

## Updates

January 12, 2021

### Portal Opens for New PPP Loans With New SBA Guidance and Application Forms

The Small Business Administration (SBA) has announced that they will reopen their portal for Paycheck Protection Program (PPP) loans for eligible borrowers beginning the week of January 11, 2021, after being shut down since August 8, 2020, when the prior congressional authorization for PPP loans expired. This new round of PPP loans is made possible by legislation that became effective on December 27, 2020, titled the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the Economic Aid Act), which made \$284 billion available for PPP loans, authorized so-called "second draw" PPP loans for certain borrowers who previously received a PPP loan, and made certain other changes to PPP loans as summarized [here](#). On January 6, 2021, the SBA and U.S. Department of Treasury (Treasury) issued new interim final rules (IFRs) providing (1) guidance regarding "second draw" PPP loans for borrowers who already received and spent their initial or "first draw" PPP loan, and (2) updated and consolidated guidance regarding PPP loans to improve readability. In addition, on January 8, 2021, the SBA made available new loan application forms for borrowers who had not yet obtained a "first draw" PPP loan and for borrowers seeking to apply for a "second draw" PPP loan.

The new IFRs and borrower application forms help fill in some of the gaps left by the Economic Aid Act and also clarify some of the requirements for borrowers who are looking to obtain a "first draw" or a "second draw" PPP loan. Key takeaways from this new guidance and the new application forms are summarized below.

#### **Key Takeaways for New "First Draw" PPP Loans**

##### **Timing to Apply for "First Draw" PPP Loans**

The SBA has announced that they will accept new "first draw" PPP loan applications from community financial institutions starting on January 11, 2021, with the PPP reopening to all participating lenders shortly thereafter. At least \$15 billion is being set aside for first draw PPP loans to eligible borrowers with a maximum of 10 employees or for loans of \$250,000 or less to eligible borrowers in low- or moderate-income neighborhoods. This is in reaction to complaints that the initial PPP funding was distributed in a manner that disadvantaged community financial institutions and smaller borrowers.

Although the SBA has announced its timeline to begin accepting loan applications, PPP loan applications are provided through eligible SBA lenders, and not the SBA directly. The exact timing for PPP lenders to begin accepting loan applications will likely vary from lender to lender as they work to incorporate the new loan applications and eligibility requirements into their internal systems and processes. Borrowers considering applying for a "first draw" PPP loan should contact an authorized SBA lender to confirm their lender's specific timing and process for applying for a new PPP loan. A list of authorized SBA lenders can be found [here](#). This round of PPP loans is scheduled to remain open until March 31, 2021, subject to the availability of funds.

##### **Updated Consolidated Guidance for "First Draw" PPP Loans**

The IFR promulgated by the SBA and Treasury on January 6, 2021, with respect to "first draw" PPP loans, which can be found [here](#), consolidates prior guidance regarding first draw PPP loans and updates it to (1) reflect changes implemented through the Economic Aid Act and (2) enhance readability. Prior guidance on PPP loans was provided in the form of numerous IFRs that were released between April 2020 and October 2020, as well as a series of frequently asked questions (FAQs). This new IFR is a welcome consolidation of prior guidance. The SBA and Treasury state that this IFR "is not intended to substantively alter or affect PPP rules that were not

amended by the Economic Aid Act." In addition, they note that, "SBA intends to issue a consolidated rule governing all aspects of loan forgiveness and the loan review process as well."

### **Updated PPP Loan Application Form**

On January 8, 2021, the SBA released a new form of loan application for "first draw" PPP loans that can be found [here](#). This form is substantially similar to prior versions of the PPP loan application form, except that it (1) expressly contemplates alternative bases for loan eligibility, including the SBA's "alternative industry size standard" and the "alternative size standard," (2) includes newly authorized uses of PPP loan proceeds specified in the Economic Aid Act, (3) adds new fields for data collection that were previously omitted, including a field for the borrower to specify their applicable North American Industry Classification System (NAICS) industry code and, if applicable, their SBA Franchise Identifier Code, and (4) updates borrower certifications regarding eligibility for a PPP loan to include references to new eligibility requirements under the Economic Aid Act.

### **Updated Eligibility for New First Draw PPP Loans**

The CARES Act, which authorized the PPP, included limits on the types of entities that were eligible for PPP loans. Under the Economic Aid Act, certain categories of borrowers previously not eligible are now eligible, including local chambers of commerce, housing cooperatives, and certain news stations. The Economic Aid Act also included language confirming that churches and religious organizations are eligible borrowers.

