



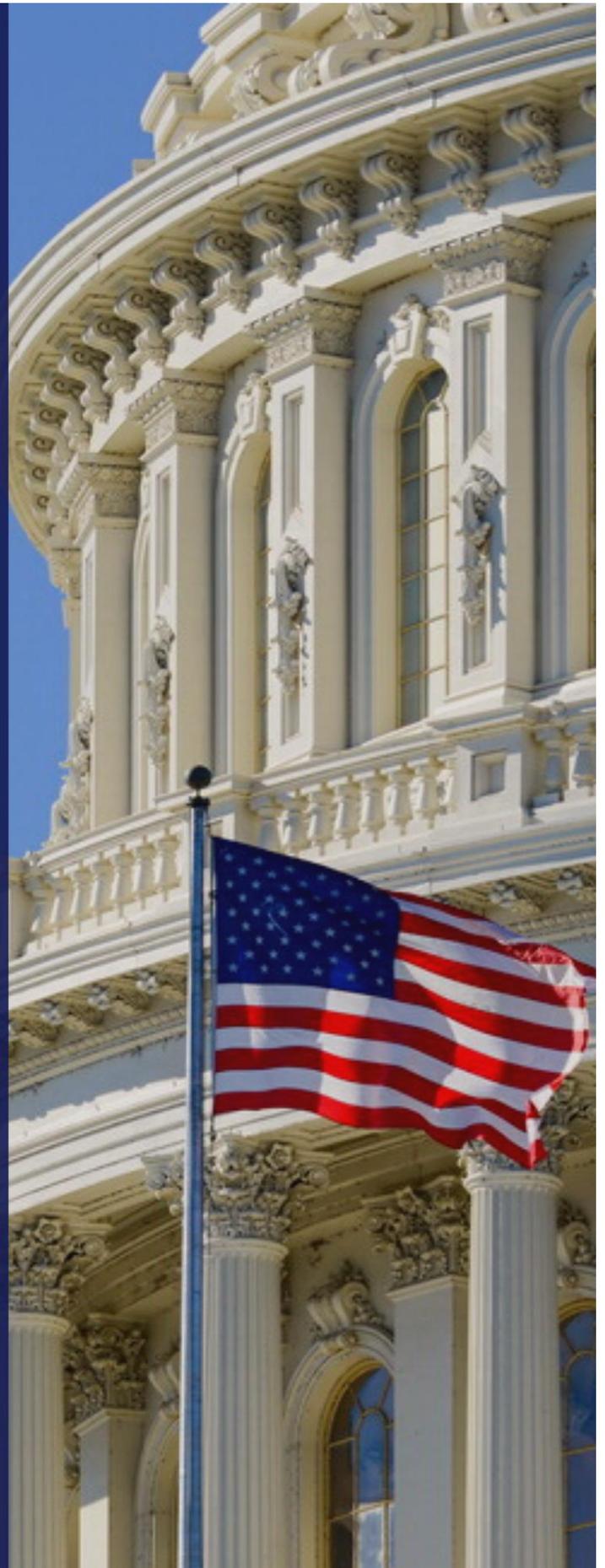
The Real Estate Roundtable

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# Coronavirus Aid, Relief, and Economic Security (CARES) Act and Implications for U.S. Real Estate

## Small Business Emergency Loans Under the "Paycheck Protection Program"

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## SMALL BUSINESS EMERGENCY LOANS UNDER THE “PAYCHECK PROTECTION PROGRAM” CARES ACT - “PHASE 3” OF COVID-19 STIMULUS

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This summary is based on The Real Estate Roundtable’s preliminary analysis of the CARES Act. It is subject to change.

### WHAT BUSINESSES ARE ELIGIBLE FOR EMERGENCY SMALL BUSINESS LOANS?

- “Small businesses” that ordinarily qualify for Section 7(a) loans<sup>1</sup>
- Businesses that do not employ more than 500 employees<sup>2</sup> – with an important qualification if the business has multiple, affiliated locations (*see next heading*)
- Businesses in an industry that has been assigned an SBA “size standard.”<sup>3</sup>
  - Even if that industry “size standard” is greater than 500 employees, it is eligible for an Emergency SBA Loan.<sup>4</sup>
  - For SBA “size standards,” see the [“look-up” table at 13 C.F.R. 121.201](#).
- 501(c)(3) non-profit organizations<sup>5</sup>
- Sole proprietors, independent contractors, self-employed individuals, “gig” workers<sup>6</sup>

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### IF MY BUSINESS HAS MULTIPLE LOCATIONS, HOW DO I COUNT EMPLOYEES TO DETERMINE IF I MEET THE 500-EMPLOYEE SIZE THRESHOLD?

