

PPP & EIDL Loans: What Happens Now that the Free Money is No Longer Free?

December 3, 2021

Jeffrey M. Sklarz, Esq.

Green & Sklarz LLC
One Audubon Street, Third Floor
New Haven, CT 06511
(203) 285-8545
www.gs-lawfirm.com



A Brief History of Coronavirus Relief

- 3/18/2020 Families First Coronavirus Response Act, P.L. 116-127
- 3/27/2020 Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, P.L. 116-136
- 6/5/2020 Paycheck Protection Program Flexibility (“PPPFA”) Act, P.L. 116-142
- 8/8/2020 Executive Order Deferring Payroll Taxes
- 11/19/2020 Rev. Rul. 2020-27
- 12/27/2020 Consolidated Appropriations Act (“CARES II”)
- 3/11/2021 American Rescue Plan (“ARP”)
- 11/15/2021 Infrastructure Investment and Jobs Act (“Infrastructure Act”)
- 11/19/2021 SBA Updated COVID Related EIDL Program

Agenda

- PPP loan forgiveness
- PPP enforcement issues
- Tax issues for PPP loans
- EIDL Loans and Work Out Options
- COD Income
- ERTCs
- Questions

PPP Loans Generally

PPP Loans Generally

No more PPP Loans – Closed as of May 31, 2021

First Draw

- Amount of loan: 2.5x your average payroll costs
 - Wages, self-employed income, healthcare costs (for employees), retirement contributions (for employees and employee/owners of C-corps)
- PPP money may be spent over 24 weeks
- 60% must be spent on payroll but no cliff (pro rata reduction of forgiveness)
- Can use to refinance EIDL loans
- 1% interest on repayable amount
- 5 year repayment term (or 2 years for pre-June 5, 2020 PPP loans)

PPP Loans Generally (cont.)

Second Draw

- Previously received a First Draw PPP loan that was full used on authorized expenses
- Demonstrated 25% or great reduction of gross receipts from 2019 to 2020
- Amount of loan: 2.5x your average payroll costs (3.5x for hospitality industry)
 - Wages, self-employed income, healthcare costs (for employees), retirement contributions (for employees and employee/owners of C-corps)
- PPP money may be spent over 24 weeks
- 60% must be spent on payroll but no cliff (pro rata reduction of forgiveness)
- Can use to refinance EIDL loans
- 1% interest on repayable amount
- 5 year repayment term (or 2 years for pre-June 5, 2020 PPP loans

Filling Out the 3508

Summary

- Form of Application
 - Long form – SBA Form 3508
 - Short form – SBA Form 3508EZ
 - Simple form – SBA Form 3508S
- Loan forgiveness process (Forgiveness IFR, Forgiveness FAQ, Appeals Rule)
- Clarification of issues
 - Covered Period vs. Alternative Payroll Covered Period for computing payroll costs and forgiveness
 - “Payroll costs paid” and “payroll costs incurred”
 - Loan forgiveness if 60% payroll cost test is not met
 - PPP Schedule A computation of FTE and payroll rate reductions
 - Definition of Full-Time Equivalent Employee
 - Definition of Cash and Non-Cash Compensation
 - Exceptions to FTE reduction and safe harbor
- Good faith certifications and potential legal implications for lender and borrowers

PPP Loan Forgiveness Application

- Name of business
- First or Second Draw
- Length of covered period
- Amount spent on payroll costs
- Requested amount of forgiveness
- Submit to your lender (generally)
 - Under some circumstances borrowers can submit the forgiveness application directly to the SBA
- You must submit a separate forgiveness form for First and Second Draw loans

Form 3508S

- Use if your PPP loan(s) were \$150,000 or less
- No reduction in FTEs or compensation
- 1 page - very easy to complete
- No calculations required
- No documents need to be submitted – but borrower must retain certain documents for 4 years (actually 3 years for non-payroll documents, but lets keep it simple)
- If forgiveness is sought for a Second Draw, and revenue reduction documents were no previously submitted, the lender (or SBA) may require additional documentation



Paycheck Protection Program

PPP Loan Forgiveness Application Form 3508S Revised July 30, 2021

OMB Control No.: 3245-0407
Expiration Date: 01/31/2022

A BORROWER MAY USE THIS FORM ONLY IF THE BORROWER RECEIVED A PPP LOAN OF \$150,000 OR LESS

Business Legal Name ("Borrower")		DBA or Tradename, if applicable	
Business Address	NAICS Code	Business TIN (EIN, SSN, ITIN)	Business Phone
		() -	
		Primary Contact	E-mail Address

First Draw PPP Loan Second Draw PPP Loan (check one)

SBA PPP Loan Number: _____

Lender PPP Loan Number: _____

PPP Loan Amount: _____

PPP Loan Disbursement Date: _____

Amount of PPP Loan Increase (if applicable): _____

Date of PPP Loan Increase (if applicable): _____

Employees at Time of Loan Application: _____

Employees at Time of Forgiveness Application: _____

Covered Period: _____ to _____

Amount of Loan Spent on Payroll Costs: _____ Requested Loan Forgiveness Amount: _____

By Signing Below, You Make the Following Representations and Certifications on Behalf of the Borrower:

The Authorized Representative of the Borrower certifies to all of the below by initialing next to each one.

- The Borrower has complied with all requirements in the Paycheck Protection Program Rules (Sections 7(a)(36), (7)(a)(37), and 7A of the Small Business Act, the PPP interim final rules, and guidance issued by SBA through the date of this application), including the rules related to:
- eligible uses of PPP loan proceeds;
 - the amount of PPP loan proceeds that must be used for payroll costs (including proprietor expenses for Borrowers that applied for loans using SBA Forms 2483-C or 2483-SD-C);
 - the calculation and documentation of the Borrower's revenue reduction (if applicable); and
 - the calculation of the Borrower's Requested Loan Forgiveness Amount.
- Information regarding these requirements may be found in the Form 3508S Instructions and the Paycheck Protection Program Rules.

- The information provided in this application is true and correct in all material respects. I understand that knowingly making a false statement to obtain forgiveness of an SBA-guaranteed loan is punishable under the law, including 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.

Following submission of this forgiveness application, the Borrower must retain all records necessary to prove compliance with Paycheck Protection Program Rules for four years for employment records and for three years for all other records. SBA may request additional information for the purposes of evaluating the Borrower's eligibility for the PPP loan and for loan forgiveness, and the Borrower's failure to provide information requested by SBA may result in a determination that the Borrower was ineligible for the PPP loan or in a denial of the Borrower's loan forgiveness application.

The Borrower's eligibility for loan forgiveness will be evaluated in accordance with the Paycheck Protection Program Rules. SBA may direct a lender to disapprove the Borrower's loan forgiveness application if SBA determines that the Borrower was ineligible for the PPP loan.

Signature of Authorized Representative of Borrower

Date

Print Name

Title

Form 3508EZ

- If your PPP loan(s) were more than \$150,000
- Use if there were no reductions in FTEs or compensation during covered period
- 1 page – easy to complete – but requires a bit more information than 3508S
- Requires itemization of covered expenses to justify forgiveness
- Do *not* use if you (a) reduced FTEs or compensation **or** (b) cannot certify that your business qualified for the safe harbor

In addition, the Authorized Representative of the Borrower must certify by **initialing at least ONE** of the following two items:

____ The Borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period (other than any reductions that arose from an inability to rehire individuals who were employees on February 15, 2020, if the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020 (or, for a PPP loan made after December 27, 2020, before the last day of the Covered Period), and reductions in an employee's hours that a borrower offered to restore and were refused).

____ The Borrower 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 (or, for a PPP loan made after December 27, 2020, requirements established or guidance issued before the last day of the Covered Period), 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 of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.

Form 3508 (cont.)

- You must submit the required documentation
 - Bank statements or payroll forms showing compensation paid
 - Payroll tax returns
 - Documentation to show payment of employee benefits
 - Cancelled checks / proof of payment for non-payroll expenses with invoices (if applicable)
- Remember: under CARES II, covered non-payroll expenses include:
 - Certain damaged property replacement costs
 - Covered supplier costs
 - Payments made to suppliers of goods pursuant to contracts, orders, or purchase orders **in effect before the covered period** (or, for perishable goods, in effect before or during the covered period), for the supply of goods that “are essential to the operations of the borrower at the time at which the expenditure is made”
 - Covered worker protection payments
- Additional documentation must be retained but not submitted, such as documentation for employees who were offered a return to work but refused
- Records are to be retained for 6 years



Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ Revised July 30, 2021

OMB Control No.: 3245-0407
Expiration Date: 01/31/2022

Business Legal Name ("Borrower")		DBA or Tradename, if applicable	
Business Address	NAICS Code	Business TIN (EIN, SSN, ITIN)	Business Phone
		() -	
		Primary Contact	E-mail Address

First Draw PPP Loan Second Draw PPP Loan (check one)

SBA PPP Loan Number: _____ Lender PPP Loan Number: _____

PPP Loan Amount: _____
Amount of PPP Loan Increase (if applicable): _____ Date of PPP Loan Increase (if applicable): _____

Employees at Time of Loan Application: _____ Employees at Time of Forgiveness Application: _____

Covered Period: _____ to _____

Forgiveness Amount Calculation:

Payroll and Nonpayroll Costs

Line 1. Payroll Costs: _____

Line 2. Business Mortgage Interest Payments: _____

Line 3. Business Rent or Lease Payments: _____

Line 4. Business Utility Payments: _____

Line 5. Covered Operations Expenditures: _____

Line 6. Covered Property Damage Costs: _____

Line 7. Covered Supplier Costs: _____

Line 8. Covered Worker Protection Expenditures: _____

Potential Forgiveness Amounts

Line 9. Sum the amounts on lines 1 through 8: _____

Line 10. PPP Loan Amount: _____

Line 11. Payroll Cost 60% Requirement (divide Line 1 by 0.60): _____

Forgiveness Amount

Line 12. Forgiveness Amount (enter the smallest of Lines 9, 10, and 11): _____

Form 3508

- Use if FTEs or compensation was reduced
- Must complete the “Schedule A” worksheet to calculate forgiveness reduction
- FTE/compensation safe harbors still applies



Paycheck Protection Program
Loan Forgiveness Application Form 3508 Revised July 30, 2021

