

Comparing Paycheck Protection Program and Emergency Economic Injury Disaster Loan Options for Small Business under the CARES Act.

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) has authorized significant funds under the SBA’s 7(a) loan program through the Paycheck Protection Program and the Emergency Economic Injury Disaster Loan program. As many small businesses develop their plans to address the impacts of COVID-19, we are supplying a comparison of these two programs.

	PAYCHECK PROTECTION PROGRAM LOANS	EMERGENCY ECONOMIC INJURY DISASTER LOANS
Source	CARES Act (3/27/2020) modified SBA 7(a) loans	Existing program modified by the CARES Act
Who is the Lender?	<p>Any existing SBA lender or through any federally insured depository institution, federally insured credit union and Farm Credit System institution that is participating</p> <p>Other regulated lenders will be available to make these loans once they are approved and enrolled in the program.</p> <p>The Application can be found here.</p>	<p>US Small Business Administration</p> <p>Apply online here.</p>
Who is Eligible?	<p>Subject to applicable size requirements:</p> <ul style="list-style-type: none"> ▪ Small business concerns¹ ▪ Other business concerns² ▪ 501(c)(3) nonprofit organizations ▪ 501(c)(19) veteran organizations ▪ Tribal business concerns ▪ Sole proprietorships ▪ Independent contractors 	<p>Subject to applicable size requirements:</p> <ul style="list-style-type: none"> ▪ Small business concerns ▪ Small agricultural cooperatives ▪ Most private nonprofits of any size⁴ ▪ Other business concerns with 500 or less employees ▪ Cooperatives with 500 or less employees ▪ ESOPs with 500 or less employees ▪ Tribal business concerns with 500 or less employees

¹ A “small business concern” as used in this comparison is any business concern independently owned and operated and which is not dominant in its field of operation meeting the applicable size standard for its industry. See Section 3(a) of the Small Business Act.

² A “business concern” as used in this comparison is any business entity organized for profit, with a place of business located in the U.S. which operates primarily within the U.S. or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

⁴ Private non-profit organization granted tax exemption under 501(c), (d) or (e) of the Internal Revenue Code. According to the National Council of Nonprofits, eligible private nonprofits for purposes of EIDLs include, without limitation, nursing homes, food kitchens, educational facilities, senior citizen centers, daycare centers, playhouses, and shelters.

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	<ul style="list-style-type: none"> ▪ Eligible self-employed individuals <p>*Religious organizations are eligible according to FAQs issued by the SBA on 4/3/2020.³ Click here to view these Frequently Asked Questions.</p> <p>*Businesses that continue to be ineligible include shopping centers, apartment buildings, mobile home parks, residential facilities that do not provide medical services, lending and investment companies, and other businesses primarily engaged in owning or purchasing real estate and leasing it for any purpose (hotels, RV parks, marinas, campgrounds, nursing homes and assisted living facilities are explicitly exempt from this ineligibility and self-storage facilities are generally considered eligible).</p>	<ul style="list-style-type: none"> ▪ Sole proprietorships ▪ Independent contractors <p>*Religious organizations are eligible according to FAQs issued by SBA on 4/3/2020. Click here to view these Frequently Asked Questions.</p> <p>*Businesses that continue to be ineligible include certain agricultural enterprises, charitable organizations, gambling concerns, life insurance companies, lending and investment companies. EIDL loans are available to a wider range of asset classes compared to PPP, including owners of shopping centers, apartment complexes and office buildings.</p>
What are the applicable size requirements?	<ul style="list-style-type: none"> ▪ Small business concerns: <ul style="list-style-type: none"> ○ Applicant alone (without affiliates) must not exceed the SBA employee-based or revenue based⁵ size standard for the industry in which the applicant is primarily engaged; AND ○ Applicant when combined with its affiliates must not exceed the size standard designated for either the primary industry of the Applicant alone or the primary industry of the Applicant and its affiliates, whichever is higher. Go to http://www.sba.gov/size for industry standards. ○ If the applicant does not meet the SBA size standard above, it can use alternative size standard if as of 3/27/2020: (1) maximum tangible net worth of the business is not more than \$15 million; and (2) average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before date of application is not more than \$5 million. 	<ul style="list-style-type: none"> ▪ Small business concerns and small agricultural cooperatives: <ul style="list-style-type: none"> ○ SBA employee-based or revenue-based size standard corresponding to the applicant’s primary industry and the primary industry of the applicant and its affiliates; AND ○ The size of the applicant combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, whichever is higher. ▪ Other businesses see size limitations within the “Who is Eligible” row.