- If your business is a hotel, restaurant, or bar covered by [NAICS Sector Code 72](#) – and you do *not* employ more than 500 employees “per physical location” – then you *may* qualify for an Emergency SBA loan.<sup>7</sup>
- The converse is also likely the case. That is, if your business concern is covered by NAICS Code 72 – and you employ *more* than 500 workers at *any* one of your physical locations – then you do *not* qualify for an emergency SBA loan.
- If your business is *not* a hotel, bar or restaurant – and you have multiple locations – then you must add up all employees that work at your individual locations.

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<sup>1</sup> Page 14, lines 8-9

<sup>2</sup> Page 14, line 17

<sup>3</sup> Page 14, line 18

<sup>4</sup> Page 14, line 16

<sup>5</sup> Page 10, line 16; page 14, lines 9-10. Note that (c)(6)s are *not* covered.

<sup>6</sup> Page 15, line 1

<sup>7</sup> Page 15, line 23



- If after aggregating employees across all locations you have more than 500 employees, then you are **not** eligible for an emergency Small Business loan.<sup>8</sup>

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## WHAT IF THE CONCERN OWNS OR OPERATES MULTIPLE BUSINESSES AS A FRANCHISE?

- Each franchise location is considered its own entity – if it is assigned an identification code in SBA’s “Franchise Directory.”<sup>9</sup>.
- In other words, the business would **not** “aggregate” employees across all franchise locations (as designated by SBA).
- The business would only have to count employees at each separate location to stay within the “500 employee” eligibility cap

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## IF THE BUSINESS IS A HOTEL, RESTAURANT OR FRANCHISE - AND IT CAN “DISAGGREGATE” FOR PURPOSES OF COMING WITHIN THE 500-EMPLOYEE ELIGIBILITY COUNT - DOES THAT MEAN EACH SEPARATE LOCATION CAN GET ITS OWN SBA LOAN?

- The language is not clear.<sup>10</sup>
- On the one hand, language in the bill may be read to mean that each separate physical location is eligible for **its own** SBA Emergency Loan.
- On the other hand, the language could mean that only **one single** SBA loan goes to the “parent” company of the multiple concerns – as long as no single location has more than 500 employees.
- Clarification from the Small Business Administration and/or Congress will be necessary on this point.

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## WHAT IF THE BUSINESS OWNS AND OPERATES SEVERAL OFFICE BUILDINGS, AND EACH ASSET IS FORMED AS ITS OWN LLC OR LLP? IS EACH BUILDING ITS OWN SMALL BUSINESS?

- No, not for purposes of this SBA Emergency Loan Program.

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<sup>8</sup> Jump to the second-to-last heading in this document to see what provisions in the *CARES Act* might assist businesses exceeding the 500-employee threshold.

<sup>9</sup> Page 16, line 21.

<sup>10</sup> Compare p. 14 line 13 (“business concern” eligible for loan); p. 16 lines 3-7 (“per physical location” of NAICS Code 72 concern “shall be eligible to receive a covered loan”); p. 16 lines 8-24 (SBA’s “affiliation rules” suspended for NAICS Code 72 concerns and franchises).



- Because the concern is not a hotel or restaurant (covered by NAICS Code 72), the SBA’s “affiliation rules” at [13. C.F.R. 121.103](#) apply to this situation.<sup>11</sup>
- The affiliation rules are complicated. Basically, business concerns are considered affiliates of each other when one has the “power to control” the other.<sup>12</sup>
- Because these office LLPs have common ownership, employees must be aggregated across all buildings.
- If there are 500 **or less** employees across all buildings, then the business concern **is** eligible for an Emergency SBA Loan.
- If there are **more than** 500 employees across all buildings, then the business concern is **not** eligible for an SBA loan.

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### WHAT IF THE BUSINESS IS RETAIL, IT IS NOT FRANCHISED, AND IT INCLUDES SEVERAL STORES?

- Same treatment as above.
- Each store is not its own separate business (assuming the stores are not franchised<sup>13</sup>).
- Retail businesses are subject to the SBA “affiliation rule”<sup>14</sup> and must aggregate employees across all stores.
- If, across all stores, the business has 500 employees **or less**, then it **is** eligible for an emergency SBA loan.
- If, across, all stores, the business has **more than** 500 employees, then it is **not** eligible for an Emergency SBA loan.