OMB Control No.: 3245-0461
Expiration Date: 01/01/2021

PPP Loan Forgiveness Calculation Form

Business Legal Name ("Borrower")		DBA or Tradename, if applicable	
Business Address	NAICS Code	Business TIN (EIN, SSN, ITIN)	Business Phone
		() -	
		Primary Contact	E-mail Address

First Draw PPP Loan Second Draw PPP Loan (check one)

SBA PPP Loan Number: _____ Lender PPP Loan Number: _____

PPP Loan Amount: _____ PPP Loan Disbursement Date: _____

Amount of PPP Loan Increase (if applicable): _____ Date of PPP Loan Increase (if applicable): _____

Employees at Time of Loan Application: _____ Employees at Time of Forgiveness Application: _____

Covered Period: _____ to _____

Forgiveness Amount Calculation:

Payroll and Nonpayroll Costs:

Line 1. Payroll Costs (enter the amount from PPP Schedule A, line 10): _____

Line 2. Business Mortgage Interest Payments: _____

Line 3. Business Rent or Lease Payments: _____

Line 4. Business Utility Payments: _____

Line 5. Covered Operations Expenditures: _____

Line 6. Covered Property Damage Costs: _____

Line 7. Covered Supplier Costs: _____

Line 8. Covered Worker Protection Expenditures: _____

Adjustments for Full-Time Equivalency (FTE) and Salary/Hourly Wage Reductions:

Line 9. Total Salary/Hourly Wage Reduction (enter the amount from PPP Schedule A, line 3): _____

Line 10. Sum the amounts on lines 1 through 8, then subtract the amount entered in line 9: _____

Line 11. FTE Reduction Quotient (enter the number from PPP Schedule A, line 13): _____

Potential Forgiveness Amounts:

Line 12. Modified Total (multiply line 10 by line 11): _____

Line 13. PPP Loan Amount: _____

Line 14. Payroll Cost 60% Requirement (divide line 1 by 0.60): _____

Forgiveness Amount:

Line 15. Forgiveness Amount (enter the smallest of lines 12, 13, and 14): _____



Paycheck Protection Program
Loan Forgiveness Application Form 3508 Revised July 30, 2021

OMB Control No.: 3245-0407
Expiration Date: 01/01/2022

PPP Schedule A Worksheet

Table 1: List employees who:

- Were employed by the Borrower at any point during the Covered Period whose principal place of residence is in the United States; and
 - Received compensation from the Borrower at an annualized rate of less than or equal to \$100,000 for all pay periods in 2019 or were not employed by the Borrower at any point in 2019.

Employee's Name	Employee Identifier	Cash Compensation	Average FTE	Salary / Hourly Wage Reduction
FTE Reduction Exceptions:				
Totals:		Box 1	Box 2	Box 3

Table 2: List employees who:

- Were employed by the Borrower at any point during the Covered Period whose principal place of residence is in the United States; and
 - Received compensation from the Borrower at an annualized rate of more than \$100,000 for any pay period in 2019.

Employee's Name	Employee Identifier	Cash Compensation	Average FTE
Totals:		Box 4	Box 5

Attach additional tables if additional rows are needed.

EIT Reduction Safe Harbor 2:

- Step 1. Enter the borrower's total average FTE between February 15, 2020 and April 26, 2020. Follow the same method that was used to calculate Average FTE in the PPP Schedule A Worksheet Tables. Sum across all employees and enter:

Step 2. Enter the borrower's total FTE in the Borrower's pay period inclusive of February 15, 2020. Follow the same method that was used in step 1:

Step 3. If the entry for step 2 is greater than step 1, proceed to step 4. Otherwise, FTE Reduction Safe Harbor 2 is not applicable and the Borrower must complete line 13 of PPP Schedule A by dividing line 12 by line 11 of that schedule.

Step 4. Enter the borrower's total FTE (a) for a PPP loan made before December 27, 2020, as of December 31, 2020 or (b) for a PPP loan made after December 27, 2020, the last day of the covered period:

Step 5. If the entry for step 4 is greater than or equal to step 2, enter 1.0 on line 13 of PPP Schedule A; the FTE Reduction Safe Harbor 2 has been satisfied. Otherwise, FTE Reduction Safe Harbor 2 does not apply and the Borrower must complete line 13 of PPP Schedule A by dividing line 12 by line 11 of that schedule.

Calculating Hourly Wage/Salary Reduction

Step 1. Determine if pay was reduced more than 25%.

- a. Enter average annual salary or hourly wage during Covered Period: _____.
- b. Enter average annual salary or hourly wage during the most recent full quarter before the Covered Period: _____.
c. Divide the value entered in 1.a. by 1.b.: _____.
If 1.c. is 0.75 or more, enter zero in the column above box 3 for that employee; otherwise proceed to Step 2.

Step 2. Determine if the Salary/Hourly Wage Reduction Safe Harbor is met.

- a. Enter the annual salary or hourly wage as of February 15, 2020: _____.
- b. Enter the average annual salary or hourly wage between February 15, 2020 and April 26, 2020: _____.

If 2.b. is equal to or greater than 2.a., skip to Step 3. Otherwise, proceed to 2.c.
c. Enter the average annual salary or hourly wage as of (a) for a PPP loan made before December 27, 2020, December 31, 2020 or (b) for a PPP loan made after December 27, 2020, the last day of the Covered Period: _____.

If 2.c. is equal to or greater than 2.a., the Salary/Hourly Wage Reduction Safe Harbor has been met – enter zero in the column above box 3 for that employee. Otherwise proceed to Step 3.

SBA Form 3508 (07/21)

Step 3. Determine the Salary/Hourly Wage Reduction.

- a. Multiply the amount entered in 1.b. by 0.75: _____.
- b. Subtract the amount entered in 1.a. from 3.a.: _____.

If the employee is an hourly worker, compute the total dollar amount of the reduction that exceeds 25% as follows:

- c. Enter the average number of hours worked per week during the most recent full quarter before the Covered Period:
d. Multiply the amount entered in 3.b. by the amount entered in 3.c. _____ . Multiply this amount by the number of weeks in the Covered Period (a whole number between 8 and 24): _____. Enter this value in the column above box 3 for that employee.

If the employee is a salaried worker, compute the total dollar amount of the reduction that exceeds 25% as follows:

- e. Multiply the amount entered in 3.b. by the number of weeks in the Covered Period: _____. Divide this amount by 52: _____. Enter this value in the column above box 3 for that employee.

Process for Obtaining Loan Forgiveness

- Borrower to submit appropriate form
- Banks are generally using on-line portals. Some want paper.
- Borrowers have 10 months to submit forgiveness application from when they spent the money.
- Lender has 60 days to review and submit to SBA with a reimbursement application
- SBA then has 90 days to review the lender's submission and issue reimbursement
- The SBA may retroactively determine that a borrower was not eligible for a PPP loan.

Deferral Period and Forgiveness

- Borrowers can apply for forgiveness anytime after they have used all of the loan proceeds (including before the end of the covered period)
- If you apply for forgiveness before the end of the covered period (be it 8 or 24 weeks) you must still account for additional FTE/wage reduction for the entire covered period
 - Thus, if you apply before the end of the covered period and later reduce FTEs/wages you will not be able to take advantage of FTE/wage restoration safe harbor
 - The open question is if you can further reduce FTEs/wages after the forgiveness application is filed and if that would effect forgiveness (for example, reducing salary that was reduced below the 25% threshold even further)
- Borrowers decide whether to use the 8 or 24 week period when they submit the forgiveness application
- **Borrower must apply for forgiveness within 10 months after the last day of the covered period, or the loan cannot be forgiven**

Loan Forgiveness Process

- If forgiveness is denied, the loan must be repaid over the 2 or 5-year period from the time the loan was approved.
- The Appeal Regulation establishes an administrative review process and access to federal courts for appeals of PPP forgiveness decisions (discussed in detail later)

Compliance with Covered Period

- The Covered Period ends 24 weeks after the advance.

Three Types of “Payroll Costs” (line 1)

- Cash compensation
 - Gross salary, wages, tips, commission, hazard pay, etc.
 - Paid leave (other than FFCRA leave)
 - Separation pay
- Employee Benefits
 - Healthcare benefits paid by employer only
 - Retirement benefits
 - State and local tax payments assessed on compensation
- Owner Compensation
 - Owner-employees
 - Self-employed
 - General partners

**** Forgiveness does not include payments that are accelerated other than as allowed under the various rules (e.g. certain payments made in the ordinary billing cycle)**

Payment of Bonuses in Excess of Regular Payroll

- Nothing in the Application specifically addresses increasing compensation during the Covered Period
- Compensation paid to any employee (or owner) during the Covered Period cannot exceed \$20,833 (or \$15,385 for 8 week period).
- Increases in owner compensation are likely to be scrutinized
- The Forgiveness FAQ specifically allows “bonuses” as a covered payroll cost. (Subject to the \$100,000 cap.)

Payroll Costs and The Covered Period: Owner Compensation

- Generally
 - If 8 weeks: 8/52nds of 2019 cash compensation
 - If 24 weeks: 2.5/12ths of 2019 cash compensation
 - C-Corporations
 - Payroll costs include: salary, employer retirement and healthcare contributions
 - S-Corporations
 - Payroll costs include employer retirement contributions
 - For <2% owners, payroll costs *do not* include healthcare insurance contributions
 - Partnerships, LLCs
 - Payroll costs include: net earnings from self-employment $\times 0.9235$ divided by either: 8/52 or 2.5/12
 - Payroll costs do not include retirement or health insurance contributions
-
- Max. forgivable compensation to owners is \$20,833

Payments to Owners/Self-Employed

- Amount capped at \$20,833 ($\$100,000/12\text{ months} \times 2.5\text{ months}$)
- Amounts paid to owner-employees are excluded from calculation of FTE or salary reduction calculations.
- “Owner” is still not a defined term.
- Under the Forgiveness IFR, 92.35% of Section 179 depreciation is excluded for purposes of calculating net business income (this reflects the inclusion of self-employment tax on Form 1040 Schedule SE, Section A line 4).
- Rules for defining who is an “owner” may depend on state laws
 - For example, in community property states, are both spouses treated as owners if the business is treated as community property?

