

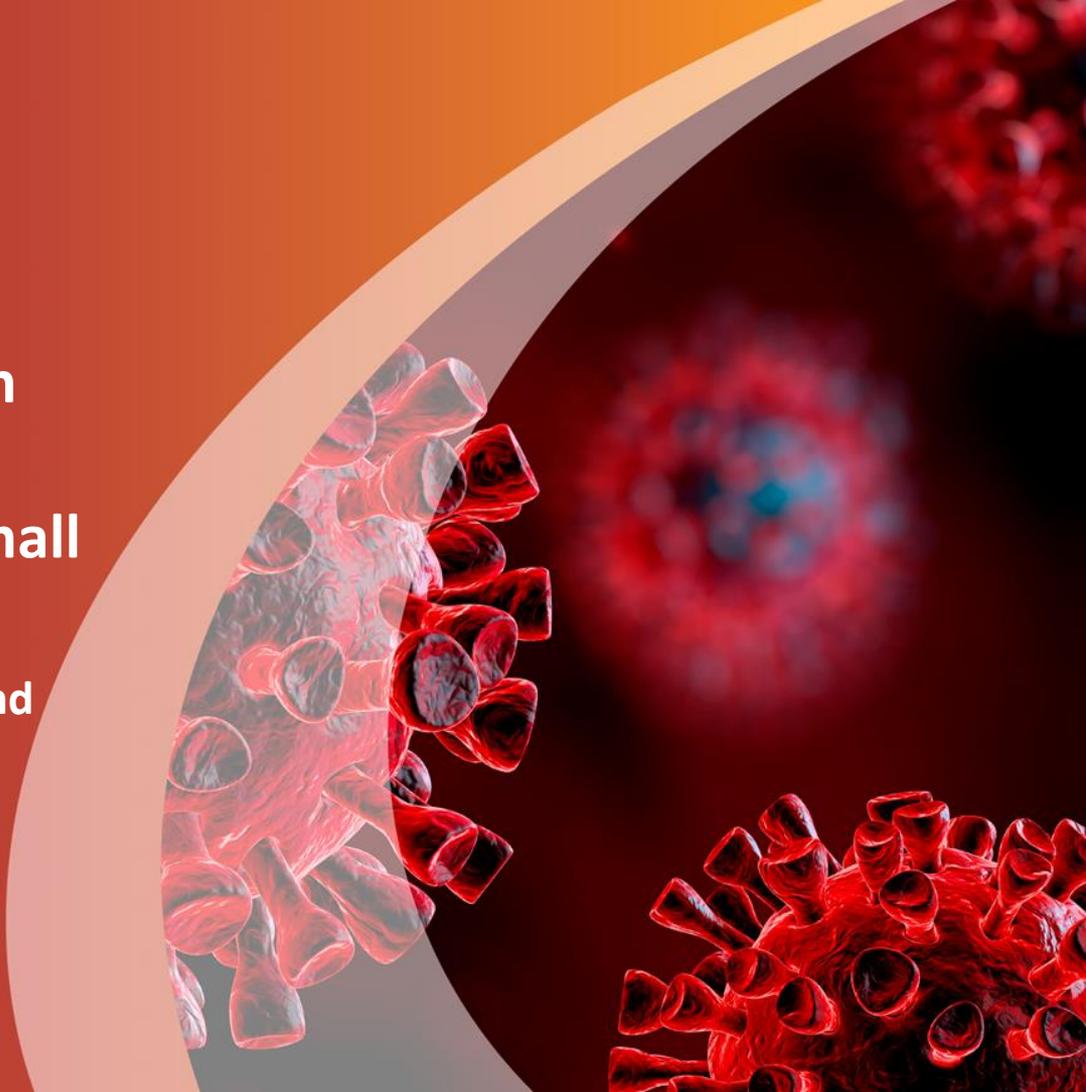


# **COVID-19 Stimulus Law Paycheck Protection Program and SBA Economic Injury Disaster Loan Lifelines for Small Businesses:**

**Are You Eligible, How Do You Apply, and  
What are the Key Terms/Benefits?**

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# Agenda

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- PPP and EIDL Loan Overviews
- Key Loan Terms and Benefits
- Eligibility
  - Understanding size status and affiliation
  - PPP Standards
  - EIDL Differences
- Required PPP Certifications
- How to Prepare to Apply Now

# Two Different Types Of Small Business Loans

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## Paycheck Protection Program (PPP) And Economic Injury Disaster Loans

- **\$349 billion** appropriated for forgivable loans to small business concerns and businesses and nonprofit organizations with under 500 employees under new PPP
  - Up to \$10 million, with amount based upon average total monthly payroll costs from prior 12 months
  - Can be used as working capital to pay payroll costs, rent, utilities and other specified costs
- Separate SBA Economic Injury Disaster Loan (EIDL) program previously established
  - Up to \$2 million; CARES Act also includes up to \$10,000 immediate grant
  - Provides working capital to assist small businesses through disaster recovery period to pay accounts receivable, fixed debts, payroll and other bills
  - Can be refinanced into PPP Loan if obtained after January 31, 2020

