

Looking for an Alternative to the PPP? Taking a Second Look at the Economic Injury Disaster Loan (EIDL) Program

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The Economic Injury Disaster Loan (“**EIDL**”) program is an existing loan facility offered by the Small Business Administration (“**SBA**”) under Section 7(b) of the Small Business Administration Act of 1953. The purpose of the EIDL program is to extend low-interest credit to small businesses that are impacted by disasters. In the wake of the COVID-19 crisis, the federal government has enacted new legislation aimed at enhancing the availability and accessibility of EIDL funds.

First, under the terms of the Coronavirus Preparedness and Response Supplemental Appropriations (“**CPRSA**”) Act, the coronavirus pandemic was declared a disaster, allowing affected businesses to apply for an EIDL. The CPRSA Act also allocated \$20 million to the EIDL program.

Further, the Coronavirus Aid, Relief, and Economic Security (“**CARES**”) Act modified the EIDL program by establishing the Emergency EIDL Grant (“**Emergency EIDL Advance**”) to provide a loan advance of up to \$10,000 to EIDL applicants. The Emergency EIDL Advance will not need to be repaid, even if the qualifying business is denied an EIDL. The CARES Act allocated \$10 billion towards Emergency EIDL Advance.

Finally, the recently enacted H.R.266, the Paycheck Protection Program and Health Care Enhancement Act (the “**PPP/HCE Act**”) includes \$60 billion of additional funding for the EIDL program, \$10 billion of which is allocated toward the Emergency EIDL Advance. Reports released by the SBA show that as of April 19, 2020, a total of 26,919 EIDLs have been approved, and 755,476 Emergency EIDL Advances processed, totaling amounts of \$5,566,913,788 and \$3,293,963,000 distributed under each program, respectively.

Below is a high-level summary of the provisions relating to the EIDL program and Emergency EIDL Advance as modified and supplemented by the CARES Act and PPP/HCE Act (including periodic guidance and FAQs released by the Department of Treasury and SBA). We expect the U.S. Department of Treasury and the SBA to provide further guidance and regulations on the legislation in the coming days and weeks. Such guidance and regulations will provide further detail on the administration of EIDL program and Emergency EIDL Advance and may materially change the summary below.

EIDL Program Overview

<p>Who is eligible for the EIDL program?</p>	<p>Applicants will need to certify that they have been negatively impacted by the COVID-19 crisis. However, there is no set dollar amount or percentage loss in its operations/financial condition that an applicant must report in order to qualify. An applicant defines its loss in comparison to its 2019 operations/financial condition.</p> <p>The following entities/persons are eligible to apply for EIDL if the applicant was in operation as of January 31, 2020:</p> <ol style="list-style-type: none"> 1. Any small business with 500 or less employees¹ including: <ol style="list-style-type: none"> a. Cooperatives; b. Employee stock ownership plans (ESOPs); c. Tribal businesses; and d. Agricultural enterprises². 2. Small businesses and non-profits that meet the specific SBA's industry sizing (may be more than 500 employees). 3. 501(c)(19) Veterans Organizations. 4. Sole proprietorships and independent contractors. 5. Faith-based organizations. <p>Subject to further guidance, the applicants above would need to take the relevant affiliation rules into account when determining eligibility.</p> <p>Businesses that are ineligible for an EIDL are outlined in 13 CFR § 123.101, 13 CFR § 123.201 and 13 CFR § 123.301, and include:</p> <ol style="list-style-type: none"> 1. Businesses principally engaged in illegal activities³ or gambling⁴ or that are otherwise of a sexual nature; 2. Concerns engaged in lending, multi-level sales distribution, speculation, or investments (except for real estate investment with property held for rental when the disaster occurred); and 3. Political or lobbying concerns.
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¹ Employees are calculated pursuant to 13 CFR §121.106. Employees include all persons employed on a full-time, part-time or other basis. The number will be the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months).

² The ambiguity surrounding whether Agricultural Enterprises would be eligible for EIDLs was clarified by the PPP/HCE Act, which explicitly stated that such enterprise will be eligible for EIDLs provided that it has 500 or less employees. An Agricultural Enterprise is defined as a “small business concern engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural-related industries.” 15 U.S.C. § 647.

³ “Illegal” in this context is in reference to the Federal guidelines. Thus, cannabis businesses are ineligible for EIDLs.

⁴ Businesses that derive more than one-third of their annual gross income from legal gambling activities.

<p>Loan and Advance Amounts</p>	<p>Loans under the EIDL program are capped at \$2 million.</p> <p>Emergency EIDL Advance amounts are capped at \$10,000 and the exact amount of each Emergency EIDL Advance will be determined by the number of employees of a business as of January 31, 2020. The Emergency EIDL Advance will provide \$1,000 per employee, up to a maximum of \$10,000.⁵</p>
<p>Loan Usage</p>	<p>EIDL and Emergency EIDL Advance amounts may be used towards a wide array of business related purposes such as:</p> <ol style="list-style-type: none"> 1. Payroll. 2. Fixed debts (rent, mortgage, etc.). 3. Accounts Payable. 4. Additional costs associated with disruptions in supply chains. 5. Obligations that cannot be met as a result of revenue losses. <p>Ineligible loan uses include:</p> <ol style="list-style-type: none"> 1. Dividends or bonuses. 2. Disbursements to owners, unless for performance of services. 3. Repayment of stockholder/principal loans.⁶ 4. Expansion of facilities or acquisition of fixed assets. 5. Refinance long term debt. 6. Civil fines. 7. Paying down or off loans provided or owned by a Federal agency (including SBA).⁷ 8. Payment of direct Federal debt, including SBA loans (exception for IRS obligations). 9. Relocation.
<p>Loan Maturity</p>	<p>Up to 30-year term. Specific term determined on a case by case basis.</p>
<p>Interest Rates and Applicable Fees</p>	<p>Interest rates of 3.75% for businesses and 2.75% for non-profits are fixed for the full term of the loan.</p> <p>No upfront fees or prepayment penalties.⁸</p>
<p>Loan Repayment</p>	<p>Loan payment of a COVID-19 EIDL is automatically deferred for 12 months. Payment on disaster loans from a previous disaster will be automatically deferred through the end of 2020. However, interest will still accrue under both scenarios.</p>

⁵ If an applicant is self-employed, a sole proprietor, or an independent contractor, such applicant counts as one employee.