Non-Payroll Costs: Meaning of “Paid and Incurred”

- Costs must have commenced prior to 2/15/2020
- Payments *incurred* during the 24 weeks must be paid prior to the next regularly scheduled due date for the bill (even if paid outside the 24-week period)
- Costs can only be paid/incurred once
 - A prepayment of a bill is not eligible
 - A bill incurred before the covered period and paid during the covered period would be eligible
- Transportation costs seemed to be allowable as expenses (per Application)
- Forgiveness FAQ appears to clarify that the application is referring to “transportation utility” costs are considered a *utility* payment and thus forgivable. This still doesn’t make sense.
- Forgiveness IFR Q.4(b): Prepayments of mortgage interest is not permitted
- Not forgivable: interest on unsecured debts (e.g. credit card interest)

The 60% Rule is Not a Bar to Loan Forgiveness

- The 60/40 rule is not a total bar to forgiveness if it is not met.
- If <60% of loan proceeds are used for eligible payroll costs, i.e. if 50% of loan proceeds were used for eligible payroll costs, seek forgiveness of that 50%. However, eligible nonpayroll costs cannot exceed 40% of the total forgiveness

Defining FTEs

- 2 options in calculating FTE:
 - Option 1: Average full-time equivalency (FTE) is the average number of hours paid per week divided by 40 (rounded to nearest tenth), with the maximum for each employee capped at 1
 - Option 2: Borrower may elect to assign a 1.0 for employees who work 40 hours/week or more and 0.5 for employees who work less than 40 hours/week

Borrow Not Penalized for FTE Refusing to Return to Work

Borrower does not have to reduce FTE if borrower shows:

- Good faith written offer to rehire that was rejected by employee (PPP FAQ 40);
- Employee was fired for cause (PPP FAQ 40);
- Employee voluntarily resigned (PPP FAQ 40);
- Employee voluntarily requested (in writing) and received a reduction in their hours (PPP FAQ 40);
- Inability to rehire similarly qualified individuals (Forgiveness FAQ); or
- Inability to operate at the same capacity during Covered Period (Application p. 5)

FTE Re-Hire Safe Harbor

The Borrower is exempt from the reduction in loan forgiveness based on a reduction in FTE if the borrower restores FTEs by:

1. December 31, 2020, for a PPP loan made before December 27, 2020, or
2. The last day of the Covered Period, for a PPP loan made after December 27, 2020.

What happens when FTEs are not restored and salary is reduced by more than 25%

- Nothing in the CARES or CARES II specifically addresses this
- Based on the regulations and forgiveness application, best practice is to apply FTE reduction first then the compensation reduction
- Wage reduction applies only to the part of reduced wage that is not also attributable to FTE reduction

What happens when FTEs are not restored and salary is reduced by more than 25% (cont.)

Example:

- If an employees hours are cut to $\frac{1}{2}$ time, but their hour rate remained the same, there is no wage reduction.
- But, if the employees wages were also reduced by $\frac{1}{2}$ the wage reduction forgiveness limitations would be applicable.
- Earlier versions of the Forgiveness FAQs provided more examples. But most recent doesn't, which is odd.
- If restoration occurs before December 31, 2020, no forgiveness reduction
- Increases in compensation need not be referenced on Schedule A to the forgiveness application (Forgiveness FAQ)

PPP Loans: Good Faith Certification

Borrower Must Certify That:

- Request for forgiveness is as to funds were knowingly used for authorized purposes
- Confirms that borrower acknowledges civil and criminal liability for seeking forgiveness of unauthorized amounts
- The Application is accurate
- Submission to lender of required verification docs.
- The Application is correct in all “material” respects (The Application cites USC codes and defines fines and imprisonment time frames if there is a false statement held to be knowingly made (i.e. fraud)).
- Tax documents given to lender are the same as those provided to the IRS
 - Lender can share tax documents with the IRS
- That SBA may request additional information and Borrower's failure to provide it may result in denial of loan forgiveness.
- SBA has authority to direct lender to disapprove loan forgiveness

Payroll Costs and The Covered Period

- Payroll costs “paid or incurred” during the covered period are eligible for forgiveness, as well as up to 40% of non-payroll costs
- The covered period starts the day the loan proceeds are deposited
- Payroll costs are considered paid on the day paychecks are distributed or an electronic payment is initiated
- Borrowers don’t have to change their payroll cycle to obtain forgiveness
 - Even if payroll costs are incurred after the end of the covered period, as long as paid during the regular payroll cycle they are forgivable

Non-Payroll Costs

- Non-payroll costs that are incurred during the covered period are forgivable (not to exceed 40% of the loan amount)
- If payments are made pursuant to a regular billing cycle, if the payment is made after the end of the covered period, it is still forgivable
- Example: Borrower receives its electric bill monthly on the 20th. The loan was advanced on May 1st and the borrower elects the 24 week period. The “covered period” ends October 16th. Even though the electric bill is received after the end of the covered period, it is for costs incurred during the covered period and will be a forgivable expense
- The Alternative Payroll Covered Period (discuss below) does not apply to non-payroll costs

Loan Forgiveness Process for Lenders

- Must ensure forgiveness application is complete and all data is supported as required
- Must perform at least a “minimal review of calculations” and supporting documents, including third-party payroll processing information
- If the payroll is not well documented or not processed by a recognized third-party processor, more diligence will need to be undertaken (i.e. obtain cancelled checks, etc.)
- If the lender finds errors or missing information, it should inform the borrower of its errors and attempt to get a correct and complete application
- It is the borrower's responsibility to provide accurate information and the lender may reasonably rely on borrower
- The SBA began accepting forgiveness applications August 10th
- Not covering the lender-side process for working with the SBA

Loan Forgiveness Denial

- When a lender recommends **denial** of a forgiveness application (in whole or part), it must provide the SBA with: (a) the forgiveness application form, (b) confirm the accuracy of information in the forgiveness application, (c) proof that borrower has been notified, and (d) basis for the denial.
- The borrower has 30 days to protest the denial.
- The SBA is not required to review the denial and has 5 days to determine whether to deny review.
- If the SBA accepts review, it has 90 days to render a decision
- “SBA may review any PPP loan or any size at any time at its discretion.” (SBA Procedural Notice, 7/23/2020.)

Rules for Refinancing EIDL Loan

- An EIDL loan **cannot** be refinanced with a PPP loan if funds were received (a) before 1/31/2020 or (b) after 4/3/2020
- A borrower is **not** required to use PPP loan funds to refinance EIDL loans if: (a) the EIDL loan was received between 1/31/2020 and 4/3/2020 and (b) the EIDL loan proceeds were used for purposes **other than** to fund payroll costs
- A borrower **must** use PPP loan funds to refinance an EIDL loan when: (a) the EIDL loan was received between 1/31/2020 and 4/3/2020 and (b) the EIDL loan proceeds were used to fund payroll costs

Calculating Forgiveness Reduction Due to Wage Reduction of More than 25%

Example

- Prior to the February 15th Eric's Café had average monthly wages of \$250,000 (\$3,000,000 annually)
- Due to COVID Eric's Café reduced its monthly payroll to \$100,000/month as it was only able to do take-out and delivery (\$1,200,000 annually)
- On May 5th, Eric's Café applied for and received a \$625,000 PPP loan
- To date, Eric's Café has not restored wages

Salaried Employee

Step 1. Determine if pay was reduced more than 25%.

a. Enter average annual salary or hourly wage during Covered Period or Alternative Payroll Covered Period: **\$50,000**

b. Enter average annual salary or hourly wage between January 1, 2020 and March 31, 2020: **\$75,000**

c. Divide the value entered in 1.a. by 1.b.: **0.67**

If 1.c. is 0.75 or more, enter zero in the column above box 3 for that employee; otherwise proceed to Step 2.

Salaried Employee

Step 2. Determine if the Salary/Hourly Wage Reduction Safe Harbor is met.

- a. Enter the annual salary or hourly wage as of February 15, 2020: **\$75,000**
- b. Enter the average annual salary or hourly wage between February 15, 2020 and April 26, 2020: **\$60,000**

If 2.b. is equal to or greater than 2.a., skip to Step 3. Otherwise, proceed to 2.c.

- c. Enter the average annual salary or hourly wage as of the earlier of December 31, 2020 and the date this application is submitted: **\$75,000**.

If 2.c. is equal to or greater than 2.a., the Salary/Hourly Wage Reduction Safe Harbor has been met – enter zero in the column above box 3 for that employee. Otherwise proceed to Step 3.

Salaried Employee

Step 3. Determine the Salary Reduction (salaried employee)

- a. Multiply the amount entered in 1.b (**\$75,000**) by 0.75:
\$56,250

- b. Subtract the amount entered in 1.a. from 3.a.: **\$56,250**
- \$50,000 = \$6,250

Salaried Employee

If the employee is an hourly worker, compute the total dollar amount of the reduction that exceeds 25% as follows:

- c. Enter the average number of hours worked per week between January 1, 2020 and March 31, 2020:
- d. Multiply the amount entered in 3.b. by the amount entered in 3.c. Multiply this amount by 24 (if Borrower is using a 24-week Covered Period) or 8 (if Borrower is using an 8-week Covered Period): _____ . Enter this value in the column above box 3 for that employee.

If the employee is a salaried worker, compute the total dollar amount of the reduction that exceeds 25% as follows:

- e. Multiply the amount entered in 3.b. by 24 (if Borrower is using a 24-week Covered Period) or 8 (if Borrower is using an 8-week Covered Period): **$\$6,250 \times 24 = \$150,000$** , divide this amount by 52 = **$\$2,884.62$**

Enter this value in the column above box 3 for that employee.

Hourly Employee

Assumptions

- \$25/hourly wage
- 40 hours per week work

Step 1. Determine if pay was reduced more than 25%.

- a. Enter average annual salary or hourly wage during Covered Period or Alternative Payroll Covered Period: **\$16.75/hour**
 - b. Enter average annual salary or hourly wage between January 1, 2020 and March 31, 2020: **\$25.00/hour**
 - c. Divide the value entered in 1.a. by 1.b: **0.67**
- If 1.c. is 0.75 or more, enter zero in the column above box 3 for that employee; otherwise proceed to Step 2.

Hourly Employee

Step 2. Determine if the Salary/Hourly Wage Reduction Safe Harbor is met.

- a. Enter the annual salary or hourly wage as of February 15, 2020: **\$25.00/hour**
- b. Enter the average annual salary or hourly wage between February 15, 2020 and April 26, 2020: **\$16.75/hour**

If 2.b. is equal to or greater than 2.a., skip to Step 3. Otherwise, proceed to 2.c.