In addition, the new application reflects the Economic Aid Act's exclusions from eligibility for (1) issuers of securities listed on a registered national securities exchange (i.e., most publicly traded companies), (2) any person or entity that receives a grant for shuttered venue operators under section 324 of the Economic Aid Act, (3) businesses controlled by the U.S. president, vice president, the head of an executive department, or a member of Congress, or the spouse of such person, and (4) businesses that have permanently closed. Some of these categories of borrowers would have been eligible borrowers under prior SBA guidance. In addition, the new application form appears to deny loan eligibility for any borrower that is presently involved in any bankruptcy, which differs from the Economic Aid Act, which appeared to allow the SBA to approve PPP loans for certain borrowers in bankruptcy.

### **Updated Loan Amount Calculation**

The IFR regarding new first draw PPP loans and the new first draw loan application clarify that borrowers can calculate their loan amount based on 2½ times their 2019 average monthly payroll costs or 2½ times their 2020 average monthly payroll costs.

### **Key Takeaways for "Second Draw" PPP Loans**

#### **Timing to Apply for "Second Draw" PPP Loans**

The SBA announced that, to promote access for smaller lenders and their customers, the SBA will initially only accept "second draw" PPP loan applications from community financial institutions starting on January 13, 2021. The SBA has announced that the PPP will then open to all participating lenders for "second draw" PPP loans shortly thereafter, but did not specify a target opening date. At least \$25 billion is being set aside for "second draw" PPP loans to eligible borrowers with a maximum of 10 employees or for loans of \$250,000 or less to eligible borrowers in low- or moderate-income neighborhoods. As with the expanded first draw PPP loans, this round of PPP loans is scheduled to remain open until March 31, 2021, subject to the availability of funds.

PPP loan applications for "second draw" PPP loans will be submitted through eligible SBA lenders, and not the SBA directly. Accordingly, borrowers considering applying for a "second draw" PPP loan should contact their SBA lender to confirm their lender's specific timing and process for applying for a "second draw" loan. The form for "second draw" PPP loans released by the SBA on January 8, 2021, can be found [here](#).

## **Eligibility for "Second Draw" PPP Loans**

The Economic Aid Act established eligibility requirements for "second draw" PPP loans that differ from the requirements that applied for original PPP loans. These eligibility requirements may make some borrowers who qualified for initial PPP loans ineligible for a "second draw" loan. The "second draw" IFR, which can be found [here](#), and the "second draw" loan application form create new obstacles for potential "second draw" borrowers. Specifically, the application of the new 300-employee limit, the 25% reduction in gross receipts test, and the apparent removal of "alternative industry size standard" and "alternative size standard" tests as a basis for establishing eligibility, may deny eligibility for a "second draw" loan for certain borrowers who previously qualified for a PPP loan. In addition, certain borrowers are categorically denied eligibility for "second draw" PPP loans based on criteria set forth in the Economic Aid Act.

"Second draw" PPP loans are subject to the following new eligibility requirements:

- Eligible borrowers are capped at no more than 300 employees (rather than 500); however, borrowers that have more than 300 employees but whose primary industry is in NAICS category 72 (accommodations and food service) and that have no more than 300 employees per physical location will also be eligible. The SBA's "affiliation" rules as discussed here continue to apply, except with respect to certain excluded businesses.
  - The 300-employee limit may make ineligible for a "second draw" PPP loan borrowers who, either independently or in connection with their "affiliates" under the SBA's rules, exceed the new 300-employee limit, but not the prior 500-employee limit.
- Eligible borrowers must have had gross receipts during the first, second, third, or fourth quarter of 2020 that demonstrate not less than a 25% reduction compared to the same quarter in 2019 (or, if the borrower was not in business in 2019, a 25% reduction in the second, third, or fourth quarter of 2020, compared to the first quarter of 2020).
  - The IFR regarding "second draw" PPP loans and the instructions to the "second draw" PPP loan application form elaborate on this eligibility requirement. Based on preexisting SBA regulations, the SBA defines "gross receipts" in a way that differs from "gross revenue," "net revenue," or similar amounts that borrowers may use in operations, which means that many borrowers may need to recalculate their quarterly "gross receipts" to determine whether they satisfy this eligibility requirement.
  - The SBA defines "gross receipts" to include all revenue in whatever form received or accrued (in accordance with the entity's accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. The SBA states that, generally, receipts are considered "total income" (or in the case of a sole proprietorship, independent contractor, or self-employed individual "gross income") plus "cost of goods sold," and exclude net capital gains or losses as these terms are defined and reported on IRS tax return forms.
  - Gross receipts do not include the following: taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees); proceeds from transactions between a borrower and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder, or

customs broker. However, any forgiveness amount of a First Draw PPP Loan that a borrower received in calendar year 2020 is excluded from a borrower's gross receipts.