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### WHAT IF THE BUSINESS OWNS A NUMBER OF SENIOR CARE FACILITIES, AND THEY ARE NOT FRANCHISED?

- Same treatment as above.
- Each facility is not its own separate business (assuming the facilities are not franchised<sup>15</sup>).
- The business is subject to the SBA “affiliation rule”<sup>16</sup> and must aggregate employees across all facilities.
- If, across all senior care facilities, the business has 500 employees **or less**, then it **is** eligible for an emergency SBA loan.

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<sup>11</sup> Page 16, lines 10-11, 15-24 (SBA affiliation rule waived only for [NAICS Code 72 \(“Accommodation and Food Service”\)](#), and SBA-identified franchises. In this example, the commercial office business is covered by [NAICS Code 53, “Real Estate Rental and Leasing.”](#)

<sup>12</sup> [13 C.F.R. 121.103\(a\)\(1\)](#). “SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.” [13 C.F.R. 121.103\(a\)\(2\)](#).

<sup>13</sup> See footnote 9.

<sup>14</sup> “Retail Trade” is designated as [NAICS Codes 44-45](#), and thus subject to the SBA “affiliation rule.”

<sup>15</sup> See footnote 9.

<sup>16</sup> Senior living facilities would fall under [NAICS Code 62, “Health Care and Social Assistance.”](#) and thus subject to the SBA “affiliation rule.”



- If, across, all senior care facilities, the business is **more than** 500 employees, then it is **not** eligible for an Emergency SBA loan.

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## WHAT IF THE BUSINESS CONCERN IS A HOME BUILDING COMPANY, A REAL ESTATE BROKERAGE COMPANY, OR A CONSTRUCTION CONTACTING OR SUBCONTRACTING COMPANY?

- The business is eligible for an Emergency SBA loan if it employs 500 people or less.

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## IF A BUSINESS QUALIFIES, HOW BIG OF AN SBA LOAN CAN IT GET?

- Either \$10 million<sup>17</sup>
- Or 2.5 times payroll<sup>18</sup>
- Whichever is less.<sup>19</sup>

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## WHAT CAN A BUSINESS USE THE LOAN FOR?

- Payroll costs (e.g., salary, tips, paid vacation, severance, payment of retirement benefits, state/local compensation taxes )
- Costs for employee health care, sick leave, family leave, and insurance benefits
- Salaries, commissions and similar compensation
- Payments of mortgage interest (not principal)
- Rent
- Utilities
- Interest on any other debt obligation “incurred before the covered period.”

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## FOR WHAT PERIOD OF TIME WILL THE LOAN COVER THESE COSTS?

- February 15, 2020 through June 30, 2020<sup>20</sup>

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## WHO DISBURSES THE LOAN TO THE QUALIFYING BUSINESS?

- An SBA-approved lender,<sup>21</sup> listed [here](#).
- SBA and the Treasury may determine that other lenders are qualified to process, disburse and service these Emergency Loans.<sup>22</sup>

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<sup>17</sup> Page 19, line 25

<sup>18</sup> Page 18 line 3 through page 19 line 24

<sup>19</sup> Page 18, line 2

<sup>20</sup> Page 10, line 1

<sup>21</sup> Page 21, lines 7-8.

<sup>22</sup> Page 22, line 4



- SBA does not disburse the loans directly.

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## HOW FAST WOULD A BUSINESS RECEIVE THE LOAN, IF IT QUALIFIES?

- There is no deadline by which a lender must disburse the loan after it receives an application.
- But Congress wants to speed the process, and minimize the agency friction that might typically arise in SBA loan programs.
- For example, SBA lenders are themselves delegated with authority to make and approve loans with minimal agency review.<sup>23</sup>
- When the lender reviews the borrower's eligibility, the criteria are minimal. A business is presumed to be economically impacted by the pandemic if it was in operation on February 15, and had employees or paid independent contractors.<sup>24</sup> That's it.

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## WHEN A BUSINESS APPLIES, WHAT DOCUMENTS MUST IT PROVIDE TO THE BANK?

- Minimal documentation is required from the borrower to apply for an Emergency SBA Loan.
- Just a “good faith certification” that it needs to money to continue operations, that it will use the money to pay workers and mortgages, leases, and utility bills; and that it is not “double-dipping” with other SBA loans.<sup>25</sup>
- Ordinary SBA application fees are waived.

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## MUST THE BUSINESS, OR ITS PARTNERS OR SHAREHOLDERS, PROVIDE A PERSONAL GUARANTEE OR COLLATERAL?