- c. Enter the average annual salary or hourly wage as of the earlier of December 31, 2020 and the date this application is submitted: **\$16.75.**

If 2.c. is equal to or greater than 2.a., the Salary/Hourly Wage Reduction Safe Harbor has been met – enter zero in the column above box 3 for that employee. Otherwise proceed to Step 3.

Hourly Employee

Step 3. Determine the Salary/Hourly Wage Reduction.

- a. Multiply the amount entered in 1.b **\$25/hour** by 0.75:
\$18.75
- b. Subtract the amount entered in 1.a. from 3.a.: **\$18.75 - \$16.75 = \$2.00**

Hourly Wage Example

If the employee is an hourly worker, compute the total dollar amount of the reduction that exceeds 25% as follows:

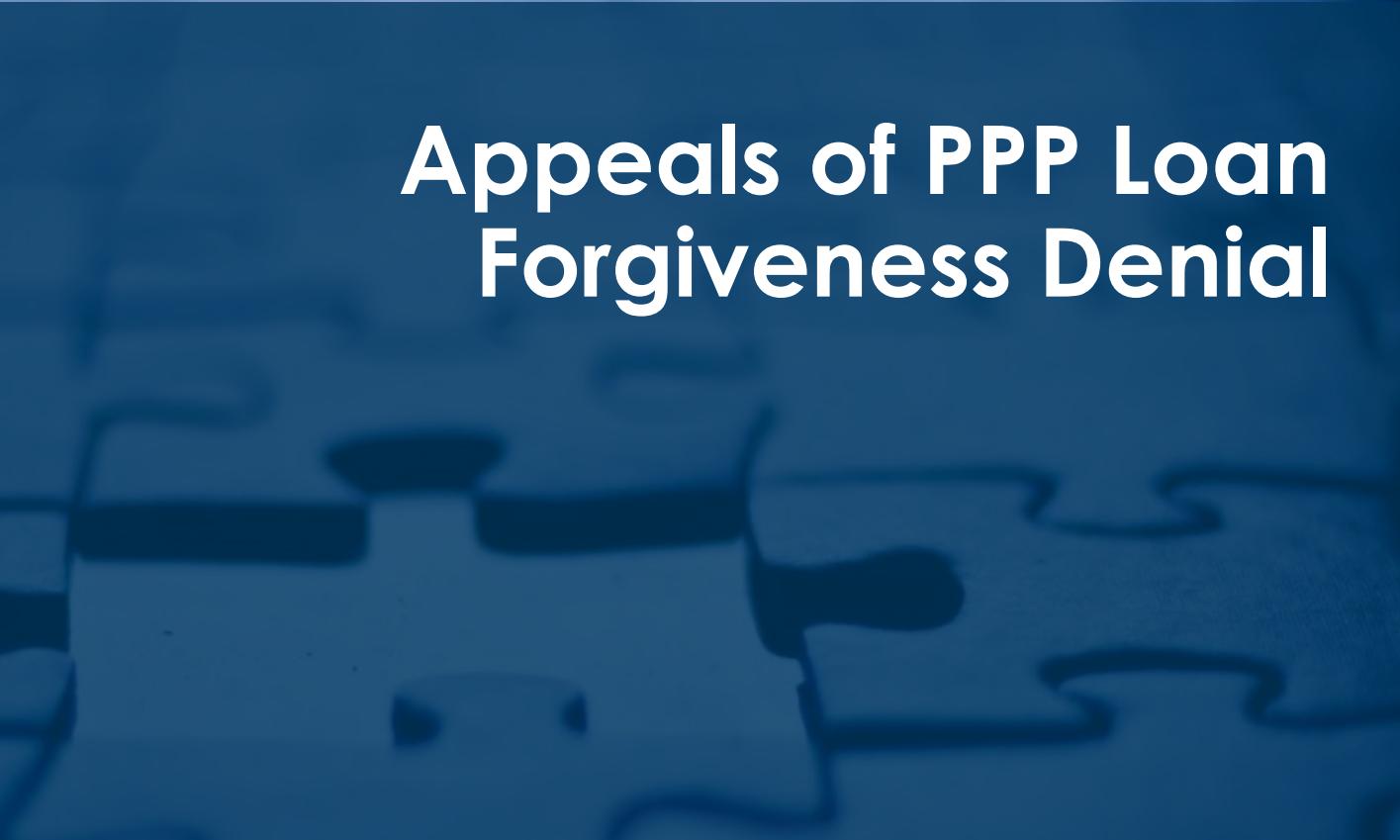
- c. Enter the average number of hours worked per week between January 1, 2020 and March 31, 2020: **40**
- d. Multiply the amount entered in 3.b. by the amount entered in 3.c. **(2 x 40 = 80)**
Multiply this amount by 24 (if Borrower is using a 24-week Covered Period): **\$1,920** or 8 (if Borrower is using an 8-week Covered Period):**\$16.00**. Enter this value in the column above box 3 for that employee.

If the employee is a salaried worker, compute the total dollar amount of the reduction that exceeds 25% as follows:

- e. Multiply the amount entered in 3.b. by 24 (if Borrower is using a 24-week Covered Period) or 8 (if Borrower is using an 8-week Covered Period): _____, divide this amount by 52.

Enter this value in the column above box 3 for that employee.

\$1,920 is the non-forgiveable amount attributable to the wage reduction



Appeals of PPP Loan Forgiveness Denial

Appeal of Forgiveness Denial

- 8/11/2020 Interim Final Rule published ("Appeals Rules") updated September 16, 2021, 68 Fed. Reg. 177
- Establishes quasi-judicial administrative review procedure
- Appeals go to SBA Office of Hearings and Appeals ("OHA")
- **Deadline to file:** 30 days after the borrower's receipt of the final SBA loan review decision (this is a change from the interim rule, which was more confusing)
- Not all SBA decisions are reviewable under the Appeals IFR. OHA has jurisdiction to hear appeals involving an SBA determination that finds a borrower:
 - Ineligible for a PPP loan
 - Ineligible for the amount received
 - Used proceeds for ineligible purposes
 - Is ineligible for forgiveness (in whole or part)

Appeal of Forgiveness Denial (cont.)

- A borrower **cannot** appeal a decision by a lender, only a final decision of the SBA
 - Thus if borrower's lender denies (in full or part) forgiveness, borrow **must** request SBA review or borrow will be precluded from further appeals or relief.
- An appeal does **extends** the repayment date. [This is a change from the interim rule] – however the borrower must provide the appeal petition to the lender for the extension
- If the SBA remits partial payment to the lender, the borrower cannot appeal to OHA
 - Question: Does this mean borrower has no appeal rights for a partially denied forgiveness application?
- Only the actual borrower has standing to pursue an appeal
- The Appeals Rules do not cover investigations by the Office of Inspector General or fraud related matters

Appeal of Forgiveness Denial (cont.)

- **Standard of review:** Clear error.
- **Burden of Proof:** No burden of proof, but decisions of SBA officials will be reviewed for clear error. This seems confusing.
- **Discovery:** None for either SBA or borrower. Case is based on the administrative record.
- **Oral Argument:** Not permitted.
- The “judge” need not be an administrative law judge, and it is unclear who will be assigned to hold appeal hearings.

Appeal of Forgiveness Denial: The Petition

The petition initiating the appeal must include:

1. The basis for OHA jurisdiction, including, that the appeal is timely.
2. A copy of the SBA loan review decision that is being appealed.
3. An explanation of why the SBA loan review decision was decided wrongly, together with all factual support, legal arguments, and supporting documents
4. The relief being sought
5. Required documents to be attached to petition: (a) copies of payroll tax and unemployment tax filing or, if not available, the PPP Loan Forgiveness Application, or an explanation as to why they are not relevant or not available and (b) copies of federal tax returns actually filed with the IRS, if not provided with the PPP Borrower Application Form, or an explanation as to why they are not relevant or not available
6. Signed under penalty of perjury
7. Address and phone number of borrower and its counsel

Practice Point: Think of this like a protest to IRS Appeals – Build your record!

Appeal of Forgiveness Denial: Dismissal of Appeal

The Judge may dismiss an appeal if:

- It exceeds OHA jurisdiction
- Appellant lacks standing
- No final decision has been rendered by the SBA concerning forgiveness
- The petition fails to set forth fact, which if true, would constitute a valid appeal
- The SBA may request a borrower to further explain their Petition (motion for more definite statement)

Appeal of Forgiveness Denial: The Administrative Record

- The appeal is not a “de novo” hearing
- Based on administrative record
- The administrative record is a set of documents that the ALJ will review to determine if the SBA decision was valid
 - The SBA prepares the administrative record
 - The appellant may seek to add documents to the administrative record by objecting to the SBA’s failure to include such documents
 - The appellant may also object to the SBA’s inclusion of documents in the administrative record
 - The ALJ may rule that the administrative record can be supplemented
- Upon “good cause shown” the ALJ may permit submissions, including discovery, beyond the administrative record
- The borrower may object to the contents (either absence or inclusion of information) of the administrative record. The ALJ will render a decision on the objection.

Appeal of Forgiveness Denial: The Hearing

- The SBA must respond to the Petition within 45 days or the issuance of the notice of hearing
 - The SBA is not required to respond and the non-response does not constitute an automatic win for the borrower.
 - Unless directed by the ALJ, no further papers may be filed (i.e. a reply by the borrower to the SBA response)
- ALJ must decide case on the papers, no trial or hearing
- ALJ has discretion to allow additional evidence into the record
After the record is closed, the ALJ will issue a decision.

Appeal of Forgiveness Denial: Post-Hearing

- The ALJ will issue an “initial decision” within 45 days of the record closing
The decision will contain findings of fact and conclusions of law.
- The losing party may either:
 - Within 10 days of the initial decision, request reconsideration by the Presiding OHA Judge; or
 - File a lawsuit in U.S. District Court (subject to procedures governing appeals from administrative agencies)
 - While there is no longer a requirement to appeal to the SBA Administrator (as set forth in the interim rule), the SBA Administrator may elect to reconsider an ALJ decision or a reconsidered decision.
- A reconsidered initial decision becomes a final decision 30 days after service, unless the SBA Administrator elects to review it

Additional Items

- Only lawyers can represent clients before the SBA.