- With respect to borrowers with affiliates, the IFR provides that "gross receipts" are calculated by adding the gross receipts of the borrower with the gross receipts of each affiliate. This means that PPP borrowers who have affiliates under the SBA's affiliation rules (which apply a broad "affiliation" concept that includes affiliation through negative controls that may implicate venture capital or private equity portfolio companies) would need to aggregate "gross receipts" across affiliated entities to determine whether they satisfy this eligibility requirement.
- Borrowers who engaged in acquisitions or divestitures may need to adjust their "gross receipts" to determine eligibility. If a borrower acquired an affiliate or was acquired as an affiliate during 2020, the borrower's gross receipts must include the receipts of the acquired or acquiring business. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose. However, if a borrower acquired a segregable division of another business concern during 2020, gross receipts do not include the receipts of the acquired division prior to the acquisition. The gross receipts of a former affiliate are not included. This exclusion of gross receipts of former affiliates applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a borrower sold a segregable division during 2020, the gross receipts will continue to include the receipts of the division that was sold.
- Borrowers applying for a "second draw" loan above \$150,000 must identify the 2020 quarter meeting this requirement, identify the reference quarter, and state the gross receipts amounts for both quarters, as well as provide supporting documentation. The "second draw" loan application does not specify what supporting documentation will be considered sufficient or address the confidentiality of such supporting documentation. Borrowers should coordinate closely with their SBA lender to confirm what supporting documentation will suffice and exercise caution in providing documentation that could reveal confidential information. Some borrowers may want to request confidential treatment of such supporting documentation.
- For loans of \$150,000 and below, the fields of the loan application regarding gross receipts are not required to be completed, and the borrower only must certify that they have met the 25% gross receipts reduction test at the time of application. However, upon or before seeking loan forgiveness (or upon SBA request), a borrower of \$150,000 and below must provide documentation that identifies the 2020 quarter meeting this requirement, identify the reference quarter, state the gross receipts amounts for both quarters, and provide supporting documentation.
- The "second draw" loan application form differs from the updated application form for initial PPP loans in that the "second draw" loan application does not provide a way for borrowers to claim eligibility based on the SBA's "alternative industry size standard" or "alternative size standard." These alternative ways to establish eligibility were used by some first draw PPP borrowers who may not have satisfied the general requirement of having 500 or fewer employees, or who did not satisfy this 500-employee limit due to the application of the SBA's affiliation rules.
  - On the surface, the language of the "second draw" loan application and the differences between the new loan applications threaten to make ineligible for "second draw" PPP loans borrowers who were and are eligible for an initial PPP loan based on the "alternative industry size standard" or "alternative size standard." However, the SBA has not yet directly addressed this point. Borrowers that previously relied upon the "alternative industry size standard" or the "alternative size standard" should exercise caution when considering whether to apply for a "second draw" PPP loan.
  - Certain business types are specifically excluded from eligibility, regardless of their number of employees or gross receipts. This includes any: (1) issuer of securities listed on a registered national securities exchange (i.e., most publicly traded companies), (2) businesses created in or organized under the laws of China or Hong Kong, or having significant operations in China or Hong Kong, or those that are more than 20% owned by businesses in China or Hong Kong, or businesses with a

board member who is a resident of China, (3) businesses required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938, (4) any person or entity that receives a grant for shuttered venue operators under section 324 of the Economic Aid Act, (5) businesses controlled by the U.S. president, vice president, the head of an executive department, or a member of Congress, or the spouse of such person, (6) businesses primarily engaged in political or lobbying activities, (7) businesses that have permanently closed, and (8) businesses that previously received a "second draw" PPP loan.

- Although publicly traded companies are excluded from eligibility, it appears that subsidiaries of publicly traded companies may be eligible, if they satisfy the other eligibility requirements and are able to make the necessity certification discussed below.
- The SBA has not yet clarified what constitutes "significant operations" in China or Hong Kong. As a result, businesses with operations in China or Hong Kong should exercise caution when considering whether to apply for a "second draw" PPP loan.
- Under the application form for a "second draw" PPP loan, if the borrower is presently involved in any bankruptcy, their application for a "second draw" PPP loan will not be approved.
  - This differs from the Economic Aid Act, which appeared to leave open the door that the SBA could approve PPP loans for certain borrowers in bankruptcy.
- In addition to the new eligibility requirements described above, applicants for "second draw" PPP loans will still be required to certify that current economic uncertainty makes the loan request necessary to support the ongoing operations of the applicant.
  - Since the necessity certification is made at the time of the loan application, borrowers will need to assess this requirement again, even if they previously analyzed and documented the "necessity" of their initial PPP loan.

