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The Paycheck Protection Program: Second Draw PPP Loans

The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Pub. L. 116-260) (the “Economic Aid Act”), which was passed by Congress on December 21, 2020 and signed into law by President Trump on December 27, 2020 as part of the Consolidated Appropriations Act, 2021, makes significant changes to the Paycheck Protection Program (PPP) established on March 27, 2020 under the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”).

I. FIRST DRAW PPP LOAN PROGRAM

The Economic Aid Act reopened the PPP for first-time loans under Section 7(a)(36) of the Small Business Act (“First Draw PPP Loans”). These loans were available beginning the week of January 11, 2021. The application deadline for First Draw PPP Loans is March 31, 2021.

The SBA has implemented the reopening of First Draw PPP Loans pursuant to a Consolidated First Draw PPP Interim Final Rule issued on or about January 1, 2021, which incorporates the Economic Aid Act amendments and consolidates the interim final rules (and important guidance) issued previously with respect to First Draw PPP Loans, including as to borrower eligibility, lender eligibility, PPP application and origination requirements for new PPP loans, and loan increases and loan forgiveness.

II. SECOND DRAW PPP LOAN PROGRAM

Section 311 of the Economic Aid Act added a new temporary section 7(a)(37) to the Small Business Act, making “Second Draw PPP Loans” available to certain borrowers that previously received First Draw PPP Loans. Like First Draw PPP Loans, Second Draw PPP Loans are intended to provide expeditious relief to America’s small businesses impacted by the COVID-19 pandemic. SBA lenders began accepting applications for Second Draw PPP Loans on January 13, 2021. The application deadline for these loans is also March 31, 2021.

The SBA has implemented Section 311 pursuant to a separate Interim Final Rule issued on or about January 1, 2021 (the “Second Draw PPP IFR”). Certain of provisions of the Second Draw PPP IFR are summarized below.

A. First Draw PPP Loan Terms

- 1% interest rate, calculated on a non-compounding, non-adjustable basis¹
- 5-year loan maturity
- Non-recourse (no personal guarantees)
- No collateral required
- 100% SBA guaranteed
- No “credit elsewhere test”
- No credit worthiness test
- No borrower fees
- No prepayment penalties
- 100% loan forgiveness under certain circumstances
- Lenders are permitted to rely on certifications of the borrower to determine the borrower’s eligibility and use of loan proceeds

B. Second Draw Loan Borrower Eligibility

- **General Requirements.**
 - The borrower has previously received a First Draw PPP Loan;
 - Before the Second Draw PPP Loan is disbursed, the borrower has used or will have used the full amount of its First Draw PPP Loan (including any increase) only for eligible expenses;
 - The borrower needs the Second Draw PPP Loan to support its ongoing operations;
 - The borrower, together with its affiliates² (if applicable):
 - (1) is an independent contractor, eligible self-employed individual, or sole proprietor with no employees; **or**
 - (2) employs no more than 300 employees; **or**
 - (3) has an NAICS code beginning with 72 (Accommodations or Food Service) and has no more than 300 employees per physical location; **or**
 - (4) is a news organization that is majority owned or controlled by a business having an NAICS code 511110 (Newspaper Publisher) or 5151 (Radio and Television Broadcasting), or is a nonprofit or tax exempt public broadcasting entity with a trade or business under NAICS code 511110 or 5151, and in each case has no more than 300 employees per location; **or**
 - (5) is a nonprofit organization eligible for a First Draw PPP Loan, a veterans organization, Tribal business concern, housing cooperative, small agricultural cooperative, eligible 501(c)(6) organization (excluding professional sports leagues and political campaigns) or destination marketing organization, and in each case has no more than 300 employees; **AND**
 - The borrower has experienced a revenue reduction of 25% or more in 2020 relative to 2019, measured as follows:

¹ If the borrower submits its Second Draw PPP Loan forgiveness application within 10 months after the end of its “loan forgiveness period,” it will not have to make any payments of principal or interest on the loan before the date on which the SBA remits the loan forgiveness amount on the loan to the lender.

² Paragraph 7(a)(37)(E) of the Small Business Act (added under the Economic Aid Act) applies the First Draw PPP Loan affiliation rules and waivers to Second Draw PPP Loans, adds a waiver for certain eligible news organizations, and makes adjustments to reflect the reduced size requirements (from 500 to 300 employees) for Second Draw PPP Loans.