PPP Related Tax Issues

PPP Tax Issues

- PPFA allows employers to both obtain a PPP loan and defer the employer portion of withholding taxes through December 31, 2020
 - The deferred portion must be paid 50% by December 31, 2021 and 50% by December 31, 2022
 - If deferred and paid on schedule, no interest or penalties
- The IRS is taking the position that once a PPP loan is forgiven, the employer may no longer defer (FAQ 1, 4)
- The IRS has clarified that the deferral period is March 27 – December 31, 2020 (unless the loan is forgiven earlier)
- The IRS will be revising Form 941 and providing guidance on how to properly prepare Q2 2020 941s
- If an employer believes they are entities to refundable tax credits for paid COVID-19 leave, they can still defer

PPP Tax Issues (cont.)

- CARES II made PPP loans both not income and expenses paid with PPP loans deductible
 - Accountants continue to struggle with how to account for PPP forgiveness
 - Don't credit equity when the loan is forgiven
 - The event should effectively disappear from the balance sheet
- Borrower's loan and forgiveness applications must be consistent with tax documents

Early Withdrawal from Qualified Plans (Notice 2020-50 (Jun. 22, 2020))

- Allows “qualified individuals” to avoid 10% penalty on early withdrawals (or certain loans) from qualified plans taken during 2020
- Permits employers to implement rules to facilitate early distributions/loans
 - Not required
- Definition of “qualified individual”:
 - Diagnosed with COVID-19
 - Spouse or dependent is diagnosed with COVID-19
 - Experienced adverse financial consequences due to (a) being quarantined, (b) unable to work due to lack of childcare, (c) lost job or hours, (d) job rescinded, (e) adverse financial consequences of spouse or family member who share's individual's personal residence

PPP Enforcement Issues

Don't Commit Fraud

- The government is aggressively prosecuting misuse of PPP funds!
- On May 17, 2021 DOJ established a PPP fraud task force
- *15% of Paycheck Protection Program Loans Could Be Fraudulent, Study Shows, NYT (Aug. 17, 2021)*

Practice Points (If you represent wannabe thieves)

- Don't buy a Lamborghini (at least 4 prosecutions involve Lamborghinis), or Range Rovers, Mercedes, etc.
- Can't pay for your kid's college
- No creating false companies
- Can't make up the existence of employees
- No buying racing boats and gambling
- No buying crypto
- Can't pay off your home mortgage
- No paying off student loans
- Can't use for luxury (or even run of the mill) vacations
- Can't take kick back for helping commit PPP fraud

One of my favorites

'Love & Hip Hop: Atlanta' star Maurice Fayne charged with misusing coronavirus relief funds

-USA Today, May 14, 2020

- Claimed he had 107 employees
- Submitted forged bank statements.
- Spent money on:
 - Rolex Presidential watch
 - 5.73 carat diamond ring
 - Paid \$50,000 for restitution in a previous fraud case, \$40,000 in back child support, \$139,000 to lease a Rolls Royce
 - \$230,000 to co-conspirators who had helped him run a previous Ponzi scheme.

Special Rules for Loans in Excess of \$2 million

Overview

- The SBA will conduct some auditing of all loans over \$2 million
- However in July 2021 the SBA rolled back most of the extensive reporting required for these companies
- Previously:
 - Borrowers must complete Form 3509 - Paycheck Protection Program Loan Necessity Questionnaire
 - NFPs must complete a similar form (Form 3510)
 - ~30,000 PPP loans are over \$2 million
 - Purpose was to confirm that the funds were necessary
- It is not clear presently how SBA is reviewing larger loans.
- There has still be extensive investigation into PPP fraud

EIDL Loans

Overview

- SBA Procedural Notice 5000-20017 (Dec. 16, 2020)
- FAQ's issued Sept. 8, 2021
- Subject to SBA 7(a) underwriting
- Directly from SBA
- Up to \$2 million – although program has routinely run out of funding and amounts received have varied
- Collateral required for loans over \$200,000
- PG required for loans over \$25,000
- Unlike PPP loans EIDL loans may be used for virtually any legitimate business purposes, including working capital.
 - You **cannot** use your EIDL loan for: Paying yourself, paying personal debt, starting a new business, personal expenses
- Repayment is 3.75% interest (2.75% for NFPs) over 30 years – first 24 months of payment are deferred

SBA Offer in Compromise Program

- Must be applied for separate for borrower and guarantor
- Acceptance will result in COD Income and issuance of 1099-C
- May result in not being allowed to access SBA loans in the future

SBA SOP 50-57-2

“An offer in compromise is an offer made by an Obligor to pay less than what is owed in full settlement of the Obligor’s obligation on their SBA loan. Submitting the offer does not ensure that it will be accepted. Rather, it begins a process of evaluation and verification by the Lender and SBA. Generally, an offer in compromise will be accepted if it reflects the Obligor’s true ability to pay, and will be rejected if the Obligor can pay the loan in full via a lump sum payment or an installment agreement, or if acceptance of the offer would harm the integrity of the SBA loan program.”

Required Information

- Detailed explanation of reason for inability to pay
- Completed Offer (SBA Form 1150)
- Completed financial statement (SBA Form 770)
- Documents to support financial statement / condition including: bank statements, tax returns, etc.
- UCC and title searches (if applicable)
- Payoff statements for each lien holder senior to SBA

When to Seek SBA Offer in Compromise

- Inability to pay over time despite deferrals / restructuring
- Demonstrated ability to continue operating the business
- No evidence of fraud or misappropriation
- Offer is reasonable based on documented economics
- Must be in the interest of the government and fair and equitable

Not unlike an in-business OIC with the IRS

Considerations for Granting Offer

- Recoverable value of any remaining pledged collateral that has not been liquidated
- Exemptions available under state and federal law
- Amount that could be recovered from the borrower/gurantor non-exempt assets that were not pledged as collateral
- Amount of present and potential income that could be obtained through collection proceedings
- Litigation risk
- Expenses that would be incurred through enforced collection
- The time it would take to enforce collection
- The possibility that assets have been or will be concealed or fraudulently transferred.

“Feasibility Test”

SBA SOP 50-57-2:

“To determine whether a Borrower is a good candidate for the workout process, in addition to reviewing the existing Loan Documents, review the new financial information required by Paragraph B above, conduct a site visit if feasible, and ascertain whether the Borrower is: (1) competent, i.e., has the necessary technical and management skills to turn the business around; (2) cooperative, i.e., willing to take the necessary action to address the problems that caused the default; (3) acting in good faith, and (4) financially and operationally viable.”

Work Out Options

- Forbearance
- Deferment
- Modification
- Subordination
- Liquidation (partial or complete)

COVID Related Programs

Deferral – SBA Procedural Notice 5000-807838 (Mar. 26, 2021)

- All SBA loans existing as of March 1, 2020 that were not already in work out have received some form of deferral
- **Automatic Deferral:** Through March 31, 2022, the SBA deferred the loan. Repayment recommences April 1, 2022
- **Additional Deferral:** The SBA will consider additional deferral based on general standards after March 2022.
- Automatic Deferral applied to EIDL loans approved in 2020 or 2022 (although there was a built in 2 year deferral)
- To qualify for deferral, loans must be current as of the deferral date
- Interest continues to accrue

COVID Related Programs (cont.)

COVID Related EIDL Programs

- Funding extended to December 31, 2021 – SBA will continue to process until funds run out
 - Up to \$2 million
- Borrowers may request increase in EIDL loans for up to 2 years after origination date
- ARP allocated substantial additional funding to EIDL, so there does not appear to be a funding issue as of November 2021 (SBA Press Release 21-10 (Nov. 19, 2021)

Cancellation of Debt Income

Cancellation of Debt (COD) Issues

- What is COD Income
- Section 108 Exceptions
- Calculating COD
- COD in and out of bankruptcy

Cancellation of Debt Income

- Gross income includes income from COD
- COD is a taxable event.
- COD income is eligible for exclusion under I.R.C. § 108, subject to possible tax attribution reduction.
- COD income exclusions include (i) discharge but still insolvent after the discharge and (ii) discharge in bankruptcy.
- Student loan discharge exception
- Relief from COD due to COVID-19
 - COD related to cancellation of home mortgage debt through 2020
 - PPP loan forgiveness

IRS Materials to Review

- Publication 523, Selling Your Home
- Publication 4681, Canceled Debts, Foreclosures, Repossessions, and Abandonments
- Form 982, and related instructions
- TR § 1.1001-2

When does debt cancellation occur?

- For there to be Debt cancellation, there must be an identifiable event (i.e., a moment where it is clear that the debt will never be paid).
- When a debt cancellation occurs depends on facts and circumstances
- Regulations provide that debt acquisition by related parties can constitute debt cancellation. TR § 1.108-2.
- The acquisition can be direct or indirect

Debt exchanges can constitute a debt cancellation

- Exchange of debt for nonrecourse debt which will never be paid.
- **Debt-for-Debt** where acquired debt has lesser principal under § 1274 original issue discount (OID) rules.
- **Receipt of 1099c** from creditor is evidence that there is no intention to collect
 - This is not conclusive since rules for filing form does not mean there is a discharge.
- **Form 1099-A** (acquisition or abandonment of security) is intended only to notify as to an acquisition of interest in security.

Special rules for fixing date of cancellation

- Insolvency of Taxpayer does not fix the date (though it makes payment unlikely).
- Bankruptcy discharge will fix COD (but recognition exceptions can apply)
- Expiration of Statute of Limitations on collection of debt will show cancellation.

Cancellation of Debt Income

Debt Relief from Sale or Exchange.

- AB (adjusted basis) includes debt, so the person who pays by borrowing is on an equal footing with the person who pays in cash
- AR (amount realized) includes debt relief.
- Debt relief from sale or exchange does not qualify for the I.R.C. § 108 exclusions.

Cancellation of Debt Income

Sale of property with recourse debt.

Treas. Reg. § 1.1001-2(c), Example 8.

- Step 1. Compute sale or exchange gain, which generally is FMV of property less AB.
- Step 2. Compute COD income, which is generally amount of debt less FMV of property.

Cancellation of Debt Income

Recourse Debt Example: Debt = \$100; FMV = \$70; AB = \$80.

Step 1. \$70 AR (FMV of property)

(\$80) AB

(\$10) Sale or exchange loss; exclusion rules of § 108 do not apply

Step 2. Difference between discharged debt of \$100 and FMV of \$70 is
\$30, which is COD income and eligible for § 108 exclusions

Cancellation of Debt Income

Sale of property with nonrecourse debt.