### **Certification Risks and SBA Review**

As with the initial PPP, the revised program raises enforcement risks for borrowers. Each borrower must certify in good faith their eligibility for the "second draw" loan under the rules in effect at the time the application is submitted. As with the other certifications contained in the loan application, including the certification as to "necessity," this certification is made subject to potential criminal and civil penalties, including potential treble damages under the False Claim Act for knowingly making false certifications to the federal government. Like the previous PPP loan applications, the new applications require borrowers to certify that current "economic uncertainty makes [the] loan necessary to support the ongoing operations" of the borrower, which is an imprecise standard. Accordingly, borrowers should carefully consider whether they satisfy the new eligibility requirements before applying for a "second draw" PPP loan and should carefully document their good-faith determination that the loan is necessary to support ongoing operations.

In addition to the eligibility requirements above, the IFR for "second draw" PPP loans provides that the disbursement of a "second draw" PPP loan may be delayed for borrowers whose "first draw" PPP loan is under review by the SBA. Specifically, if a borrower's "first draw" PPP loan is under review by the SBA and/or information in the SBA's possession indicates that the borrower may have been ineligible for the "first draw" PPP loan it received or for the loan amount it received, the SBA lender will receive notification from the SBA when the lender submits an application for a guaranty of a "second draw" PPP loan and will not receive an SBA loan number until the issue related to the unresolved borrower's "first draw" PPP loan is resolved. The IFR does not specifically state that a first draw loan that is still under review for forgiveness purposes (as opposed to a review of eligibility requirements) is subject to delay. However, it is possible that an SBA loan number will be delayed until the forgiveness process is completed.

### **Calculation of "Second Draw" PPP Loan Amount**

The CARES Act provided that the calculation of the loan amount for PPP loans was based on 2½ times the borrower's average monthly payroll costs in 2019, up to a total of \$10 million. For "second draw" PPP loans, the loan amount is capped at the lower of (1) 2½ times the borrower's average monthly payroll costs for the one-year period before the loan is made, or calendar year 2019, or (2) \$2 million. However, for accommodation and food service businesses categorized under NAICS Sector 72, the payroll multiplier is increased from 2½ times to 3½ times. Additional adjustments to the formula apply for seasonal employers and businesses that did not exist for a full year prior to February 1, 2020.

The "second draw" IFR added an additional limitation to the loan amount for "second draw" PPP loans, stating that the aggregate amount of "second draw" PPP loan proceeds that may be received by businesses that are part of a single corporate group is limited to \$4 million.

### **Forgiveness of "Second Draw" PPP Loans**

The Economic Aid Act provides for forgiveness of "second draw" PPP loans on substantially the same terms as the forgiveness of initial PPP loans, except that it expands the permitted uses of PPP loans that would qualify for loan forgiveness. As noted above, borrowers who receive a "second draw" PPP loan of \$150,000 or lower will need to provide, upon application for forgiveness, information and supporting documentation with respect to their 25% decline in gross receipts between a quarter in 2019 and the corresponding quarter of 2020. As of January 11, 2021, the SBA had not yet released an updated loan forgiveness application to reflect changes called for by the Economic Aid Act.

### **What to Do Next?**

The new IFRs and updated loan applications provide a path for borrowers interested in a "first draw" PPP loan or a "second draw" PPP loan to assess their eligibility and begin gathering documentation to support their loan application. This includes gathering payroll documents to support the calculation of the loan amount, which may require coordination with payroll providers, information to support the calculation of the "gross receipts" test for "second draw" loans, and support for the borrower's "necessity" certification. As noted above, the specific timing for SBA lenders to begin accepting loan applications will vary from lender to lender. In addition, certain aspects of the "gross receipts" test and the required supporting documentation for a "second draw" PPP loan remain unclear. Accordingly, interested borrowers should consider contacting their SBA lender to determine next steps and the specific documentation requirements that their lender will apply. Experienced counsel can also assist as needed.

### **Resources**

- [CARES Act](#)—Section 1102 addresses eligibility and other PPP loan requirements, while Section 1106 addresses loan forgiveness
- [Paycheck Protection Program Flexibility Act of 2020](#)—Amending certain aspects of the CARES Act that pertain to PPP loans
- [Economic Aid Act](#)—Providing further amendments to portions of the CARES Act that pertain to PPP loans and authorizing "second draw" PPP loans
- [Frequently Asked Questions](#)—Last updated December 9, 2020
- [Interim Final Rule Regarding First Draw PPP Loans](#)—First released on January 6, 2021
- [Interim Final Rule Regarding Second Draw PPP Loans](#)—First released on January 6, 2021
- [New PPP Loan Application for First Draw PPP Loans](#)—First made available on January 8, 2021
- [PPP Loan Application for Second Draw PPP Loans](#)—First made available on January 8, 2021

- [U.S. Treasury CARES Act Resources](#)

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