

Putting the CARES Act to Work for Your Business

April 2, 2020

Presenters



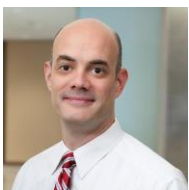
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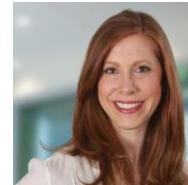
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Preface & Disclaimer

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Who is eligible for a paycheck protection program (PPP) loan?



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Is my business a small business eligible for a PPP loan?

- In addition to “small business concerns” eligible under the existing provisions of the Small Business Act, under the proposed amendments to the SB Act provided for in the CARES Act, the following additional business concerns may be eligible to receive a PPP loan:
 - **any “business concern” with less than 500 employees;**
 - **501 (c)(3) nonprofit organizations (excluding those that receive Medicaid reimbursements);**
 - **501(c)(19) veterans’ organizations; or**
 - **Tribal business concern described in Section 31(b)(2)(C) of the SB Act**

Is my business a small business eligible for a PPP loan?

- **Businesses with more than 500 employees (individually or when aggregated with multiple affiliate entities) may still be eligible under existing SBA guidelines.**
- In line with its authority, the Administrator has provided additional criteria in the form of **size standards** made on an industry-by-industry basis under the North American Industry Classification System (NAICS) (to be discussed in more detail by Elisabeth Prescott).
- Special rules for “accommodation and food service” sectors under NAICS codes (employees counted by location)

Expanded Scope of Eligibility

- Sole proprietorships, independent contractors, and certain eligible self-employed individuals (as such term is defined in section 7002(b) of the Families First Coronavirus Response Act (Public Law 116-127) may also apply for a PPP loan.
 - Disqualified Applicants (Per PPP Application Form) include situations where:
 - (a) the Business or “any owner” suspended, debarred, “proposed for debarment, declared ineligible, voluntarily excluded from participation . . .by any Federal department or agency,”
 - (b) the Business or “any owner” is presently “involved in any bankruptcy”;
 - (c) the Business or any owner (or any business owned or controlled by any of them) obtained a direct or guaranteed loan from SBA or any other Federal agency and that loan is delinquent or has defaulted in the last 7 years and caused a loss to the government, or
 - (d) any individual signing the loan application is “subject to indictment . . . arraignment” or is currently incarcerated or on parole or probation, or has been convicted of a felony within the last 7 years or a misdemeanor within the last six months.
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PPP Lender Application Form 2484

- General Eligibility (*If no, the loan cannot be approved*)
 - Applicant (1) was in operation on February 15, 2020 and either had employees for whom the Applicant paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC, (2) is located in the United States and its territories and possessions, (3) is small (as defined by 13 CFR Part 121) or meets the employee-based size standard established in the CARES Act (whichever is greater), and (4) is impacted by COVID-19 Emergency.
 - If Applicant is an independent contractor, eligible self-employed individual, or sole proprietor, Lender has documentation in its file to support the Applicant is eligible for a PPP Loan.

Who are my employees?

- The CARES Act makes clear that, for purpose of calculating the number of employees, the term **“employee” shall include individuals on the payroll, whether full-time, part-time or on some other basis.** According to existing law, **“other basis” includes those individuals obtained from a temporary employee agency, professional employee organization or leasing concern.** Volunteers are not considered employees, though applicants should be mindful that individuals receiving in-kind compensation for work performed are not considered volunteers but, rather, employees for purposes of size.

When does SBA determine the size of my business?

- Existing regulations regarding the SB Act, particularly 13 CFR §121.302, provide for the date on which size is determined. The CARES Act does not expressly address this issue. Currently, the SB Act provides that the SBA will determine the size status of an applicant for SBA financial assistance as follows:
 - **generally, as of the date the application for financial assistance is accepted for processing by SBA;**
 - in the case of applications under the Preferred Lenders Program (PLP), the SBA Express Loan Program (SBA Express), and the Export Express Loan Program (Export Express), as of the date of approval of the loan by the Lender; and
 - in the case of applications, the Disaster Loan Program, as of the date the disaster commenced, as set forth in the Disaster Declaration.

