

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

	PAYCHECK PROTECTION PROGRAM LOANS (PPP loans)	EMERGENCY ECONOMIC INJURY DISASTER LOANS (EIDL)
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 ▪ Eligible self-employed individuals 	<p>Subject to applicable size requirements:</p> <ul style="list-style-type: none"> ▪ Small business concerns ▪ Small agricultural cooperatives ▪ Agricultural enterprises⁶ with 500 or less employees ▪ Most private nonprofits of any size⁷ ▪ 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 ▪ Sole proprietorships

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.

⁶ “Agricultural enterprises are defined by Section 18(b) of the Small Business Act as businesses engaged in the production of food and fiber, ranching and livestock, aquaculture, and all other farming and agricultural related industries.

⁷ 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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	<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). Hedge funds and private equity firms are ineligible; however, portfolio companies of these firms may be eligible if they satisfy other eligibility requirements after applying the affiliation rules.⁴</p> <p>*Agricultural producers, farmers, ranchers, and agricultural cooperatives are eligible if they have 500 or fewer employees or, as a small business concern, have annual receipts of \$1 million or less or meet the alternative size standard.⁵</p>	<ul style="list-style-type: none"> ▪ 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 loans, 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 based⁸ 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. 	<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.

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 to the FAQs.

⁴ Clarified by the Interim Final Rule issued 4/24/2020.

⁵ Clarified by FAQ #34 and #35 issued on 4/24/2020.

⁸ 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"> ○ 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. ▪ 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>	<ul style="list-style-type: none"> ▪ For other businesses, see size limitations within the “Who is Eligible” row.
<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. For purposes of determining eligibility, full-time and part-time employees are counted equally.⁹ Note that counting employees for purposes of size eligibility is a</p>	<p>Businesses should use the average number of employees of the concern, including employees of its affiliates, over the past 12 months.</p>

⁹ Student workers should also be counted unless the applicant is an institution of higher education and the student worker’s services are performed as part of a Federal Work-Study Program or similar program. Payroll costs for such student workers should be excluded from payroll costs used to determine the applicant’s loan amount. See [Interim Final Rule issued on 5/5/20](#).

	PAYCHECK PROTECTION PROGRAM LOANS (PPP loans)	EMERGENCY ECONOMIC INJURY DISASTER LOANS (EIDL)
	<p>different calculation than determining full-time equivalent employees for purposes of loan forgiveness.</p> <p>All employees of the applicant and its affiliates (U.S. affiliates and foreign affiliates) must be counted for purposes of determining size-based eligibility.¹⁰ For “other business concerns” qualifying using the 500 or fewer employee standard, all employees of the applicant and its affiliates with a principal place of residence in the U.S. must be counted. This U.S. residence limitation does not apply in the context of businesses satisfying the eligibility standards as a “small business concern.”</p> <p>For seasonal businesses, the business should use the average number of employees during the payroll measurement period it selects as noted as described in “Maximum Amount.”</p> <p>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 purposes of determining the number of employees and calculating payroll costs.</p>	
Maximum Amount	The lesser of (1) \$10 million or (2) applicant’s average total monthly payroll costs ¹¹ multiplied by 2.5 plus the amount of any outstanding	Up to \$2 million but limited to the amount of economic injury associated with COVID-19

¹⁰ On 5/5/2020, the SBA issued FAQ #44 to clarify that the employees of all affiliates (U.S. or foreign) must be counted for purposes determining the applicant’s size. While this FAQ #44 did not address that only employees with a primary residence in the U.S. need be counted for purposes of the “other business concern” standard, the Interim Final Rule issued on 4/2/2020 (and corresponding FAQ #3) that contains the U.S. residency consideration remains in effect.

¹¹ “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” however this should be considered in the context

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<p>EIDL. Effective with any loan that has not been fully disbursed by 4/30/2020, the maximum amount that may be borrowed by a “corporate group” is limited to \$20 million. Businesses that are majority owned, directly or indirectly, by a common parent are considered a “corporate group.”¹²</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.¹³ 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>Eligible applicants who are sole proprietorships, self-employed, or independent contractors should calculate the maximum amount available by determining their monthly average net profit, reflected on Line 31 of their Schedule C for the 2019 tax year, for their individual compensation, in addition to any other payroll costs and the amount of any outstanding EIDL.</p> <p>Seasonal businesses may elect to use the average monthly payroll for any of the following periods:</p> <ul style="list-style-type: none"> ▪ the period beginning 2/15/2019 through 6/30/2019 	

of where the applicant is the independent contractor or sole proprietor. “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 2/15/2020 and 6/30/2020; (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.

¹² See [Interim Final Rule issued on 4/30/20](#).

¹³ 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 FAQs 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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	<ul style="list-style-type: none"> ▪ the period beginning 3/1/2019 through 6/30/2019 ▪ any consecutive 12-week period between 5/1/2019 through 9/15/2019 <p>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> <p>If an applicant uses a payroll provider or a professional employer organization, these payroll costs may be included in the applicant's payroll cost calculation.</p>	
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

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Special Program Criteria	<ul style="list-style-type: none"> Business must be operational on 2/15/2020¹⁴ Business must have had employees for whom it paid salaries and payroll taxes or paid 1099 independent contractors Must certify that current economic uncertainty makes the loan request necessary to support the ongoing operations of the “Applicant” Must certify the business will use the funds to retain employees and maintain payroll and other permitted uses No minimum credit score required <p>On 4/23/3030, FAQ #31 was issued by the SBA addressing the certification referenced in the third bullet above. This FAQ establishes an expectation that a borrower must consider its current business activity and its ability to access other sources of liquidity to support its operations in a manner that is not significantly detrimental to the business when making this certification.¹⁵</p>	<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>
Do SBA Affiliation Rules Apply ¹⁶	<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) 	<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</p>

¹⁴ The SBA issued FAQ #38 on 4/29/2020 to allow an applicant to be eligible where the applicant acquired, after 2/15/2020, a business that was in operation on 2/15/2020. The acquiring business may use the historic payroll costs and headcount of the acquired business for purposes of the PPP application. Further, an Interim Final Rule issued on 4/27/2020 (with corresponding FAQ #41 issued on 5/3/2020) permits that a seasonal business will be considered to have been in operations as of 2/15/2020 if the business operated for any 8-week period between 5/1/2019 and 9/15/2019.