³ Churches that meet the requirements of 501(c)(3) are eligible for the Paycheck Protection Program and EIDLs even if they have not applied for or been advised of their tax-exempt status by the IRS according the Frequently Asked Questions.

⁵ SBA calculates annual receipts for both the Applicant and its affiliates based on federal tax returns.

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	<ul style="list-style-type: none"> ▪ Other business concerns, 501(c)(3) nonprofit organizations, 501(c)(9) veteran organizations, and Tribal business concerns, when combined with affiliates has no more than the greater of: <ul style="list-style-type: none"> ○ 500 employees whose principal place of residence is in the U.S.; OR ○ SBA employee-based size standards for the industry in which it operates (if applicable). <p>Applicants that fall under a NAICS Code starting with the number 72 (Accommodations and Food Service sector) may have 500 or fewer employees whose principal place of residence is in the U.S. at each physical location.</p> <p>Click here to be taken to the small business size table and look for your applicable NAICS code.</p> <p>*What if I fall under more than one NAICS code? Look at the NAICS code for which the applicant is primarily engaged and the NAICS code for the applicant combined with its affiliates. The SBA considers the distribution of receipts, employees and costs of doing business among different industries to determine an applicant’s primary industry.</p>	
<p>How do I count employees?</p>	<p>Most businesses will use the average number of employees of the concern, including employees of its affiliates, over the past 12 months or from calendar year 2019.</p> <p>For seasonal businesses, the business may use the average monthly payroll for period between 2/15/2019 or 3/1/2019 and 6/30/2019. An applicant that was not in business during that period may use the average number of employees for the period 1/1/2020 through 2/29/2020.</p> <p>Employees of an applicant who are technically employees of a professional employer organization or payroll provider are considered employees of the applicant and not employees of the professional employment organization or payroll provider for</p>	<p>Businesses should use the average number of employees of the concern, including employees of its affiliates, over the past 12 months.</p>

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	purposes of determining the number of employees and calculating payroll costs.	
Maximum Amount	<p>The lesser of (1) \$10 million or (2) applicant’s average total monthly payroll costs⁶ multiplied by 2.5 plus the amount of any outstanding EIDL</p> <p>Average monthly payroll is calculated taking the average of the aggregate payroll costs from the last twelve months or from calendar year 2019 for employees whose principal place of residence is in the United States, excluding salary and wages over \$100,000 on an annualized basis for each employee and any amounts to be paid to a sole proprietor (where the applicant is the sole proprietorship) in excess of \$100,000 per year.⁷ The exclusion of compensation in excess of \$100,000 applies only to cash compensation, and not to non-cash benefits such as employee benefits or employer contributions to retirement plans.</p> <p>Seasonal businesses may elect to use the average monthly payroll for the period beginning 2/15/2019 through 6/30/2019. New businesses (that were not in business from 2/15/2019 to 6/30/2019) may calculate average monthly payroll based on the period from 1/1/2020 - 2/29/2020, annualized.</p>	Up to \$2 million but limited to the amount of economic injury associated with COVID-19

⁶ “Payroll costs” means any compensation with respect to employees that is a (a) salary, wage, commission, or similar compensation; (b) payment of cash tips or equivalent; (c) payment for vacation, parental, family, medical, or sick leave; (d) allowance for dismissal or separation; (e) payment required for the provisions of group healthcare benefits, including insurance premiums; (f) payment of any retirement benefits; and (g) payment of State or local tax assessed on the compensation of employees. Payments of compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, or net earnings, or similar compensation that is not more than \$100,000 in one year is also included in the definition of “payroll costs”. “Payroll costs” specifically exclude costs relating to (a) the compensation of an individual in excess of an annual salary of \$100,000; (b) federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020; (c) compensation of any employee whose principal place of residence is outside of the United States; (d) qualified sick leave wages for which a credit is allowed under the Families First Act; and (e) qualified family leave for which a credit is allowed under the Families First Act. There are special considerations made for seasonal employers.

⁷ While the CARES Act indicates that that the payroll cost calculation exclude any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year, the Interim Final Rule issued on 4/2/2020 and the Frequently Asked Questions dated 4/8/2020 indicate that payments to independent contractors are excluded from the calculation outright, without reference to the \$100,000 threshold, as an independent contractor may apply for a Paycheck Protection Program loan directly.