Calculation of Employees

- Compute your total number of employees for each pay period *over the preceding 12-calendar months*.
 - Based on the “period of measurement” rules discussed earlier, we believe this likely means, under the general rule, the 12-calendar months preceding the loan application itself.
- Formula:

$$\frac{\text{Total \# employees for each pay period}}{\text{Total \# of pay periods}}$$

** The CARES Act is specific that, in calculating employees for purposes of size, “the term ‘employee’ includes “individuals employed on a full-time, part-time, or other basis.” “Other basis” includes those individuals obtained from a temporary employee agency, professional employee organization or leasing concern. As the concept seems to relate to who the business is actively paying, it is unlikely that furloughed employees in Louisiana would be included, though the CARES Act does not so specify.*

What is the maximum loan amount available?

- The “Maximum Loan Amount” (capped at \$10 million) is the lesser of:
 - i. **2.5 times average total monthly “payroll costs”** (as defined below) incurred
 - a) During calendar year 2019 (even though the CARES Act provides for the one-year period before the loan is made), or
 - b) for seasonal employers, as determined by the Administrator, the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or the four (4) month period from March 1, 2019 to June 30, 2019;
 - c) for businesses that were not in existence during the period from February 15, 2019 to June 30, 2019 –2.5 times the average total monthly payroll payments from January 1, 2020 to February 29, 2020;
 - ii. **\$10 million**

What is the maximum loan amount available?

- **Form Loan Application Prepared by the U.S. Treasury:**
 - Most businesses should use average monthly payroll for calendar year 2019
 - Seasonal businesses should use February 15, 2019 through June 30, 2019
 - New businesses should use January 1, 2020 through February 29, 2020
- **Note:** To the extent the applicant intends to refinance a EIDL loan, such loan balance would be added to the number derived from the 2.5 x payroll costs formula (but total maximum loan amount remains \$10 million)

What is the maximum loan amount available?

- For purposes of computing the Maximum Loan Amount (as well as for the permitted use of loan proceeds discussed more fully below), the term “**payroll costs**”:
 - (I) means
 - (aa) the sum of payments of any compensation with respect **to employees** that is a - (AA) salary, wage, commission, or similar compensation, (BB) payment of cash tip or equivalent, (CC) payment for vacation, parental, family medical, or sick leave, (DD) allowance for dismissal or separation, (EE) payment required for the provisions of group health care benefits, including insurance premiums, (FF) payment of any retirement benefit, or (GG) payment of State or local tax assessed on the compensation of employees; and
 - (bb) the sum of payments of any compensation to or income of **a sole proprietor or independent contractor** that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in 1 year, as prorated; and
-

What is the maximum loan amount available?

- (II) shall not include –
 - (aa) the compensation of an individual employee in excess of an annual salary of \$100,000, as prorated;
 - (bb) taxes imposed or withheld under Chapter 21, 22, 24 of the Internal Revenue Code of 1986 (FICA, FUTA and federal income tax withholding);
 - (cc) any compensation of employees whose principal place of residence is outside of the United States;
 - (dd) qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (Public Law 116-127); or
 - (ee) qualified family leave wages for which credit is allowed under section 7003 of the Families First Coronavirus Response Act (Public Law 116-127).

How may my business use the proceeds of a PPP loan?



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How may my business use the proceeds of a PPP loan?

- Proceeds of a PPP Loan may be used by an eligible recipient to cover the following (“**Permitted Uses**”):
 - payroll costs (presumably having the same meaning as defined above);
 - costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums;
 - employee salaries, commissions, or similar compensations (includes independent contractors) (capped at \$100,000 on an annualized basis for each employee/independent contractor);
 - payments of interest on mortgage obligations (not principal) incurred before February 15, 2020;
 - rent under a lease agreements in force before February 15, 2020;
 - utilities for which service began before February 15, 2020; and
 - interest on any other debt obligations that were incurred before the 4.5 Month Covered Period.
- At present, there is no guidance on what “rent” may include but presumably it includes rent paid for land and buildings and may include rent paid for equipment, vehicles and other movable (tangible) property.

What is the maximum amount of the loan eligible for forgiveness?



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Maximum Loan Forgiveness Amount

- Already covered
 - the Maximum Loan Amount
 - what the loan proceeds can be used for

- What is the Maximum Loan Forgiveness Amount?