# Payroll Costs

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## Determines Amount That Can Be Borrowed And Forgiven For PPP Loans

- For U.S. employees, capped at \$100,000 in annual salary and excludes FICA taxes or income tax collected at the source:
  - salary, wage, commission, or similar compensation; payment of cash tip or equivalent;
  - payment for vacation, parental, family, medical, or sick leave;
  - allowance for dismissal or separation;
  - payment required for the provisions of group health care benefits, including insurance premiums;
  - payment of any retirement benefit; or
  - payment of State or local tax assessed on the compensation of employees
- 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

# Permitted Uses For PPP Loans

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## Some Expenditures Are Not Eligible To Be Forgiven

- Permitted Uses for PPP Loans include:
  - payroll costs;
  - 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; payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation);
  - rent (including rent under a lease agreement);
  - utilities;
  - interest on any other debt obligations that were incurred before the covered period; and
  - uses otherwise for loans made under Section 7(a) of the Small Business Act, which includes equipment and fixtures; working capital, inventory, seasonal line of credit or refinancing debt, including an EIDL loan.

# PPP Loans Are Forgivable

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## They Also Come With Favorable Terms To The Extent They Are Not

- PPP Loans are subject to forgiveness, in whole or in part, for certain “covered expenses” incurred during the 8 week period following the date of the PPP Loan
  - Covered expenses are payroll costs, interest on covered mortgage obligations, rent obligations and utilities
  - The amount of principal that is forgiven is not included in gross income for tax purposes
  - PPP Loan forgiveness is subject to formulaic reduction compared to specified prior periods **and** additional reduction for workforce or salary reductions after February 15, 2020 which can be mitigated if the company increases its workforce or the salary/wages it pays its employees by June 30, 2020
- Any balance of a PPP Loan which is not forgiven must be repaid, with a loan maturity of up to 10 years after forgiveness and a maximum 4% interest rate
  - Deferral of loan payments for a period of not less than 6 months, and not more than 1 year
  - No personal guarantees required

# Applying for a PPP Loan

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## The SBA Has Not Yet Established The Application Process

- Contact existing banking relationships
  - The CARES Act expands the number of lenders that can make PPP Loans
- Gather documentation likely to be needed
  - The CARES Act mandates a streamlined process
  - A lender is to consider whether a borrower
    - Was in operation on February 15, 2020; and
    - Had employees for whom the borrower paid salaries and payroll taxes; and/or paid independent contractors, as reported on a Form 1099–MISC
- Application form to follow once created by the SBA

# EIDL Approval and Terms

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## The CARES Act Eases Approval Requirements

- Can be made directly by the SBA or authorized lender
- Approval based solely on an applicant's credit score or "alternative appropriate methods" for determining the applicant's ability to pay
- Terms of the loans vary depending on the applicant's ability to repay
  - Loans can be for up to 30 years for some borrowers
  - Interest rate is 3.75% per annum for small businesses and 2.75% per annum for nonprofits
  - Deferral of principal and interest payments similar to PPP Loans
  - Waiver of requirement for personal guarantee on advances and loans of not more than \$200,000

# Emergency EIDL Grants

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## Up To \$10,000 In Advances

- An applicant for an EIDL loan may request that the SBA provide an up to \$10,000 advance within 3 days after the SBA receives an application from such applicant
- Grants may be used for providing sick leave for employees unable to work as a result of COVID-19 illness, payroll, increased cost of materials, rent or mortgage payments and paying obligations that cannot be met as a result of revenue losses
- If the SBA ultimately rejects the application, the applicant may retain the initial \$10,000 advance without needing to repay it
- If the applicant subsequently receives a PPP Loan, the grant amount is deducted from the forgiveness amount of a PPP Loan

# PPP/EIDL Loan Eligibility

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## Access To Loans Limited Based On Eligibility

- Eligible entities are all determined based on size status in some form
- All applicants (even commercial contractors) must understand how the U.S. Government measures size and applies concept of affiliation
- Central to analysis is the applicable NAICS code (primary or options?)
- Expanded types of entities and individuals eligible
- Avenues of Eligibility
  - Small businesses
  - Expanded PPP eligibility for Entities with a NAICS Code beginning with 72
  - Expanded PPP eligibility for entities with other NAICS Codes
  - Expanded EIDL eligibility and differences from PPP

# Eligibility

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## Understanding How Small Business Status Is Determined

- Whether a business is “small” is a complex and dynamic determination
- Industry-specific size standards
  - Average annual receipts – 3 year lookback
  - Number of employees – 12 month lookback
- Measured at a specific point in time
- Eligibility criteria (for contracts, financial assistance, etc.) with associated certifications – risk of fraud, false claims
- Includes employees/receipt of the business and all “affiliates”

# The Complex Spider Web of Affiliation

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## An Applicant's Status May Have To Include Additional Employees/Receipts

