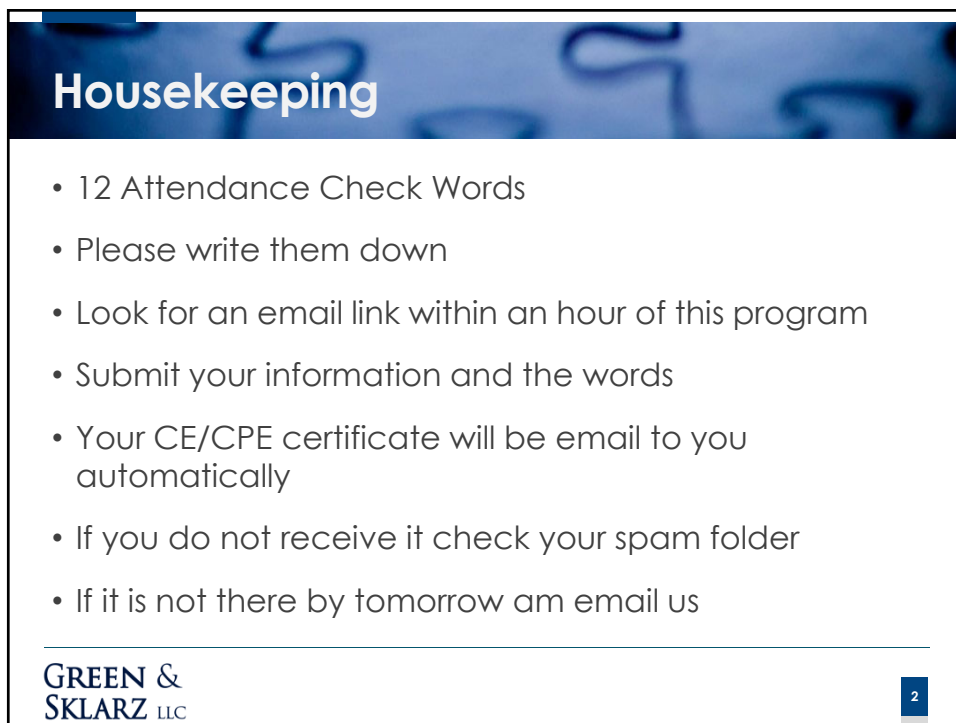
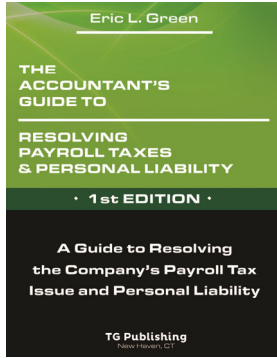


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Release of the New Accountant's Guide



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!

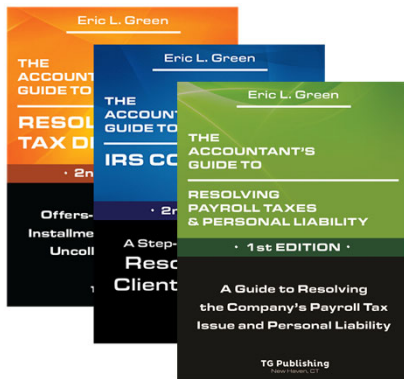
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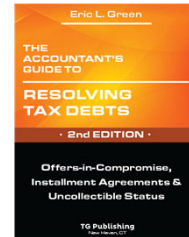
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The Ultimate Offer-in-Compromise Workshop

- 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!**



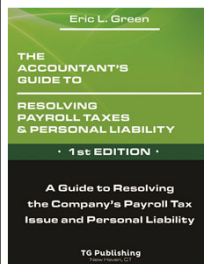
Register here: <https://taxrepllc.com/program-20200515-ultimate-oic-workshop/>

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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/>

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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

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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.

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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

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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

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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

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PPP Loans

- Generally 500 or 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.

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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).

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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

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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.

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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?

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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”

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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.

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PPP Loans: Good Faith Certification

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

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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”

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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?

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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?*

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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

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.”

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

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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

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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

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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?

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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

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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 NOI 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.

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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*

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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?

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PPP Loans: Loan Forgiveness

Reduction in Forgiveness

- Forgiveness is reduced *pro rata* based on:
 - Failure to rehire 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)

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

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.

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.

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

$$\text{Thus: } \$416,667.50 \times \frac{7}{10} = \$291,667.30 \text{ [disallowed amount]} \\ \rightarrow \underline{\$125,000.25 \text{ [amount forgiven]}}$$

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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

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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

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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: \$50,000/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 8/52^{nds} during the covered period, the balance must be repaid over 2 years, but there is a 6 month payment deferral.

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%.

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

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

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.

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.”

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.

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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.]

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Main Street Lending Program

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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.

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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.

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

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.

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.

General Lender Requirements

- Proceeds will not be used to refinance old loans.
- No cancellation 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.

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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.

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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.

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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.

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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)




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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.



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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.

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Business Tax Provisions

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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).

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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)

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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

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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.

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§461(I) 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

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

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.

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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

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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.



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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)

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Civil and Administrative Oversight

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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.

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Civil and Administrative Oversight

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

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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

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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

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?

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

Criminal Enforcement

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

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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).

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Criminal Enforcement: CARES Act Specific Violations

- This means the certifications in the PPP loan application are judged 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

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?

Questions



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