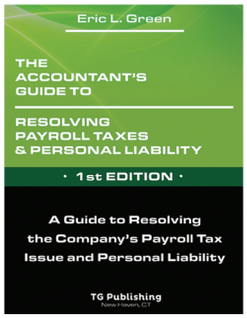
If you've been thinking about expanding your tax practice to serve clients that are behind in filing or payments or both, then this is perfect guide. You'll learn the procedures you need to know so you can add this lucrative, in-demand service to your tax practice.

The Accountant's Guide to Resolving Tax Debts: Offers-in-Compromise, Installment Agreements, and Uncollectible Status



More than 14 million people owe the IRS money, and many of them need the help of a tax resolution professional. This guide steps you through the procedures you need to know to help tax clients who have debt with the IRS.

The Accountant's Guide to Resolving Payroll Taxes & Personal Liability: A Guide to Resolving the Company's Payroll Tax Issue and Personal Liability



Unpaid payroll taxes are the number one reason why small businesses get into tax trouble. Complete with procedures, forms, case studies and checklists, this guide has everything you need to help clients navigate payroll tax debt with the IRS.

Find Out More: TGPublish.com

203-285-8545 | info@tgpublish.com

Testimonials

"The representation side of my practice has just exploded thanks to Eric. I have added staff and now focus my business on much more lucrative representation matters. There is no way this would have happened without his expertise…" -*Dawn B.*

"My tax practice has grown because of Tax Rep Network. It gave me an opportunity to understand the client more. It gave best case and worst case scenarios, which is always great. At least I knew what to do and how to make the best decision for the client. So yes, it has helped tremendously." -*Amber P.*

"I joined Tax Rep, LLC because I realized I needed a revenue stream outside of tax season. When my first tax season ended, I was thinking, 'Wow, I'm not going to have as much revenue.' I got trained as a tax resolution specialist, and I've been able to really grow my practice and help clients. I've probably increased my revenue by $150,000. I'm a solo practitioner, so it's not as big as maybe some others, but without Tax Rep, LLC and Eric Green's help, none of that would've been possible." -*Patrick W.*

Eric L. Green

Attorney Eric L. Green is a practicing tax attorney, author, speaker, and coach. He founded Tax Rep LLC which runs the popular tax representation practice-growth training and coaching program Tax Rep Network. Through his role as the primary instructor and coach at Tax Rep Network, he has helped hundreds of accountants start and grow successful tax representation practices.

Eric is a partner and founder of law firm Green & Sklarz LLP, which is based in New Haven, Connecticut, where his focus is taxpayer representation before the IRS, Department of Justice Tax Division and state departments of revenue. Prior to becoming an attorney, Eric served as a senior tax consultant for national and international accounting firms, including KPMG and Deloitte & Touche.

Eric developed a national reputation by building a remarkable record of negotiating favorable settlements in thousands of civil cases against government agencies and has also been able to convince government agents and attorneys to forgo criminal charges and civilly resolve many cases.

Eric is a Fellow of the American College of Tax Counsel, an organization in which membership is an honor reserved for those at the top of their chosen profession. The College's members, called "Fellows," are recognized for their extraordinary accomplishments and professional achievements and for their dedication to improving the practice of tax law. Fellows must be nominated by their peers for this honor.

Eric is a frequent lecturer at American Bar Association Tax Section conferences, accounting conferences, and state Enrolled Agent conferences. He served as adjunct faculty at the University of Connecticut School of Law where he taught law students to handle taxpayer representation matters in the low income taxpayer clinic. He is often quoted in the Wall Street Journal, USA Today, CreditCard.com and Consumer Reports Financial News.

Eric is the author of the Accountant's Guide to IRS Collection, the Accountant's Guide to Resolving Tax Debts, a contributing author on Advocating for Low Income Taxpayers: A Clinical Studies Casebook and was interviewed for the book Stop Hiding from the IRS: The Insider's Guide to Solving Your Tax Debts Once and For All.

Attorney Green received his Bachelor of Business Administration degree in Accounting with a minor in International Business from Hofstra University and is an honors graduate from New England School of Law. He earned a Masters of Laws in Taxation from Boston University School of Law.

Find Out More: TGPublish.com

203-285-8545 | info@tgpublish.com