- What is affiliation?
  - Does the applicant control or have the power to control third parties?
  - Does another entity or individual have the power to control the applicant as well as to control other third-parties?
  - Only power to control required (not actual) and includes negative control (blocking rights)
  - Key areas of affiliation analysis: ownership, management, decision-making control, identity of interest (family or common economic interests)
- CARES Act provides no EIDL exemptions from affiliation
- Very limited affiliation exemptions for PPP:
  - Applicants with Sector 72 NAICS code and 500 or fewer employees
  - Franchises
  - Applicants receiving financial assistance from SBICs

# How the U.S. Government Measures Size

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## NAICS Code Dictates Size Status

- NAICS Code are based on industry under broader umbrellas of sector and all have assigned size standard – 13 C.F.R. § 121.201
- Receipts-Based NAICS Codes for services and construction
  - Average annual receipts of a concern = the total receipts of the concern over its most recently completed three fiscal years divided by three
- Employee-Based NAICS Codes for manufacturing
  - Average number of employees of the concern = numbers of employees (including full-time, part-time, and other basis) for each of the pay periods for the preceding completed 12 calendar months
- Applicant may operate in more than one NAICS and can be small in one NAICS and large in another
- Size determined as of a specific date

# PPP/EIDL Eligibility

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## Types Of Entities & Individuals Eligible

- Small business concerns – based on applicable NAICS code
- Self-employed individual (only for PPP), independent contractor, or sole proprietorship
- The following with 500 or fewer employees:
  - Non-profit organization (PPP) or private non-profit organization (EIDL)
  - A business concern
  - Veterans organization (PPP)
  - Tribal business concern defined in 15 U.S.C. §657a(b)(2)(C) (PPP & EIDL)
  - Cooperative (EIDL)
  - ESOP defined in 15 U.S.C. § 632 (EIDL)
  - Small agricultural cooperative (EIDL)

# PPP Eligibility Expansion

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## Expanded Eligibility For Entities With A NAICS Code That Begins With 72

- Relevant threshold for other than small business concern: 500 or fewer employees
- Analysis:
  - Affiliation rules will apply if the applicant has more than 500 employees, as of the date on which the covered loan is disbursed
  - Applicant with or without affiliates but only 1 location: will be eligible if have (in total) 500 or less employees
  - Applicant with no affiliates and more than 1 location: will be eligible if have 500 or less employees per location
  - Applicant with affiliates and more than 1 location: not clear how eligibility will be measured

# PPP Eligibility Expansion

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## Expanded Eligibility For Entities With A NAICS Code Do NOT Begin With 72

- Relevant standard either:
  - 500 or fewer employees, or
  - If the applicant is subject to a larger employee-based size standard under the NAICS for the industry in which the applicant operates, the applicable size standard.
- Analysis:
  - Do the affiliation rules apply? If so, does the applicant have affiliates?
  - Does the applicant *and its affiliates* fall under the relevant threshold?

# EIDL Eligibility Expansion & Key PPP Eligibility Differences

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- Different coverage of types of eligible entities in PPP, EIDL
- CARES Act added new 500 employee standard (in addition to small businesses)
- No different standards for NAICS Sector 72
- No waiver of affiliation
- Must have been in operation as of January 31, 2020
- Must have substantial economic injury and are located in a disaster-declared county or contiguous county
  - Small business owners in all U.S. states and territories are currently eligible to apply for a low-interest loan due to COVID-19
- Eligibility verification part of SBA COVID-19 online application process, and SBA cautions:
  - “The Applicant understands that the SBA is relying upon the self-certifications contained in this application to verify that the Applicant is an eligible entity to receive the advance, and that the Applicant is providing this self-certification under penalty of perjury pursuant to 28 U.S.C. 1746 for verification purposes.”

# Key Issues In Need Of Clarification

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## Without Additional Guidance Or Regulations, Key Questions Remain

- Which affiliation and size standards apply?
  - 13 C.F.R. § 121.103 or 13 C.F.R. § 121.301
  - Size is determined as of what date?
- How is the applicable NAICS determined, including when applicant operates under more than one?
- How do I calculate employees?
- What information is needed to support representation/certification of size status/eligibility?

# PPP Certifications That Will Be Required

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1. That the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the recipient;
2. Acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;
3. That the recipient does not have an application pending for a loan under Section 7(a) of the Small Business Act; and
4. During the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under Section 7(a) of the Small Business Act.

# Steps You Can Take To Prepare Now

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1. Document current efforts taken to support ongoing operations;
2. Determine how many employees the applicant has as well as how many employees any potential affiliate has;
3. Determine if changes could be made quickly on ownership or control issues to avoid affiliation BEFORE loan application; and
4. If the affiliation rules apply to the applicant, collect the documents necessary to help counsel determine if the applicant has affiliates, including but not limited to: cap table; by-laws; articles of incorporation or certificates of incorporation; any operating agreement, voting, and/or shareholder agreement; and identification of any family relationships or common business/investment interests between individual shareholders as well as between board members.

# Questions?

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