⁶ Exception for funds that were injected on an interim basis due to the disaster, and non-payment of which would cause undue hardship to the stockholder/principal.

⁷ Federal Deposit Insurance Corporation is an exception for this purpose.

⁸ An applicant will need to certify on its EIDL loan agreement that other than those fees reported on SBA Form 5 [Business Disaster Loan Application], Form 3501 [COVID-19 Economic Injury Disaster Loan Application], or Form 159 [Compensation Agreement], no other fees for representatives (attorney, account, etc.) have been paid in connection with the EIDL application.

Approval Considerations	Primary criteria (assuming applicant is an eligible borrower) for approval will be based on: 1. Acceptable credit history; and 2. Ability for loan repayment.
Collateral	No collateral needed for loans under \$25,000. For loans over \$25,000, SBA will take real estate as collateral when available. ⁹ Real estate is the preferred form of collateral, even if it is insufficient to secure the full loan. Additionally, for loans under \$200,000, using the primary residence of the business owner as collateral will not be required if the owner is able to offer assets of equal quality that can cover the loan.
Guarantees	All personal guarantees waived for loans not more than \$200,000. For loans more than \$200,000, guarantees will most likely be required from all principals. ¹⁰ Guarantee from an affiliate is required only if cash flow from the affiliate is necessary for the repayment of the loan or if the affiliate is providing collateral.
Timing	Applicants must complete and submit applications by December 31, 2020. However, since applications are processed on a first come first served basis, it is strongly advised that applicants considering the EIDL should apply as soon as possible.
Existing Disaster Loans	Applicants with an existing disaster loan with the SBA may still qualify for the COVID-19 related EIDL, but the loans cannot be consolidated.
Paycheck Protection Program (PPP)	Paycheck Protection Program (" PPP ") eligibility is not affected for entities that have received EIDLs between January 31, 2020 – April 3, 2020 and did not use the loan for payroll costs. However, if the EIDL was used for payroll purposes, the PPP must be used to refinance the EIDL. Existing EIDL borrowers receiving disaster loans that are not related to COVID-19 are also eligible to apply for PPP, but cannot refinance their EIDL loan into the PPP.
PPP Forgiveness	PPP forgiveness is reduced by the Emergency EIDL Advance amount.

⁹ SBA will not decline a loan for lack of collateral but will require borrower to pledge what is available.

¹⁰ Principals defined as: (1) Sole Proprietorships, the proprietor; (2) General Partnerships, all general partners; (3) Limited Partnerships, all general partners and any limited partners with 20% or more ownership; (4) LLEs, managing member and any member with 20% or more ownership; and (5) Corporations, any individual or entity with 20% or more ownership. Further, the SBA on a case-by-case basis may deem a principal with less than 20% ownership based on composition of the controlling group.

<p>Possible Requested Information and Documents</p>	<p>The information and documentation that may be requested by the loan processor for the EIDL application are as follows:</p> <ol style="list-style-type: none">1. The following figures for the 12 months prior to January 31, 2020 and/or date of application:<ol style="list-style-type: none">a. Gross Revenueb. Cost of Goods Soldc. Lost Rents (for property owners)d. Cost of Operating Expenses (for non-profits)e. Expected Reimbursements (ex. business interruption insurance)f. Number of employees2. SBA Loan Application (SBA Form 5 or 5C)3. Personal Financial Statement (SBA Form 413)4. Schedule of Liabilities (SBA Form 2202)5. Tax Information Authorization (IRS Form 4506T)6. Federal income tax returns of principals, general partners, managing member, and affiliates7. Year end profit/loss statement and balance sheet for most recent tax year if tax returns have not been filed.8. Current year to date profit/loss statement9. Additional Filing Requirements (SBA form 1368) with monthly sales numbers
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Given the fast pace of developments, businesses are encouraged to seek advice from qualified legal counsel before applying for a EIDL or PPP loan.

For more information, please see the following resources:

1. Additional Resources on the EIDL Program:
 - a. [SBA Disaster Assistance EIDL Page](#)
 - b. [SBA Disaster Assistance Loan Application](#)
 - c. [SBA EIDL Program Eligibility](#)
 - d. [SBA Emergency EIDL Advance Page](#)
 - e. [Frequently Asked Questions for Faith-Based Organizations Participating in the PPP and EIDL loan programs](#)
 - f. [SBA Small Business Investment Corporation \(SBIC\) Program](#)



- g. [SBA Size Standards and Affiliation Principles for Financial Assistance Programs](#)
- h. [SBA Small Business Standards by NAICS Code](#)
- i. [SBA Size Standards Table](#)

2. Related Haynes and Boone Guidance:

- a. [Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program](#)
(updated April 22, 2020)
- b. [President Signs Additional Appropriation for Small Business Relief](#) (April 24, 2020)
- c. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#)
(April 6, 2020)

Additional Questions? Contact a member of the Haynes and Boone [Finance](#) or [Corporate](#) Practice Groups at Haynes and Boone, including the following individuals:

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