Maximum Loan Forgiveness Amount

- 8-Week Covered Period = 8 week period from origination of loan
 - Some flexibility and planning
 - Borrower picks when to apply for loan
 - Thereby picks the 8-Week Covered Period
- Maximum Loan Forgiveness Amount = Amount of Eligible Expenditures in 8-Week Covered Period

Maximum Loan Forgiveness Amount

- Eligible Expenditures
 - Payroll costs
 - Interest on mortgage obligations
 - Rent
 - Utilities

Maximum Loan Forgiveness Amount

- “Payroll costs” (as payroll costs are defined above, which excludes the portion of an employee’s compensation in excess of \$100,000 per year, as prorated).

Maximum Loan Forgiveness Amount

- “Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).”
 - A “covered mortgage obligation” is defined as any indebtedness or debt instrument incurred in the ordinary course of business that is a liability of the borrower, is a mortgage on real or personal property, and was incurred before February 15, 2020.
 - Interest on unsecured loans?

Maximum Loan Forgiveness Amount

- “Any payment on any covered rent obligation.” A “covered rent obligation” is defined as rent obligated under a leasing agreement in force before February 15, 2020.
 - Land
 - Buildings
 - Vehicles
 - Equipment
 - Other movable (tangible) property

Maximum Loan Forgiveness Amount

- “Any covered utility payment.” A “covered utility payment” means payment for service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.

Maximum Loan Forgiveness Amount

- Cash basis? Accrual basis?
 - “An eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the sum of the [Eligible Expenditures] *incurred and payments made during* the [8-Week Covered Period].”
 - What if the eligible recipient has gotten behind and catches up by paying 4 months of rent during the 8-Week Covered Period?

Maximum Loan Forgiveness Amount

- Cash basis? Accrual basis?
 - What if the eligible recipient prepays future rent?
 - What if the eligible recipient pays 1 month of rent during the 8-Week Covered Period and one month the day after the end of the 8-Week Covered Period?
 - What if the dates of payroll are such that the eligible recipient incurs 8 weeks of payroll but only pay 6 weeks worth or vice versa?

Maximum Loan Forgiveness Amount

- Cash basis? Accrual basis?
 - Does the eligible recipient only get credit for Eligible Expenditures incurred in the 8-Week Covered Period that it also paid in the same 8-Week Covered Period?
 - Intent?
 - Maybe we will get some more guidance on this

Reductions in Force

- How is the Maximum Loan Forgiveness Amount (“MLFA”) reduced if the number of Employees has been reduced post-disaster (the “Reduction in Force Reduction”)?

Reductions in Force

MLFA x Avg FTEE/Mo during Covered Period*

Avg FTEE/Mo from 2/15/19 – 6/30/19

or

Avg FTEE/Mo from 1/1/20 – 2/29/20

or

for seasonal employers

Avg FTEE/Mo from 2/15/19 – 6/30/19

- *8-Week Covered Period or 4.5 Month Covered Period

Reductions in Force

- Numerator - Avg FTEE/Mo during 8-Week Covered Period*
 - What about employees you terminated prior to the 8-Week Covered Period*?
 - Is the reference to “covered period” intended to be a reference to the 8-Week Covered Period or the 4.5 Month Covered Period?
-

Reductions in Force

- You pick when you apply for a loan
- If you have laid off employees but think you will rehire them before 6/30/20 (and if the reference in the numerator is to the 8-Week Covered Period), you may want to wait until you are ready to hire them to apply for loan

Reductions in Force

- Definition of FTEE?
- Not defined in SBA
- Affordable Care Act – 30 hours per week or 120 hours per month
- An employee that works less – fraction of a FTEE

Reductions in Wages

- MLFA – reductions of more than 25% of wages of any Employees DURING 8-Week Covered Period* as compared to most recent full quarter
- Do not consider any employee who received during any single pay period during 2019 a salary or wages at an annualized rate of pay over \$100,000

Reductions in Wages

- What about wage reductions prior to 8-Week Covered Period*
- What about wage reductions to highly compensated employees?

Curative Measures

- If the MLFA would be reduced as a result of a reduction in force or wages during the 8-Week Covered Period*, can you cure this?
- Statute says reductions that occur between 2/15/20 and 4/26/20 (30 days after statute approved), as compared to 2/15/20, can be cured.