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	If an applicant uses a payroll provider or a professional employer organization, these payroll costs may be included in an applicant's payroll cost calculation.	
Interest Rate	1.00%	Maximum interest rate of 3.75% (2.75% for nonprofits)
Loan Term	2 years	30 years
Personal Guarantee Required	No	Waived for loans of \$200,000 or less from 1/31/2020 through 12/31/2020.
Collateral Required	No	General requirements of collateral for loans exceeding \$25,000 expected to apply
Ability to Repay Determination	Does not apply	At discretion of SBA. Shall not require the submission of tax returns.
Proof that Credit Not Available Elsewhere Requirement	Does not apply	Does not apply
Fees	None	None
Special Program Criteria	<ul style="list-style-type: none"> ▪ Business must be operational on 2/15/2020 ▪ Business had employees for whom it paid salaries and payroll taxes or paid 1099 independent contractors ▪ Must certify the business has been substantially impacted by COVID-19 and will use the funds to retain employees and meet payroll and other obligations ▪ No minimum credit score required 	<ul style="list-style-type: none"> ▪ Business must have suffered, or are likely to suffer, substantial economic injury as a result of COVID-19 ▪ Business must be operational on 1/31/2020 ▪ May be approved solely on the applicant's credit score <p>Businesses within all US states and territories are eligible (regardless of specific jurisdiction disaster declaration)</p>

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Do SBA Affiliation Rules Apply ⁸	<p>Yes, except they are waived for the following:</p> <ul style="list-style-type: none"> ▪ Businesses within the Accommodation and Food Services sector (NAICS Sector 72) with not more than 500 employees per location are eligible (click here to view NAICS list) ▪ any business concern operating as a franchise that is assigned a franchise identifier code by the SBA (click here to check the directory) ▪ any business concern that receives funding from a company licensed under section 301 of the Small Business Investment Act of 1958 <p>*The SBA issued additional guidance concerning the affiliation rules on 4/3/2020. View the additional guidance here. There is an exemption for religious organizations stating that “[t]he relationship of a faith-based organization to another organization is not considered an affiliation with the other organization if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.”</p>	<p>Yes, but none of the special exceptions noted in the Paycheck Protection Program column apply to EIDL.</p> <p>*The additional guidance on 4/3/2020 published by the SBA concerning the affiliation rules for faith-based organizations discussed under the Paycheck Protection Program Loans column also applies to EIDL.</p>
Permitted Uses of Funds	<p>During the period of 2/15/2020 through 6/30/2020</p> <ul style="list-style-type: none"> ▪ Payroll costs - At least 75% of the Paycheck Protection Program loan proceeds MUST be used for payroll costs (including any EIDL loan that is refinanced). Costs related to the continuation of group healthcare benefits during periods of paid sick, medical or family leave, and insurance premiums ▪ Interest on mortgage and other debt in place before 2/15/2020 ▪ Rent in place before 2/15/2020 ▪ Utilities in service before 2/15/2020 	<p>Specific authorized uses for COVID-19 related EIDLs:</p> <ul style="list-style-type: none"> ▪ Pay fixed debt, including mortgage and rent payments ▪ Payroll ▪ Accounts payable ▪ Paid sick leave ▪ Meeting increased costs to obtain materials where the regular supply chains have been interrupted

⁸ The affiliation rules found at 13 CFR § 121.301 (with exemptions in §121.103(b)) continue to apply except as specifically modified by the CARES Act as described above. In general, the affiliation rules require that, for purposes of determining whether the size standard is limitation is met, the employees of an applicant are aggregated with the employees of the applicant’s affiliates. The determination of what constitutes an affiliate is very fact specific and is based on whether one business controls or has the power to control another or if a third party controls or has the power to control both businesses. For more information concerning the affiliation rules, please visit <https://frostbrowntodd.com/the-cares-act-the-affiliation-rules-and-how-they-impact-eligibility-under-the-paycheck-protection-program/>.