- No<sup>26</sup>

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## IF A BUSINESS GETS A LOAN, ARE RE-PAYMENTS DEFERRED?

- Yes. Principal and interest is deferred for at least 6 months, but not more than a year.<sup>27</sup>

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<sup>23</sup> Page 21, line 10

<sup>24</sup> Page 21, line 14

<sup>25</sup> Page 23, line 4

<sup>26</sup> No personal guarantee (p. 24 line 23); no collateral (p. 25 line 1)

<sup>27</sup> Page 26, line 18



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## HOW LONG DOES A QUALIFYING BUSINESS HAVE TO RE-PAY THE LOAN?

- 10 years from the date the borrower applies for an 8-week “forgiveness” period.<sup>28</sup>
- See heading below for more information on “forgiveness.”

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## WHAT’S THE INTEREST RATE?

- 4% or less<sup>29</sup>

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## ARE THE LOANS NON-RECOURSE?

- Yes. As long as the recipient uses the loans for the allowed uses listed above, the SBA has no recourse against any individual partner, shareholder, or member of the business concern.<sup>30</sup>

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## IS ANY PART OF THE SBA LOAN FORGIVEN?

- Yes. Consult the “Loan Forgiveness” section of the bill for details.<sup>31</sup>
- Generally: Certain amounts of these Emergency SBA Loans are forgiven for 8 weeks after the date the loan is originated.
- The “forgiven amount” converts that portion of the loan into a grant to the qualifying business. These components of the debt are cancelled.
- The loan balance (after forgiven amounts) remains 100% guaranteed by the SBA.
- But not all elements of the loan are forgiven. Only payroll costs, interest on a mortgage, rent, and utility payments can be forgiven.
- Any forgiven amount cannot exceed principal.
- The amount of forgiveness is also reduced if the business lays-off workers during the crisis. The clear objective of the forgiveness section is for businesses to retain their workers.

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## WHAT ARE THE TAX CONSEQUENCES IF PART OF THE LOAN IS FORGIVEN AND THE BUSINESS DOESN’T HAVE TO RE-PAY IT? IS THAT INCOME?

- No. Any forgiven loan amounts under this section do not count as income.<sup>32</sup>

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<sup>28</sup> Page 25, line 12

<sup>29</sup> Page 25, line 18

<sup>30</sup> Page 22, line 18

<sup>31</sup> Section 1106, starting at p. 41, line 10

<sup>32</sup> Page 52, line 5.



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## WHAT IF THE BUSINESS IS WOMEN- OR MINORITY-OWNED?

- Supplemental resources in the *CARES Act* – and under “ordinary” SBA assistance programs – may be available for women- and minority-owned businesses.

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## IF THE BUSINESS IS “SIZED-OUT” AND DOESN’T QUALIFY FOR AN EMERGENCY SBA LOAN, ARE THERE OTHER PROVISIONS IN THE CARES ACT THAT MIGHT GIVE FINANCIAL ASSISTANCE DURING THE COVID-19 CRISIS?

- ***Consult Section 2301, which offers a refundable “Employee Retention Tax Credit.”***
  - The tax credit is up to \$5,000 per employee for businesses that continue to pay employees between March 13 and December 31, 2020.
  - This payroll tax credit is available for businesses “sized-out” of the Emergency SBA Loan Program.
- ***Consult Section 4003(b)(4),<sup>33</sup> authorizing the Fed to stand-up a credit facility to extend loans and loan guarantees for entities including businesses that are sized-out of the SBA Emergency Loan section.***
  - However, there are a number of “strings attached” to receipt of loans under this section, that need to be carefully considered.
- ***Section 4003(c)(3)(D)<sup>34</sup> will need to be fleshed out by the U.S. Treasury. This gives general authority for Treasury to stand-up a credit facility for lenders to make direct loans to businesses with between 500 to 10,000 employees.***
  - Treasury is not mandated to create this lending facility, but is only given authority to do so.
  - Any loans for “500+” businesses would be at 2% interest, with no principal and interest due for the first 6 months.
  - The business must commit to retain 90% of its employees.
  - Treasury (and perhaps Congress) will need to create further guidelines on additional business eligibility requirements for these loans, and the amount of these loans.

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## WHAT OTHER RESOURCES MIGHT BE AVAILABLE TO ASSIST A SMALL BUSINESS DURING THE COVID-19 CRISIS?

- Consult small business resources available from states, cities, and municipalities.
- These jurisdictions might have business microloan programs that supplement SBA Emergency Small Business Loans.

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<sup>33</sup> Page 513, line 19

<sup>34</sup> Page 520, line 21.