Curative Measures

- What if the 8-Week Covered Period commences after 4/26/20?
- This whole curative section would seem to be irrelevant if
 - You read the reference to covered period to be to the 8-Week Covered Period
 - It makes sense if you read the reference to covered period to be to the 4.5 Month Covered Period

Curative Measures

- Ignoring this inconsistency, reductions that occur prior to April 26 can be cured if eliminated prior to June 30, 2020
- All or nothing?
- What if you terminate employees in July?

How do I Apply?



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Where do I apply?

- Apply with a qualified lender
- Qualified lenders to approve PPP loans
- Lenders must determine if borrower:
 - was in operation on February 15, 2020; and
 - had payroll (employees or independent contractors)

Requirements Waived for PPP Loans

- No collateral
- No Personal Guaranty
- No “Credit Elsewhere” requirement

Gathering Documentation

- Act is not clear and lenders awaiting SBA guidelines
- Application and current SBA guidance suggests:
 - Documents evidencing operation on 2/15/20
 - Documents showing number of FTEE and payroll numbers
 - Tax returns for 2019 and potentially earlier years
 - List owners holding 20% or more of applicant
 - List of entities owned 20% or more by applicant

Good Faith Certification

- Applicant and 20% (or greater) owners must certify
 - Loan “necessary to support” operations due to economy
 - Funds to retain workers, make payroll & other approved payments
 - Will provide documents showing approved payments
 - Loan forgiveness tied to using funds for approved costs
 - One PPP Loan
 - Certify accuracy of loan application & supporting docs
 - Certify accuracy of tax documents used to calculate loan amount

What are the terms of the PPP loan? What about EIDL loans?



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What are the terms of a PPP loan?

- Initial Deferment: Loan repayment deferred for not less than six months and up to twelve months for “Impacted Borrowers”. (US Treasury Fact Sheet - **six months** with interest accruing during deferral period)
- Secondary market: If secondary market lender declines deferment, then SBA will exercise authority to purchase the loan.
- Repayment Term: If remaining balance exists after loan forgiveness, then maximum maturity of 10 years. (US Treasury Fact Sheet - **2 year term.**)

Terms of PPP Loan (continued)

- Interest Rate: Maximum of 4% (US Treasury Fact Sheet – Initially set at **0.5%**)
 - Collateral: Waived
 - Personal Guaranty: Waived
 - Seek loan funds from other sources: Waived
 - Administrator shall have no recourse against any individual shareholder, member, or partner of business for nonpayment of any covered loan, **except** to the extent that such shareholder, member, or partner uses the covered loan proceeds for a purpose not authorized under clause.
-

Terms of PPP Loan (continued)

- Bank Fees: Lenders entitled to compensation (based on loan balance at disbursement)
 - Less than or equal to \$350k 5%
 - Greater than \$350K but less than 2 million 3%
 - Greater than 2 million 1%
- The Secretary of the Treasury may issue regulations and guidance as necessary to carry out the purposes of the PPP, including the allowance of additional lenders to originate loans and to establish terms and conditions such as compensation, underwriting standards, interest rates, and maturity.

What if I already applied for economic injury disaster loan?

- You can still apply for a PPP loan if the EIDL loan was made between January 31, 2020 and the date your PPP loan was made available.
 - But, EIDL loan must be used for different purposes.
 - EIDL loan may be refinanced as part of the PPP loan.
 - Any refinancing will not increase the \$10 million maximum amount allowed for a PPP loan.
 - If business took advantage of an emergency EIDL grant award of up to \$10,000, that amount would be subtracted from the loan amount forgiven under PPP.
-

Changes to Disaster Loans Under CARES Act

- Waives rules related to personal guarantees on advances and loans of \$200,000 or less for all applicants.
- Waives the “1 year in business prior to the disaster” requirement (except the business must have been in operation on January 31, 2020).
- Waives the requirement that an applicant be unable to find credit elsewhere.

Changes to Disaster Loans (continued)

- Allows lenders to approve applicants based solely on credit scores (no tax return submission required) or “alternative appropriate methods to determine an applicant’s ability to repay.”

How does a business know if it is a small business under existing law for the purposes of the CARES Act?



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Computing Size of Your Business

What We Know:

- Eligibility for PPP under CARES Act:

- < 500 employees (assuming no affiliates) = Eligible*

- < 500 employees (with affiliates) = Eligible*

- Individuals* who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals = Eligible (no employee calculation to make)

- > 500 employees (assuming no affiliates) = Maybe eligible

- > 500 employees (with affiliates) = Maybe eligible

- If Maybe eligible:

- Next, look to the SBA employee size standard for your NAICS code.