- Treas. Reg. § 1.1001-2(c), Example 7; and Tufts v. Comm., 461 U.S. 300 (1983)
- AR includes full amount of debt, even if FMV of property is less than amount of debt.
- All gain on disposition is sale or exchange gain/loss, and, the exclusions of § 108 do not apply.

Cancellation of Debt Income

Nonrecourse Debt Example: Debt = \$100; FMV = \$70; AB = \$80.

\$100 AR (amount of debt on property)

(\$ 80) AB

\$20 Sale or exchange gain; exclusion rules of § 108 do not apply

Its sale and exchange income!

Section 108(b)(2) – Tax Attribute Reduction

Section 108(b)(2) provides that taxpayers must reduce the following tax attributes in the order below:

- (i) any net operating loss (“NOL”) for the taxable year of the discharge and any NOL carryover to such year;
- (ii) any carryover to or from the taxable year of a discharge of an amount for purposes of determining the amount allowable as a credit under § 38 relating to general business credit;
- (iii) the amount of the minimum tax credit available under § 53(b), which is based on a portion of the taxpayer’s minimum tax liability for prior years, as of the beginning of the taxable year immediately following the taxable year of the discharge;
- (iv) any net capital loss carryover for the taxable year of the discharge and any capital loss carryover to such taxable year under § 1212;
- (v) the basis of the property of the taxpayer;
- (vi) any passive activity loss or credit carryover of the taxpayer under § 469(b) from taxable year of discharge; and
- (vii) any carryover to or from the taxable year of the discharge for purposes of determining the amount of the credit allowable under § 27 for foreign taxes imposed.

Form 982

- Should be filed with the 1040 for the year the taxpayer seeks to use a §108 exception – but can file up to 6 months later
 - If filed later, the IRS suggests writing “Filed pursuant to section 301.9100-2” amended return
- Must identify the exception used
- Identify whether a § 108(b)(5) election is being made
- If using the Qualified Principal Residence Exception,

982

Form 982
 (Rev. March 2018)
 Department of the Treasury
 Internal Revenue Service

**Reduction of Tax Attributes Due to Discharge of
 Indebtedness (and Section 1082 Basis Adjustment)**

► Attach this form to your income tax return.
 ► Go to www.irs.gov/Form982 for instructions and the latest information.

OMB No. 1545-0040

Attachment
Sequence No. 94

Name shown on return

Identifying number

Part I General Information (see instructions)

- 1** Amount excluded is due to (check applicable box(es)):
- a Discharge of indebtedness in a title 11 case
 - b Discharge of indebtedness to the extent insolvent (not in a title 11 case)
 - c Discharge of qualified farm indebtedness
 - d Discharge of qualified real property business indebtedness
 - e Discharge of qualified principal residence indebtedness (Caution: See instructions before checking this box if debt was discharged after 2017.)
- 2** Total amount of discharged indebtedness excluded from gross income **2**
- 3** Do you elect to treat all real property described in section 1221(a)(1), relating to property held for sale to customers in the ordinary course of a trade or business, as if it were depreciable property? Yes No

Part II Reduction of Tax Attributes. You must attach a description of any transactions resulting in the reduction in basis under section 1017. See Regulations section 1.1017-1 for basis reduction ordering rules, and, if applicable, required partnership consent statements. (For additional information, see the instructions for Part II.)

Enter amount excluded from gross income:

- | | |
|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4 | For a discharge of qualified real property business indebtedness applied to reduce the basis of depreciable real property |
| 5 | That you elect under section 108(b)(5) to apply first to reduce the basis (under section 1017) of depreciable property |
| 6 | Applied to reduce any net operating loss that occurred in the tax year of the discharge or carried over to the tax year of the discharge |
| 7 | Applied to reduce any general business credit carryover to or from the tax year of the discharge |
| 8 | Applied to reduce any minimum tax credit as of the beginning of the tax year immediately after the tax year of the discharge |
| 9 | Applied to reduce any net capital loss for the tax year of the discharge, including any capital loss carryovers to the tax year of the discharge |
| 10a | Applied to reduce the basis of nondepreciable and depreciable property if not reduced on line 5. <i>DO NOT use in the case of discharge of qualified farm indebtedness</i> |
| b | Applied to reduce the basis of your principal residence. Enter amount here ONLY if line 1e is checked |
| 11 | For a discharge of qualified farm indebtedness applied to reduce the basis of: |
| a | Depreciable property used or held for use in a trade or business or for the production of income if not reduced on line 5 |
| b | Land used or held for use in a trade or business of farming |
| c | Other property used or held for use in a trade or business or for the production of income |
| 12 | Applied to reduce any passive activity loss and credit carryovers from the tax year of the discharge |
| 13 | Applied to reduce any foreign tax credit carryover to or from the tax year of the discharge |

Part III Consent of Corporation to Adjustment of Basis of Its Property Under Section 1082(a)(2)

Under section 1081(b), the corporation named above has excluded \$ _____ from its gross income for the tax year beginning _____ and ending _____.

Under that section, the corporation consents to have the basis of its property adjusted in accordance with the regulations prescribed under section 1082(a)(2) in effect at the time of filing its income tax return for that year. The corporation is organized under the laws of _____.
 (State of incorporation)

Note: You must attach a description of the transactions resulting in the nonrecognition of gain under section 1081.

Bankruptcy Exception

- Only applies for discharges that occur in “a title 11 case” – i.e. under the Bankruptcy Code, 11 U.S.C § 101 et seq.
- Timing of discharge matters
 - Chapter 7 – discharge occurs per statute
 - Chapter 11 – discharge occurs per the plan
 - Subchapter V – discharge occurs per the plan or no less than 3 years after effective date of plan for cramdown cases
 - Chapter 13 – discharge occurs on completion of plan
- Other insolvency proceedings (receiverships, ABCs, liquidations, etc.) don’t count – you must look to another exception

Insolvency Exception

IRC § 108(d)(3):

- For purposes of this section, the term “insolvent” means the excess of liabilities over the fair market value of assets.
- With respect to any discharge, whether or not the taxpayer is insolvent, and the amount by which the taxpayer is insolvent, shall be determined on the basis of the taxpayer’s assets and liabilities immediately before the discharge.

Insolvency Exception (cont.)

- *Fair market value* (FMV) means: what a willing buyer would pay a willing seller
- FMV is determined immediately before the discharge
- Assets include exempt assets under state law (unless the IRS can't levy on them). Carlson v. Commissioner, 116 T.C. 87, 105 (2001)
 - For example: IRAs, 401(k)s, social security, etc.
- Burden is on taxpayer to prove insolvency. Shepherd v. CIR, 2012 Tax Ct. Memo LEXIS 213, at *4 (T.C. July 24, 2012)
- *Practice Point*: have a good appraiser – treat this as a valuation battle

Insolvency Exception (cont.)

Insolvency Worksheet

Keep for Your Records

Date debt was canceled (mm/dd/yy)	
Part I. Total liabilities immediately before the cancellation (don't include the same liability in more than one category)	
Liabilities (debts)	Amount Owed Immediately Before the Cancellation
1. Credit card debt	\$
2. Mortgage(s) on real property (including first and second mortgages and home equity loans) (mortgage(s) can be on main home, any additional home, or property held for investment or used in a trade or business)	\$
3. Car and other vehicle loans	\$
4. Medical bills owed	\$
5. Student loans	\$
6. Accrued or past-due mortgage interest	\$
7. Accrued or past-due real estate taxes	\$
8. Accrued or past-due utilities (water, gas, electric, etc.)	\$
9. Accrued or past-due child care costs	\$
10. Federal or state income taxes remaining due (for prior tax years)	\$
11. Judgments	\$
12. Business debts (including those owed as a sole proprietor or partner)	\$
13. Margin debt on stocks and other debt to purchase or secured by investment assets other than real property	\$
14. Other liabilities (debts) not included above	\$
15. Total liabilities immediately before the cancellation. Add lines 1 through 14.	\$

Part II. Fair market value (FMV) of assets owned immediately before the cancellation (don't include the FMV of the same asset in more than one category)

Assets	FMV Immediately Before the Cancellation
16. Cash and bank account balances	\$
17. Real property, including the value of land (can be main home, any additional home, or property held for investment or used in a trade or business)	\$
18. Cars and other vehicles	\$
19. Computers	\$
20. Household goods and furnishings (for example, appliances, electronics, furniture, etc.)	\$
21. Tools	\$
22. Jewelry	\$
23. Clothing	\$
24. Books	\$
25. Stocks and bonds	\$
26. Investments in coins, stamps, paintings, or other collectibles	\$
27. Firearms, sports, photographic, and other hobby equipment	\$
28. Interest in retirement accounts (IRA accounts, 401(k) accounts, and other retirement accounts)	\$
29. Interest in a pension plan	\$
30. Interest in education accounts	\$
31. Cash value of life insurance	\$
32. Security deposits with landlords, utilities, and others	\$
33. Interests in partnerships	\$
34. Value of investment in a business	\$
35. Other investments (for example, annuity contracts, guaranteed investment contracts, mutual funds, commodity accounts, interests in hedge funds, and options)	\$
36. Other assets not included above	\$
37. FMV of total assets immediately before the cancellation. Add lines 16 through 36.	\$
Part III. Insolvency	
38. Amount of Insolvency. Subtract line 37 from line 15. If zero or less, you aren't insolvent.	\$

Section 108(b)(5) Election

Taxpayers may elect to **first** reduce the basis in depreciable property, thus permitting a taxpayer to maintain NOLs

The Golden Moment

- If the excluded COD exceeds the taxpayer's tax attributes it is permanently excluded from gross income
- There are no recapture provisions

Bankruptcy Considerations

CARES Act Facilities in Chapter 11

EIDL Loans

- A debtor in bankruptcy cannot apply for EIDL loans based on underwriting standards
- Secured, personally guaranteed
- Generally “all assets”
- SBA will appear through AUSA
- No special treatment in bankruptcy because they are government loans
- SBA Guidance: *SOP 50-52-2 Disaster Loan Servicing & Liquidation*, Office of Capital Access, SBA (Sept. 1, 2015) -
https://www.sba.gov/sites/default/files/sops/SOP_50_52_2.pdf
- Write off of EIDL loan constitutes COD income, SBA will issue 1099-C