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	<ul style="list-style-type: none"> ▪ Refinancing an SBA EIDL loan made between 1/31/2020 and 4/3/2020 	<ul style="list-style-type: none"> ▪ Other bills that would have been paid had the disaster not occurred
Impermissible Uses of Funds	<ul style="list-style-type: none"> ▪ See the exclusions to the definition of “payroll costs” in Footnote 6 ▪ Any other use not set forth above 	<p>EIDLs cannot (under the general EIDL program rules) be used for:</p> <ul style="list-style-type: none"> ▪ Replacing lost sales or profits ▪ Expansion of business ▪ Refinancing debt ▪ Payments on loans owned by a federal agency (including the SBA) ▪ Payments of tax penalties or any criminal or civil fine ▪ Payment of dividends or other disbursement to owners, partners, shareholders or officers, other than for reasonable compensation for their performance of services
Loan Forgiveness	<p>Loan forgiveness is available up to the amount spent by a borrower during the 8-week period following the date the loan proceeds are initially disbursed (the “covered period”) for payroll costs, mortgage interest, rent obligations, and utility payments. Not more than 25% of the forgiven amount may be for non-payroll costs. Loan proceeds are to be disbursed within 10 calendar days from date of loan approval.</p> <p>The forgivable amount is reduced proportionally by any reduction in the number of full-time employee equivalents retained or a reduction in the pay of any employee, making less than \$100,000 annualized in 2019 greater than 25% of the employee’s prior compensation, over the period of the 8 weeks. This reduction in the forgivable amount will not apply to the extent the full-time employee count and salaries/wages are restored to their 2/15/2020 levels before 6/30/2020.</p> <p>Borrower may request loan forgiveness by submitting a request to the lender. The request must include documents that verify the</p>	<p>An applicant can request a \$10,000 advance which is payable by the SBA within 3 days of receipt of the application. This \$10,000 advance (also referred to as a grant) need not be repaid (even if the EIDL is ultimately denied) so long as it is used for the specific permissible purposes identified in the CARES Act listed above.</p> <p>As of 4/8/2020, this advance is limited to a maximum of \$1,000 per employee of the applicant, up to an aggregate maximum of \$10,000.</p>

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	number of full-time equivalent employees and pay rates for (i) the covered period of 3/1/2020 to 6/30/2020, and (ii) 3/20/2019 to 6/30/2019, payments on eligible mortgage, lease and utility obligations. Borrower will have to certify that the documents are true and that they used the forgiveness amount to keep employees and make eligible mortgage, interest, rent and utility payments. The lender must make a decision on the forgiveness within 60 days.	
Payment Deferral	All payments are deferred for 6 months. Interest will accrue over this period. There are no prepayment premiums so the loan may be paid back at any time.	All payments are deferred for 12 months. Interest will accrue over this period. There are no prepayment premiums so the loan may be paid back at any time.
Can I get both types of Loans?	<p>Yes, but</p> <ul style="list-style-type: none"> An applicant cannot get both a 7(a)/Payment Protection Program loan and an EIDL for the same purposes. However, the EIDL can be refinanced into a 7(a)/Payment Protection Program loan.⁹ If an applicant receives an advance under an EIDL (a maximum of \$10,000), this amount is reduced from the amount of the loan eligible for forgiveness under the 7(a)/Paycheck Protection Program loan. If your EIDL loan was used for payroll costs, your Paycheck Protection Program loan must be used to refinance your EIDL loan. 	
When can I apply?	<p>Now</p> <p>Applicants have until 6/30/2020 to apply, assuming funds are remaining.</p>	<p>Now</p> <p>Applicants have until 12/31/2020 to apply, assuming funds are remaining.</p>
Supporting Documentation	With the completed application lenders may want to see payroll reports for 2019 showing gross wages for each employee, including officers if paid W-2 wages, paid time off for each employee, vacation pay for each employee, family medical leave pay for each employee	<p>The application should include:</p> <ul style="list-style-type: none"> SBA Form 5 IRS Form 4506T SBA Form 2202

⁹ In short, the CARES Act prohibits “double-dipping” for the same use of funds. This would include the employee retention credit described in the Cares Act. This concept is also carried into the benefits received under the Families First Act such that an employer may not use a Paycheck Protection Program loan for the same expenses for which tax credits are received under the Families First Act. The forgivable amount of any Payment Protection Program loan will also be reduced since these are omitted from the definition of “payroll costs”.

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	<p>and state and local taxes assessed on employee’s compensation. Lenders may also ask for 2019 IRS Quarterly 940, 941 or 944 payroll tax reports.</p> <p>*Knowingly making a false statement or providing false information to get a loan is punishable by law.</p>	<ul style="list-style-type: none"> ▪ SBA Form 413 <p>The SBA may require additional information to process an application.</p>
Who will be Given Priority?	First-come, first-serve.	First-come, first-serve.
Who is responsible for ensuring compliance with the program requirements?	The applicant is responsible. The applicant must certify “in good faith” this information when submitting the application. Lenders may rely on these certifications but are expected to perform a good faith review of the borrower’s calculations.	The applicant is responsible for all information supplied to the SBA.

For more information on the Paycheck Protection Program, Emergency Economic Injury Disaster Loans, and other financial assistance available to businesses under the CARES Act, please contact Shannon Kuhl, Becky Moore, Jana Syrle, Adam Okuley or any attorney in Frost Brown Todd’s [Finance](#) Practice Group.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team, including a special team focusing on SBA funding options under the CARES Act. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce. Click [here](#)¹⁰ to see all of the articles posted by the Coronavirus Response Team.

¹⁰ <https://frostbrowntodd.com/coronavirus-response-team/>