- If the stated employee size is greater than 500 and your total employees (with affiliates' employees counted) are at or under the stated employee size = Eligible

Computing Size of Your Business

What We Know:

- Example #1 – Applicant business has 600 employees and no affiliates. Applicant is music publisher (NAICS code 512230), the size standard (in employees) of which is 750 employees. Applicant is eligible because applicant meets the size standard in number of employees established for its industry.
- Example #2 – Applicant Company A has 300 employees (its NAICS code permits up to 750). Company B has 300 employees. Though each has less than 500 employees, assuming affiliation rules support a finding of affiliation between Company A and B, their employee numbers must be aggregated to 600. Applicant Company is eligible because applicant, with its affiliate employees included, still meets the size standard in number of employees established for its industry.

Computing Size of Your Business

What We Know:

- Example #3 – Applicant has 500 employees. The stated size standard in number of employees for Applicant’s industry is 500. Applicant, alone, meets the CARES Act criteria. However, Company B is determined to be an affiliate of Applicant. Company B has 100 employees. The stated size standard in number of employees for Company B is 750. Company B, alone meets the CARES Act criteria. Aggregated, the total number of employees of Applicant and Company B is 700. Together, Applicant and Company B exceed the stated employee standard for the Applicant.
- *Can Applicant take advantage of its affiliate’s higher size standard so as to be eligible?*

Computing Size of Your Business

What We Don't Know for Certain:

- Under the existing regulations for an SBA 7(a) loan generally [see, particularly, 13 CFR §121.301(a)], an applicant can take advantage of its' affiliate's higher size standard as long as the applicant company, alone, also meets its own size standard, which is the case in Example #3. However, the applicant would not be permitted to benefit from an affiliate's higher standard if the applicant did not, on its own, meet its own size standard.
- It is not clear, under the CARES Act, whether Congress intended for the rule in 13 CFR §121.301(a) to apply.
 - The language contained in the CARES Act may even be read to limit the rule's application.
 - It reads: “the size standard in number of employees... for the industry in which the business concern operates.”
 - The CARES Act specifies the affiliation rules applicable to nonprofits & veterans organizations (13 CFR §121.301); it does not similarly confirm the affiliation rules for the remaining businesses.

Computing Size of Your Business

What We Don't Know for Certain:

- Will we get an answer?
 - Hopefully.
 - Per the Interim Final Rule issued for comment by the SBA on April 2, 2020, the SBA intends to “promptly issue additional guidance with regard to the applicability of affiliation rules at 13 CFR §§ 121.103 and 121.301 to PPP loans.

Calculation of Employees

- Compute your total number of employees for each pay period *over the preceding 12-calendar months*.
 - Based on the “period of measurement” rules discussed earlier, we believe this likely means, under the general rule, the 12-calendar months preceding the loan application itself.
- Formula:

$$\frac{\text{Total \# employees for each pay period}}{\text{Total \# of pay periods}}$$

** The CARES Act is specific that, in calculating employees for purposes of size, “the term ‘employee’ includes “individuals employed on a full-time, part-time, or other basis.” “Other basis” includes those individuals obtained from a temporary employee agency, professional employee organization or leasing concern. As the concept seems to relate to who the business is actively paying, it is unlikely that furloughed employees in Louisiana would be included, though the CARES Act does not so specify.*

Calculation of Employees

- **Additional Considerations:**
 - Concerns less than a year old – calculate the average # of employees based upon the # of employees for each of the pay periods during which it has been in business.
 - Employees of an Affiliate
 - Employees of domestic and foreign affiliates must be included;
 - Employees of an affiliate acquired during period of measurement should be included; but employees of a former affiliate generally are not included.
 - Special Rule - Any Sector 72 business with more than one physical location but employing 500 or less employees per physical location = Eligible as a small business.