¹⁵ The FAQ #31 is written such that this “liquidity” standard should have been considered by a borrower even if the borrower applied prior to 4/23/2020 (the date FAQ #31 was issued). An Interim Final Rule established a safe harbor that would permit a borrower to return all loan proceeds (originally by 5/7/2020) and still be deemed to have made the necessity certification in good faith, thereby avoiding the potential civil and criminal penalties that could apply for making the certification in bad faith. A subsequent Interim Final Rule revised the date by which to return the funds to 5/14/2020. For more information concerning the necessity certification and the safe harbor, please visit [Preparing for an SBA PPP Audit: The Necessity Certification](#) and [ALERT – Paycheck Protection Program 2.0: New Rules and Additional Guidance as of April 26, 2020](#).

¹⁶ 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"> ▪ 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>discussed under the Paycheck Protection Program Loans column also applies to EIDL.</p>
<p>Permitted Uses of Funds</p>	<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 ▪ Refinancing an SBA EIDL loan made between 1/31/2020 and 4/3/2020 <p>Borrowers who are sole proprietorships, self-employed, or independent contractors may use the funds for the payment of “owner compensation replacement” based on their 2019 net profit reported on Schedule C in addition to the above permitted uses; however, the above permitted uses will only be permitted uses for</p>	<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 ▪ Other bills that would have been paid had the disaster not occurred

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	the borrower claimed or was entitled to claim a deduction for the expense on their 2019 Schedule C.	
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 disbursed¹⁷ (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.¹⁸</p> <p>The forgivable amount is reduced</p> <ol style="list-style-type: none"> 1) proportionally by any reduction in the number of full-time equivalent employees retained, and 2) by a reduction in the pay of any employee, making less than \$100,000 annualized in 2019, that is greater than 25% of the employee’s prior compensation over the period of the 8 weeks 	<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>

¹⁷ Loan proceeds are to be fully funded within 10 calendar days from date of loan approval. Special rules apply if a borrower’s loan was only partially disbursed (i.e., the loan was structured to permit multiple draws) by 4/28/2020 and the full amount will have to be disbursed by 5/8/2020. The 8-week forgiveness period begins on the date of the first draw in this scenario. See [Interim Final Rule](#) issued on 4/28/20.

¹⁸ For more information concerning how to calculate the forgivable amount, please click [Determining the Forgiveness of Your Paycheck Protection Program \(PPP\) Loan](#).

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	<p>Reductions in full-time equivalent employees or in salary/wages that occur between 2/15/2020 and 4/26/2020 are not included in the calculation to reduce the forgivable amount to the extent the full-time equivalent employee count and salaries/wages are restored to their 2/15/2020 levels before 6/30/2020.¹⁹</p> <p>A borrower may request loan forgiveness by submitting a request to the lender. The request must include documents that verify the 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.</p>	
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.²⁰ ▪ 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. 	

¹⁹ While we are awaiting additional guidance concerning the forgiveness element, reductions in full-time equivalent employees or in salary/wages occurring after 4/26/2020 are expected to be included in the calculation to reduce the forgivable amount and are not “saved” by restoring the full-time equivalents or salary/wages (by 6/30/2020 or otherwise). On 5/3/2020, the SBA issued FAQ #40 that excuses the scenario where a laid-off employee whom the borrower offers to rehire but who refuses to accept the offer to be re-employed from the forgiveness reduction calculation.

²⁰ 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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When can I apply?	<p>Now</p> <p>Technically, applicants have until 6/30/2020 to apply, assuming funds are remaining. The original \$349 billion in funds under the program were exhausted within two weeks.</p>	<p>Now</p> <p>Applicants have until 12/31/2020 to apply, assuming funds are remaining.</p>
Supporting Documentation	<p>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 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>	<p>The application should include:</p> <ul style="list-style-type: none"> ▪ SBA Form 5 ▪ IRS Form 4506T ▪ SBA Form 2202 ▪ SBA Form 413 <p>The SBA may require additional information to process an application.</p>
Who will be Given Priority?	<p>First-come, first-serve.</p>	<p>First-come, first-serve.</p>
Who is responsible for ensuring compliance with the program requirements?	<p>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.</p> <p>The SBA has said that it will audit all loans in excess of \$2 million, and other loans as appropriate, upon the lender submission of the borrower’s loan forgiveness application.²¹ Our Preparing for an SBA PPP Audit series will address compliance issues facing borrowers and what borrowers may want to include in their PPP loan files in anticipation of a potential audit.</p>	<p>The applicant is responsible for all information supplied to the SBA.</p>

²¹ See FAQ #39 in FAQs published on April 29, 2020.

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 Syrcle, Adam Okuley or any attorney in Frost Brown Todd's [Finance](#) Practice Group.