

PPP Update: January 2021

Insights

January 11, 2021

On December 27, 2020, the Consolidated Appropriations Act, 2021 was signed into law. This omnibus appropriations legislation included the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the “**Economic Aid Act**” or “**EAA**”), a \$284 billion expansion of the Paycheck Protection Program (“**PPP**”) to provide additional forgivable loans for new PPP borrowers (“first draw” loans) and a second round of loans for certain existing PPP borrowers who have suffered demonstrable financial hardship (“second draw” loans).

On January 6, 2021, the SBA issued a **new interim final rule** (the “**Restated First Draw IFR**”) to implement the provisions of the Economic Aid Act and to consolidate and restate previous IFRs issued by the SBA. The SBA also released an **IFR on second draw PPP loans** (the “**Second Draw IFR**”) and announced its intention to issue a consolidated rule governing all aspects of loan forgiveness and loan review, as well as to update its list of Frequently Asked Questions in the coming days.

Highlights of the Economic Aid Act (as implemented by the SBA’s January 6 IFRs):

- Starting the week of January 11, 2021, lenders may make new first draw and second draw PPP loans to eligible borrowers. To promote access for smaller lenders and their customers, SBA will initially only accept loan applications from community financial institutions. The last day for borrowers to apply for and receive a PPP loan is March 31, 2021.
- First draw loans for new PPP borrowers and second draw loans for existing PPP borrowers will have a maturity of five years and an interest rate of 1.00%, calculated on a non-compounding, non-adjustable basis.

- Second draw PPP loans in an amount equal to 2.5 times the borrower's average monthly payroll costs (up to \$2 million) are available for borrowers that have already received a first draw PPP loan, provided such borrowers:
 - Experienced a 25% or greater reduction in revenue in 2020 relative to 2019.
 - A borrower must calculate this revenue reduction by comparing the borrower's quarterly gross receipts for one quarter in 2020 with the borrower's gross receipts for the corresponding quarter of 2019, or by providing annual tax returns that show a reduction in annual receipts of 25% or greater in 2020 compared to 2019.
 - "Gross receipts" includes all revenue in whatever form received or accrued (in accordance with the borrower'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. Generally, receipts are considered "total 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. The amount of any forgiven first draw PPP loan, among other things, shall not be included toward any borrower's gross receipts.
 - In addition to meeting the threshold for reduction in gross receipts, second draw PPP borrowers (like new first draw borrowers) must still certify on the loan application that current economic uncertainty makes the loan request necessary to support the ongoing operations of the borrower (SBA Form 2483-SD).
 - Employ 300 or fewer employees together with affiliates (with exceptions for NAICS 72 entities such as restaurants and hotels).
 - Have used, or will have used, the full amount of their first draw PPP loans on eligible expenses on or before the expected date on which the second draw loan is disbursed to the borrower.
 - Do not have:
 - A 20% owner that is an entity created in, organized under, or with significant operations in the People's Republic of China ("**PRC**") or Hong Kong.
 - A member of their board of directors who is a resident of the PRC.
- The following borrowers of prior PPP loans can reapply or request an increase in their existing first draw loan amount:

- A borrower that repaid all of its initial PPP loan may reapply for a first draw PPP loan in an amount for which the borrower is eligible under current PPP rules.
- A borrower that repaid part of a PPP loan may reapply for an amount equal to the difference between the current principal balance on the outstanding loan and the amount previously approved.
- A borrower that did not accept the full amount of a PPP loan for which it was approved may request an increase in the amount of the PPP loan up to the amount previously approved.
- The definition of “payroll costs” now includes group life, disability, vision, or dental insurance.
- PPP borrowers may choose a covered period for loan forgiveness that ends on any date between 8 and 24 weeks from the date the loan is disbursed (rather than choosing between either an 8-week or a 24-week period).
- PPP funds for new or existing first draw loans that have not yet been forgiven and second draw loans can be used for several new categories of expenses that will qualify for forgiveness:
 - Operations expenditures: payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses.
 - Supplier costs: expenditures made to suppliers for goods that are essential to operations at the time the expenditure is made, and that are made pursuant to a contract, order, or purchase order in effect before the PPP loan was disbursed (or in the case of perishable goods, in effect before or during the covered period of the loan).
 - Worker protection expenditures: certain operating and capital expenditures to facilitate the adaptation of the business activities of the borrower to comply with federal health and safety guidelines or any equivalent state and local guidance related to COVID-19 during the period between March 1, 2020, and the end of the national emergency declaration.
 - Property damage costs: costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation.

- The Restated First Draw IFR reiterated that affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control. However, in addition to applying any applicable affiliation rules, the SBA added that all borrowers should carefully review the required certification on the PPP Application Form stating that current economic uncertainty makes this loan request necessary to support the ongoing operations of the borrower.
- Public companies (with securities listed on a national securities exchange) are ineligible for new first draw or second draw PPP loans. The Restated First Draw IFR also reiterated that hedge funds and private equity firms are ineligible to receive a PPP loan because they are primarily engaged in investment or speculation.
- The EAA requires the SBA to issue a simplified single-page forgiveness application for PPP Loans of \$150,000 or less.
- In addition to the existing provision that PPP loan forgiveness shall not be taxable as gross income, the EAA clarified that deductions are permitted for deductible expenses paid with PPP loan proceeds that are forgiven.

Clients that are considering applying for a first draw or second draw PPP loan should contact their Gunderson Dettmer attorneys.

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