Calculation of Annual Receipts

- Under the SBA Size Standards, the size of some businesses are expressed in terms of annual receipts, not employees.
- Calculations of Annual Receipts will only be relevant to the PPP *if* small business concerns are eligible for a PPP loan by virtue of qualifying as a small business concern under existing SBA size standards and without regard for the 500 or less criteria in the CARES Act.
 - There is an argument that the current language of the CARES Act, as written, intends to include any “small business concern” (defined to include, essentially, any business that qualifies as a small business concern under existing SBA regulations) without regard for the 500 or less criteria.
 - However, the SBA’s Interim Final Rule (though not final) indicates that the 500 or less criteria must even be met by a business that otherwise qualifies as a “small business concern” under the existing regulations.

Calculation of Annual Receipts

- Should a calculation of annual receipts be relevant:
 - “Receipts” generally = Total Income + CGS.
 - Receipts includes all revenue in whatever form received and from whatever source.
 - 3-year look-back period if in business for at least 3 completed fiscal years.
 - SBA will utilize tax returns.
 - Formula:
$$\frac{\text{Total Receipts for last 3 years}}{3}$$
 - Concerns less than 3 years old – annual receipts is the total receipts for period concern in business divided by number of weeks in business, multiplied by 52.

Special Affiliation Rules Under CARES Act

- Waiver of Affiliation Rules for:
 - Sector 72 businesses (hotels & restaurants) .
 - Any business concerns operating as a franchise (that is assigned a franchisor code by the SBA).
 - Any business concern that receives financial assistance from a Small Business Investment Company.
 - Indian Tribes, Alaska Native Corporations, Native Hawaiian Organizations, Community Development Corporations authorized by 42 USC §9805 are not subject to the affiliation rules (this waiver is not particular to the CARES act but existed before).

Do I have affiliates?

- Current SBA regulations 13 CFR §121.103 (Provisions of General Applicability) and 13 CFR §121.301 (Size Eligibility Requirements for SBA Financial Assistance) each contain provisions relating to determining affiliation.
 - Section 121.301 specifically relates to SBA Financial Assistance and particularly references 7(a) business loans (the PPP is a 7(a) loan program).
 - It is a reasonable conclusion that the §121.301 rules as to aggregation of size standards of affiliates and the listed affiliation rules should apply to PPP loans.
 - However, again, the Interim Ruling indicates the SBA plans to issue guidance regarding the applicability of these two CFR sections to PPP loans.

Do I have affiliates?

- In either case, it is likely the following affiliation principles will apply, in some form or fashion unless specifically carved out by the SBA regulations:
 1. Affiliation based on Ownership
 2. Affiliation arising under stock options, convertible securities, & agreements to merge;
 3. Affiliation based on management;
 4. Affiliation based on identity of interest;
 5. Affiliation based on newly organized concern rule;
 6. Affiliation based on totality of the circumstances;
 7. Affiliation based on franchise agreement.

** any one of the principles is sufficient to find affiliation.*

Affiliation Based on Ownership

- A business is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50% of the concern's voting equity;
- Example: Company A is applying for a PPP loan. Company B owns 51% of Company A's voting equity. Company A and B are affiliates. If Company A is evaluating the 500 or under rule in the CARES act or otherwise determines its size under an employee-based size standard (under typical rules), Company A must count its employees and those of Company B in determining its size. Company A will also be affiliated with any other business that Company B controls or is controlled by.

Affiliation Based on Ownership

- If no individual, concern, or entity is found to control, the SBA will deem the Board of Directors or President or CEO (or other officers, managing members, or partners who control the management of the concern) to be in control of the concern;
- A minority shareholder may be deemed to be in control if that individual or entity has the ability (under the concern's organizing documents or other agreement) to prevent a quorum or otherwise block action by the board of directors or shareholders.
- The SBA gives present effect to options, convertible securities, and agreements in determining ownership rights.

Affiliation Based on Management

- Arises where:
 - The management of one concern also controls another concern;
 - A single individual, concern, or entity that controls the Board of Directors or management of one concern also controls the Board of Directors or management of one or more other concerns; or
 - A single individual, concern or entity controls the management of the applicant concern through a management agreement.

Affiliation Based on Management

- Example: The CEO (or other officers, managing members, or partners) of the applicant Company A also controls the management Company B and Company C. Companies B and C will be affiliates of Company.
- Example: George controls the management of Companies A, B and C through the terms of the various companies operating agreements/ bylaws. Companies A, B and C will be deemed affiliates.