CARES Act Facilities in Chapter 11: EIDL Loans

- The SBA will generally work with borrowers
- Remember, the loan will generally be secured by all assets of the debtor, so you need to speak with the SBA prior to filing to reach agreements on cash collateral

CARES Act Facilities in Chapter 11

PPP Loans

- Unsecured, no personal guarantee
- 60% to be used for payroll
- DIP cannot get a PPP loan
- Nothing says a company cannot take out a PPP loan and then file bankruptcy – question is: what happens next?
- Advanced by a bank, not the SBA directly

CARES Act Facilities in Chapter 11: PPP Loans

Cash Collateral Issues

- Are co-mingled funds “cash collateral” of the secured lender?
- UCC §§ 9-312(b)(1), 9-314 – security interests in deposit accounts perfected only by control
- UCC § 9-104 – control means:
 - The money is in the account at the secured creditor/bank
 - Entry into a deposit account control agreement (DACA) between secured party/bank and third-party depository
- Thus, if PPP loan proceeds are maintained in an account of the business at the secured creditor/bank, the secured lender likely has control, and the funds would be cash collateral (given the PPP loan was likely advanced by that bank, it's a good chance control exists)
- However, if the proceeds are kept in a separate account at a different bank, without a DACA, the funds are not cash collateral, even under an all assets UCC

CARES Act Facilities in Chapter 11: PPP Loans

Confirmation Issues

- PPP loans are unsecured
- Thus, in a POR they would likely be classified without GUCs unless an argument could be made for different treatment
- If used according to their statutory purpose, PPP loans are forgivable, thus, they may not be a debt come confirmation under the correct circumstances

CARES Act Facilities in Chapter 11: PPP Loans

Concerns

- *Loan proceeds become cash collateral?*
 - In this case, it is hard to believe that the secured creditor would not want the proceeds used for forgivable purposes.
- *Debtor uses proceeds for non-forgivable purposes but seeks to discharge liability?*
 - If PPP loan was taken out without the intent to repay, DIP officers and directors could have personal liability for fraud; possible crimes under CARES Act
 - May present a confirmation issue under 1129(b)(3) ("The plan has been proposed in good faith and not by any means forbidden by law....") – is discharging a PPP loan "forbidden by law" if the funds were used for an unauthorized purpose?

CARES Act Facilities in Chapter 11: PPP Loans

PPP Loans as Entrance Financing

- A PPP loan may be a good source of entrance financing – covers payroll, rent, mortgage interest payments, and utilities for 24 weeks.
- Other collections can be used for operations, adequate protection.
- Since PPP loans are forgiven, if spent correctly, it can provide a company with additional short term liquidity.
- Caution, there is no guidance yet as to whether such a strategy would be rendered illegal by the SBA.

CARES Act Facilities in Chapter 11: Take Aways

- None are perfect fits for chapter 11 use
- Possible option to use as entrance financing
- DIPs are barred (as of now) from accessing
- Lots of questions concerning how banks/courts will react to treatment in bankruptcy

The background of the slide is a blue-tinted photograph of a jigsaw puzzle. The puzzle pieces are visible at the bottom, while the top half is mostly obscured by a dark blue overlay.

Small Business Reorganization Act

The CARES Act and the SBRA

- SBRA enacted into law on August 23, 2019 and became effective on February 19, 2020 as Subchapter V of Chapter 11, Title 11
- Must affirmatively elect treatment on the petition
- The Act increases the debt limit to access the procedures to \$7.5 million (from \$2,725,625)
- This may provide a solution for companies hard hit by a short but extreme loss of revenue.
- **SARE debtors may not elect subchapter V.**

The CARES Act and the SBRA

SBRA Basics

- Courts have held that debtors whose chapter 11 cases were filed before February 19, 2020 can elect treatment as a “small business debtor” under SBRA, if they meet eligibility requirements, by amending their chapter 11 petitions to so elect or seeking that treatment by motion, effectively making SBRA retroactive:
 - *In re Ventura*, 2020 WL 1867898 (Bankr. E.D.N.Y. Apr. 10, 2020)
 - *In re Bello*, 2020 WL 1503460 (Bankr. E.D. Mich. Mar. 27, 2020)
 - *In re Body Transit, Inc.*, 2020 WL 1486784 (Bankr. E.D. Pa. Mar. 24, 2020)
 - *In re Moore Properties of Person County, LLC*, 2020 WL 995544 (Bankr. M.D.N.C. Feb. 28, 2020)
 - *In re Progressive Solutions, Inc.* (Bankr. C.D. Cal. Feb. 21, 2020)

The CARES Act and the SBRA

Debt Limits

- Originally, to qualify as a “small business debtor,” debtor’s aggregate noncontingent liquidated secured and unsecured debts could not exceed \$2,725,625, but CARES Act increased debt limitations to \$7.5 million with a one-year sunset provision
- Excludes debts owed to one or more affiliates or insiders of the debtor
- For any guaranteed debt by the debtor where the guarantee is absolute and unconditional, it will likely be considered noncontingent and liquidated to the extent there is a default on the principal obligation guaranteed
- At least 50% of debts must arise from commercial or business activities of debtor

The CARES Act and the SBRA

Principal features of SBRA

- No creditors' committee unless court orders one for cause (§§1181(b), 1102(a)(3))
- No disclosure statement required unless the court orders one for cause, in which case either the plan itself can be considered adequate disclosure, the court could approve a disclosure statement submitted on standard forms, and court can conditionally approve pending confirmation hearing (§§1181(b), 1187(c), 1125(f))
- No US trustee fees (28 USC §1930(a)(6))
- While debtor does remain in possession, automatically appoints Subchapter V trustee whose principal function is to supervise and monitor the case and to facilitate development and confirmation of a consensual plan (§1183)
- Section 1183 enumerates trustee's duties, which notably do not include, *inter alia*, investigating acts, conduct and financial affairs of debtor unless, for cause and on request of a party in interest, the court orders an investigation.
- Only debtor may file a plan, which must be filed within 90 days of petition date, subject to extension if need therefor is attributable to circumstances for which debtor should not justly be held accountable (§1189)
- Allows for modification of residential mortgage if loan proceeds were not used primarily to acquire residence but instead were used in debtor's business (§1190(3))

The CARES Act and the SBRA

Cramdown Plans:

- All requirements of section 1129(a) still must be met, except subsections (8) (all classes must accept or be unimpaired), (10) (at least one impaired accepting class) and (15) (best efforts test for individual plan)
- no requirement that there be at least one impaired, accepting class of creditors, i.e., even if all classes reject, cram down is still available
- new “fair and equitable” standard that eliminates the absolute priority rule and in place, imposes a requirement that debtor’s “projected disposable income” must be applied to plan payments for three years or, if the court orders, up to five years; or the value of proposed plan distributions in the applicable payout period is not less than projected disposable income for that period (§1191(c)(2))
- “disposable income” means income not reasonably necessary to pay for expenses necessary to continue and preserve business operations (§1191(d)(2))

The CARES Act and the SBRA

Cramdown Plan (cont.)

- In addition, for an individual debtor, “disposable income” means income that is not reasonably necessary for support of debtor or his or her dependents or to pay a domestic support obligation coming due after the filing of the petition ((§1191(d)(1))
- For individual plans, the new “projected disposable income” standard supplants §1129(a)(15), which, if invoked by an unsecured creditor, requires that an individual debtor distribute property equal to or greater than projected disposable income, as defined in §1325(b)(2), for the longer of five years or the period for which the plan provides payments.
- Discharge will not occur until debtor completes all payments due within first three years of plan or such longer period, not to exceed five years as the court may fix.
- Subchapter V trustee remains in place to make plan payments unless the plan or confirmation order provides otherwise

The CARES Act and the SBRA

Cramdown Plans (cont.)

- Administrative expenses do not have to be paid on confirmation, but can be paid through the plan ((§1191(e)))
- Feasibility requirement modified to require finding that debtor will able to make all plan payments or has a “reasonable likelihood” of doing so (§1191(c)(3)(A))
- Plan must provide appropriate remedies on default, “which may include liquidation of nonexempt assets” (§1191(c)(3)(B))
- Cramdown requirements for secured claims remain unchanged
- Section 1111(b) election can still be made. Since there likely will be no disclosure statement, Interim Bankruptcy Rule 3017 provides that in a Subchapter V case, the election may be made not later than a date the court may fix
- Postconfirmation modification of plan permitted during plan term if circumstances warrant and cramdown confirmation requirements under §1191(b) are met (only debtor may request modification) (§1193(c))

The CARES Act and the SBRA

Consensual plans

- Shall be confirmed if all requirements of section 1129(a) are met, other than subsection (15)
- Administrative expenses must be paid on confirmation
- Subchapter V trustee discharged upon substantial consummation of plan
- Discharge occurs upon confirmation
- Postconfirmation modification not permitted after substantial consummation (§1193(b))

The influence of COVID-19 on pending cases

In re Craftworks Parent, LLC, Case No. 20-10475 (BLS) (Bankr. D. Del. March 30, 2020) (ECF No. 217): Order (I) Establishing Temporary Procedures and (II) Granting Related Relief

- Establishes special lease rejection procedures, initiated by Rejection Notice
- Establishes special stay relief and other motion filing procedures related to lift stay motions, motions or applications for administrative expense, motions to compel assumption or rejection or for payment of rent under sections 365(d)(3) or (d)(5), whereby settlement is encouraged and no hearings scheduled prior to April 30 or such later date as determined by the Court

The influence of COVID-19 on pending cases

In re Pier 1 Imports, Inc., Case No. 20-30805 (KRH) (Bankr. E.D. Va. April 6, 2020) (ECF No. 493): Order (I) Approving Relief Related to the Interim Budget, (II) Temporarily Adjourning Certain Motions and Applications for Payments, and (III) Granting Related Relief

- Authorizes temporary shutdown of operations until notice of intent to reopen filed after consultation with DIP lender (the “Limited Operation Period”)
- Authorizes critical expense budget for payment of wages, utilities, insurance, security, trust fund taxes and “other corporate and professional costs,” with deferral of all other payments, including payment of rent and payments to vendors and suppliers (except for debt incurred in suspension period)
- Debtors to make good faith efforts to pay deferred payments within 45 days following Limited Operation Period
- Adjourns to next omnibus hearing that is no less than 45 days after end of Limited Operation Period motions seeking payment of expenses not in interim budget, lift stay and adequate protection motions and motions to compel rejection or assumption

The influence of COVID-19 on pending cases

Orders entered in *In re Sakon*, Case No. 19-21619
(Bankr. D. Conn. 2019) (Tancredi, J.)