Affiliation Based on Identity of Interests

- *There is a rebuttable presumption of affiliation where:*
 - there is an identity of interest between close relatives (defined to include a spouse, parent, child or sibling, or the spouse of any such person) “with identical or substantially identical business or economic interests”
- Identity of Interests has also been found
 - among businesses that are economically dependent on each other through close business relationships or that have identical or substantially identical business or economic interests.

Possibly Ineligible Businesses/ Industries

- Just because you see your industry/ business type listed in the SBA Size Standard chart does not mean you may qualify for an SBA loan. The size standards are also used for certain governmental contracting thresholds.
- In fact, there are many types of business that are not eligible for SBA loan assistance including (among others):
 - Financial businesses primarily engaged in lending, factoring (e.g., banks, finance companies);
 - Life insurance companies (but not independent agents);
 - Businesses deriving more than one-third of gross annual revenue from legal gambling activities;
 - Businesses principally engaged in teaching, instructing, counseling or indoctrination religious beliefs;
 - Private clubs and businesses which limit the number of memberships for reasons other than capacity;
 - Government-owned entities (except for businesses owned/ controlled by Native American tribe); &
 - Strip clubs

Possibly Ineligible Businesses/ Industries

- In addition, there are many businesses that are generally ineligible on other bases such as:
 - Business located in a foreign country (businesses in U.S. owned by aliens may qualify);
 - Businesses engaged in any illegal activity;
 - SBA loan packagers (those that earn $> 1/3$ of gross annual revenue therefrom);
 - Businesses with an associate who is incarcerated, on probation, on parole, or has been indicted for a felony or crime of moral turpitude;
 - Businesses in which the Lender or CDC owns an equity interest;
 - Businesses that have previously default on a Federal loan/ Federally assisted financing (unless waived by the SBA for good cause);
 - Businesses primarily engaged in political or lobbying activities; and
 - Speculative businesses.

Possibly Ineligible Businesses/ Industries

- Though the CARES Act did not go so far as to specify, per the Interim Final Rule, businesses identified in 13 CFR §120.110 and described further in SBA'S Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2 are not eligible for a PPP loan.
 - Nonprofit organizations are specifically made eligible under the CARES Act though they otherwise are listed as a usually ineligible business in Section 120.110.
- If you fall within one of these potentially ineligible businesses, you need to review SOP 50 10 to determine if you fall within an exception to the general rule.
- A copy of SOP 50 10 can be downloaded at: <https://www.sba.gov/document/sop-50-10-5-lender-development-company-loan-programs>

What are the significant tax relief and refund opportunities?



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Significant Tax Provisions - Business Tax Relief

- Families First Act Refundable Credit
- CARES Act Employee Retention Credit
- CARES Act Payroll Tax Deferral
- PPP SBI Loan Forgiveness Income Exclusion
- Refund Opportunities
 - NOL Rules
 - Excess Loss Rules
 - AMT Credits
- Business Interest Expense Rules

Significant Tax Provisions

- Help for Certain Industries
 - Qualified Improvement Property
 - Excise Tax Relief
- Help for Your Employees
 - Retirement Plan Distributions/Loans
 - Student Loan Payments
- State Conformity Issues

Families First Coronavirus Response Act – Refundable credit

- Families First Act (3/18/20) – applies to payments for sick leave and family medical leave during period from April 1st through December 31, 2020
- Eligible employee – at least 30 days of employment and who requests leave
 - Includes leased, part time and temp employees
- Refundable tax credit = 100% of wages paid
 - \$200/day or \$500/day if employee quarantined or has CV19 symptoms; capped at \$5,100 per employee per quarter
 - Refundable family leave credit = 2/3 of employee’s regular rate of pay up to \$200 per day and \$10K in the aggregate for all calendar quarters

Families First Coronavirus Response Act – Refundable Credit

- Refundable tax credit taken against employment taxes
 - Credit available for:
 - Qualified health plan expenses allocated to qualified leave wages
 - Employers share of Medicare taxes on the qualified leave wages
 - both employer & employee SS, medicare & employee FIT
 - Use IRS Form 7200 to claim refund
 - Advance payment of credit not available to self employed
 - Available to businesses with fewer than 500 employees and tax exempt orgs (not governmental entities)

CARES ACT – Employee Retention Credit

- Refundable credit against both employer and employee's share of SS taxes plus employee FIT = 50% of qualified wages up to \$10K per employee
- Employers that average –
 - 100 or fewer employees – credit based on qualified wages paid to all employees during these periods
 - More than 100 employees – credit based on wages paid to employees not performing services
- Wages for ERC do not include wages subject to Families First Act credit and can't claim ERC if business receives a PPP Small Business Interruption loan
- Operations either partially or fully suspended due to govt'l order or significant decline in gross receipts

CARES ACT – Payroll Tax Deferral

- “Applicable employment taxes” deferred for “payroll tax deferral period”
 - Applicable payroll taxes include:
 - SS and Medicare
 - 50% of self-employment taxes
 - Payroll tax deferral period is 3/27/20 to 12/31/20
 - Payments due – half by 12/31/21, remainder by 12/31/22
 - Not available if a PPP Small Business Interruption Loan forgiveness is granted

CARES ACT – PPP Loans and Tax Issues

- Expenses eligible for loan forgiveness include payroll costs
 - Employees including S corp shareholders
 - Likely includes shareholder wages but not dividends
 - Eligible self employed individuals (sole proprietors) and partners
 - Likely includes amounts subject to self-employment tax but “payroll costs” defined without reference to a partner’s self-employment income
 - Who gets to file for loan: partnership, partners, both?

CARES ACT – PPP Loans and Tax Issues

- Forgiven amounts not taxable as cancelation of debt income (does IRC sec. 108 reduction in attributes apply?)
- Caution: the amount of the of sole proprietor's payroll costs may be directly related to prior tax elections or to decisions impacting the individual's 2019 tax return
- Consider whether to amend prior returns or impact on 2019 tax return

CARES ACT – Refund Opportunities and Issues

- Corporate tax rate - 35% (pre TCJA) to 21% and individual rates reduced
- Net Operating Losses
 - NOLs – 5 year carryback of NOLs from 2018, 2019 and 2020 (can amend back to 2013 returns)
 - Sole proprietor or partner can carry back five years (pre TCJA rules would apply)
- Excess Business Losses of Passthrough Entities
 - 2018-2020 losses are now available with carryback opportunities

CARES ACT – Refund Opportunities and Issues

- Alternative Minimum Tax Credits
 - TCJA eliminated AMT on corporations but provided transition rules allowing taxpayers to claim a refundable amount of unused AMT credits through 2021
 - Refundable credit limited to 50% of excess minimum tax in 2018-2020 (fully refundable in 2021)
 - CARES Act accelerates the ability to claim the fully refundable credits to 2018 (by election) or 2019

CARES ACT – Business Interest

- TCJA limited the allowable deduction for business interest expense to business interest income plus 30% of the taxpayer's adjusted taxable income for taxpayers above a certain inflation adjusted amount
- CARES Act raises the limitation to 50% for 2019 and 2020
- Can use 2019 figure for 2020
- Special rule for partnerships

CARES ACT – Retail Glitch “Fix”

- Qualified Improvement Property –
 - TCJA failed to modify QIP to take advantage of bonus depreciation, left on 39 year depreciation schedule
 - Now depreciated over 15 years and eligible for bonus depreciation (100% in year expense is incurred)
- Can accelerate into 2017 or 2018 via amended return or claimed on 2019 tax return (now due 7/15/20)

Help for Employees – Plan Distributions and Loans

- Sponsors can amend a qualified plan to include:
 - Liberalized distributions rules – allowing for corona virus related distributions of up to \$100,000 per employee based on a certification from the employee without 72(t) penalty
 - Liberalized plan loan rules – allowing for corona virus related loans
 - Employees must certify one of the following:
 - participant or spouse diagnosed with CV with an approved test;
 - Adverse financial consequences as result of quarantine, closure, layoff or reduced hours
-

Help for Employees – Student Loan Payment

- Student loan payments – deductible by employer and not income to employee
 - Must be made for “education”
 - Can be paid directly to employee for payment to lender

Louisiana State Conformity Issues

- Decoupled from NOLs
- LA conforms to bonus depreciation – relevant to QIP
- Interest expense addback and related issues
- Compliance deadlines
- Audit or controversy resolution possibilities

QUESTIONS?

Contacts



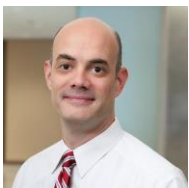
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