- Orders granting and extending temporary stay of proceedings due to pro se debtor's medical complications (ECF Nos. 64, 79)
- Order denying temporary stay of proceedings – which requested a 21-day extension of all existing deadlines to file responsive pleadings due to COVID-19 – in favor of promptly addressing extension motions on a matter by matter basis

Effect of COVID-19 on Bankruptcy Code Mandated Deadlines

- **SARE Cases** – 90 day deadline to file a plan or make adequate protection payments otherwise stay relief is granted under § 362(d)(3).

Considerations

- May make sense to file a plan early given valuations may be lower, particularly based on income analysis
- Beware of the 1111(b) election
 - Secured creditors gives up deficiency/unsecured claim and must be paid full amount of secured claim over life of plan
 - Can create feasibility issues
 - But, do banks really want real estate back?

Effect of COVID-19 on Bankruptcy Code Mandated Deadlines

- **Section 365(d)(4)** – Limitation on ability of DIP to extend time assume/reject non-residential real estate leases without landlord consent, beyond 210 days following the petition date.
- “No subsequent extensions may be granted by the court without the prior written consent of the lessor in each instance.” 2 Norton Bankr. L. & Prac. 3d § 46:41 (2020)

Considerations

- So long as a motion to assume is filed prior to the deadline, it can be acted on after the deadline. *In re Simbaki, Ltd.*, 520 B.R. 241, 245 (Bankr. S.D. Tex. 2014); *In re Eastman Kodak Co.*, 495 B.R. 618, 622 (Bankr. S.D.N.Y. 2013)
- Under certain circumstances, an appropriate assumption motion could be filed and later withdrawn.
- All “gap” rent must be paid on an administrative basis.

Effect of COVID-19 on Bankruptcy Code Mandated Deadlines

- **SBRA Deadlines:**

- 60 days from petition date to hold status conference and present plan outline, which must be filed 14 days prior to the status conference
- 90 days to file a plan
- Note, court can extend these deadlines for cause based reasons beyond the debtor's control

Considerations

- Certainly COVID-19 is beyond the debtor's control.
- Courts will likely afford reasonable extensions of these deadlines so long as the excuse is legitimate and the debtor is complying with operating criteria generally. *Talk to the trustee!*

The influence of COVID-19 on pending cases

Mothballing and Other Special Case Administration Orders

- Seminal and prototype order entered in *In re Modell's Sporting Goods, Inc.*, Case No. 20-14179 (VFP) (Bankr. D. N.J. March 27, 2020) (ECF No. 166)
 - Pursuant to sections 305 and 105 of the Bankruptcy Code, suspends jointly administered chapter 11 cases until April 30, when a further extension will be considered
 - Suspends all deadlines that would otherwise occur until suspension period terminates
 - Parties permitted to seek relief from court for exigent and unforeseen circumstances
 - Authorizes payment of "essential expenses," and the deferral of all others, including payment of rent

The influence of COVID-19 on pending cases

In re: Chip's Southington LLC, Case No. 20-2145 (Bankr. D. Conn.) (JJT)

- Local casual family restaurant chain
- Had to file for bankruptcy because of landlord eviction action
- Even though CARES II allowed PPP loans in bankruptcy, the SBA refused to allow them anyhow
- Dismissal and reinstatement
- Up for confirmation 12/17/2021

Take Aways

- PPP loans are unsecured
- EIDL loans are secured and usually PG's
- Be mindful of COD issues
- Be mindful of operational issues
- Banks/SBA are still inclined to work with borrowers.
- Provide documents promptly and accurately.
- Be nice!

Employee Retention Tax Credits

Overview

- Extended until December 2021.
- Increases tax credit from 50% to 70% of wages (up to \$10,000) for each quarter.
- Max. benefit is \$28,000 per employee in 2021.
- Businesses with 500 or fewer employees qualify for *small business treatment*.
- Employers who received PPP loans may use tax credit (but can't get forgiveness of associated payroll costs).
- Report on Form 941 *but* file Form 7200 to claim advance credit.
- IRS Cite for all things ERTC <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>
 - Note, that the IRS is way behind in providing clear guidance
 - For example the recent Infrastructure Act eliminated ERTCs for Q4 2021, but the IRS still does not have guidance about this
 - Of course there is an “exception to the exception” for “recover start up businesses”

How it Works

- Requires the business to be partially or completely suspended due to COVID or governmental actions.
- Under CARES II, gross receipts must be reduced by 20% (vs. 50% under CARES I) versus same quarter in 2019.
- Under CARES I once 50% threshold is met, every quarter is eligible for the credit until gross receipts return to 80% of 2019 quarterly earnings – no such provision exists in CARES II.
- An employer that anticipates receiving ERTCs can request an advance against potential 941 liability.

How it Works

- “Qualified Wages” means
 - For 2020, for businesses with less than 100 average FTEs in 2019, **all wages paid in** 2020 Q2, Q3 and 2021 Q1 and Q2 are qualified wages, whether the employees were working or not.
 - For 2020 for businesses with greater than 100 average FTEs in 2019, wages paid in 2020 Q2 and Q3 are qualified wages **only if** the employees **did not work**.
 - For 2021, for businesses with less than 500 average FTEs in 2019, **all wages paid in** 2021 are qualified wages, whether the employees were working or not.
 - For 2021 for businesses with greater than 500 average FTEs in 2019, wages paid in 2021 are qualified wages **only if** the employees **did not work**

ERTC: An Example

<u>Q2 2020</u>	<u>Wages</u>	<u>Fed HH (10%)</u>	<u>ER SS (6.2%)</u>	<u>EE SS (6.2%)</u>	<u>ER Med. (1.45%)</u>	<u>EE Med (1.45%)</u>	<u>50% of Salary</u>	<u>Max. ERTC Credit Amount (\$5000)</u>
A	5,000.00	500.00	310.00	310.00	72.50	72.50	2,500.00	2,500.00
B	10,000.00	1,000.00	620.00	620.00	145.00	145.00	5,000.00	5,000.00
C	15,000.00	1,500.00	930.00	930.00	217.50	217.50	7,500.00	5,000.00
D	30,000.00	3,000.00	1,860.00	1,860.00	435.00	435.00	15,000.00	5,000.00
<u>Q2 2021</u>	<u>Wages</u>	<u>Fed HH (10%)</u>	<u>ER SS (6.2%)</u>	<u>EE SS (6.2%)</u>	<u>ER Med. (1.45%)</u>	<u>EE Med (1.45%)</u>	<u>70% of Salary</u>	<u>Max. ERTC Credit Amount (\$7000)</u>
A	5,000.00	500.00	310.00	310.00	72.50	72.50	3,500.00	3,500.00
B	10,000.00	1,000.00	620.00	620.00	145.00	145.00	7,000.00	7,000.00
C	15,000.00	1,500.00	930.00	930.00	217.50	217.50	10,500.00	7,000.00
D	30,000.00	3,000.00	1,860.00	1,860.00	435.00	435.00	21,000.00	7,000.00

Does the Employer Qualify for ERTCs?

- Had employees in 2020/2021
- Qualifying event?
 - Was business closed due to governmental order
 - For 2020: Did revenue drop for each corresponding quarter by <50% when compared to 2019?
 - For 2021: Did revenue drop for each corresponding quarter by <20% when compared to 2019?

ERTC: An Example (cont.)

- Remember “qualified wages” are capped at \$10,000 per employee per quarter
- Credit is applied to Employer 941 Taxes
- Difference is a rolling credit or refund

<u>Q2 2020</u>	<u>Wages</u>	<u>Fed WH (10%)</u>	<u>ER SS (6.2%)</u>	<u>Total WH</u>	<u>Max. ERTC Credit Amount (\$5000)</u>
A	5,000.00 500.00	310.00	810.00	2,500.00	
B	10,000.00	1,000.00 620.00	1,620.00	5,000.00	
C	15,000.00	1,500.00 930.00	2,430.00	5,000.00	
D	30,000.00	3,000.00	1,860.00 4,860.00	5,000.00	
		6,000.00	3,720.00 9,720.00	17,500.00	
					<u>Refund after Credit Against 941 taxes (\$7,780.00)</u>
<u>Q2 2021</u>	<u>Wages</u>	<u>Fed WH (10%)</u>	<u>ER SS (6.2%)</u>	<u>Total WH</u>	<u>Max. ERTC Credit Amount (\$7000)</u>
A	5,000.00 500.00	310.00	810.00	3,500.00	
B	10,000.00	1,000.00 620.00	1,620.00	7,000.00	
C	15,000.00	1,500.00 930.00	2,430.00	7,000.00	
D	30,000.00	3,000.00	1,860.00 4,860.00	7,000.00	
		6,000.00	3,720.00 9,720.00	24,500.00	
					<u>Refund after Credit Against 941 taxes (\$14,780.00)</u>

ERTC: There's More

Because ERTC can now be used in conjunction with PPP there are coordinating provisions in CARES II. CARES II § 206(c) provides:

- You can't take the ERTC and get a payroll cost deduction for the qualified wages.
- But, you can opt certain wages (and allocable healthcare costs) out of ERTC treatment.
- This allows you to preserve PPP forgiveness.
- The SBA and IRS will need to issue additional guidance on this.
- Lots of other tricky rules, so we'll have to revisit it when the guidance is issued.

Recent Developments

Infrastructure Act

- ERTC terminated as pf Q3 2021
- Cryptocurrency Reporting
 - Expands definition of “broker” of cryptocurrency to include anyone who “transfers digital assets on behalf of another person”
 - This will promote more cryptocurrency reporting by exchangers and wallet companies

Build Back Better Act

- Passed the House pending in Senate, will be revised per statements of various senators
- 1 year extension of expanded child tax credit
 - Also made permanently refundable
- Increase SALT cap from \$10,000 to \$80,000
- 15% minimum tax on financial statement income on companies with more than \$1 billion in profits
- 1% surcharge on stock buybacks
- 5% surtax on AGI that exceeds \$10 million
- Up to \$8500 tax credit for certain electric vehicles
- Limits maximum IRA contributions to \$10 million

Questions?