- (1) If the applicant had gross receipts³ during the 1st, 2nd, 3rd or 4th quarter⁴ of 2020 that were at least 25% below the applicant's gross receipts during the same quarter in 2019; **or**
- (2) If the applicant was not in business during the 1st or 2nd quarter of 2019, but was in business during the 3rd and 4th quarters of 2019, the applicant had gross receipts during the 1st, 2nd, 3rd or 4th quarter of 2020 that were at least 25% below its gross receipts during the 3rd or 4th quarter of 2019; **or**
- (3) If the applicant was not in business during the 1st, 2nd or 3rd quarter of 2019, but was in business during the 4th quarter of 2019, the applicant had gross receipts during the 1st, 2nd, 3rd or 4th quarter of 2020 that were at least 25% below its gross receipts during the 4th quarter of 2019; **or**
- (4) If the applicant was not in business during 2019, but was in business on February 5, 2020, the applicant had gross receipts during the 2nd, 3rd or 4th quarter of 2020 that were at least 25% below its gross receipts during the 1st quarter of 2020; **or**
- (5) If the applicant was in business during all four quarters of 2019, the applicant's annual gross receipts in 2019 were at least 25% below its annual gross receipts in 2020 (the applicant must provide copies of its annual tax forms to confirm this annual reduction).

- ***Excluded Borrowers.***

- A business or entity that was or is ineligible to receive a First Draw PPP Loan under the CARES Act or the Consolidated First Draw PPP IFR (e.g., does not need the PPP funds to support its ongoing operations, is engaged in activities that are illegal under federal law, etc.) is also ineligible to receive a Second Draw PPP Loan.
- The following are also expressly excluded from participation in the Second Draw PPP Loan program under the Economic Aid Act and the Second Draw PPP IFR:
 - (1) A business or entity that has received or will receive another Second Draw PPP Loan;
 - (2) A business or entity that has permanently closed (businesses that have temporarily closed or suspended operations are eligible);
 - (3) A business or entity primarily engaged in political or lobbying activities, including any business or entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or that describes itself as a “think tank” in any public documents;
 - (4) A business or entity in which 20% or more of the economic interests (including equity shares or capital or profits interests) are owned or held, directly or indirectly, by an entity created in or organized under the laws of the People's Republic of China (PRC) or the Special Administrative Region of Hong Kong, or that has significant operations in the PRC or the Special Administrative Region of Hong Kong;

³ The Economic Aid Act does not include a definition of gross receipts for purposes of determining revenue reduction. The SBA will rely on the definition of receipts in 13 C.F.R. 121.104, which includes all revenue in whatever form received or accrued from whatever source, by the borrower and its affiliates, including from sales of products or services, interest, dividends, rents, royalties, fees or commissions, reduced by returns and allowances. For eligible nonprofit, veterans, nonprofit news, 501(c)(6) or destination marketing organizations, gross receipts has the meaning set forth in Section 6033 of the Internal Revenue Code of 1986. **Any forgiveness amount of a First Draw PPP Loan that a borrower received in calendar year 2020 is excluded from Borrower's gross receipts for purposes of the Second Draw PPP Loan program.**

⁴ Refers to calendar quarters only.

- (5) A business or entity that retains, as a member of the board of directors of the business concern, a person who is a resident of the PRC;
- (6) Any person required to submit a registration statement under Section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612);
- (7) A person or entity that receives or will receive a grant for shuttered venue operators under Section 324 of the Economic Aid Act;
- (8) Entities in which the President, Vice President, the head of an Executive department, or a Member of Congress, or the spouse of such person, owns, controls or holds at least 20% (by vote or value) of any class of equity (including capital or profit interest, warrants or rights to purchase equity);
- (9) Publicly traded companies, the securities of which are listed on an exchange registered as a national securities exchange under Section 6 of the Securities Exchange Act of 1934; and
- (10) Debtors in bankruptcy proceedings.

C. Maximum Second Draw PPP Loan Amounts

- **Generally.** The maximum loan amount for a Second Draw PPP Loan is generally the lesser of:
 - (1) 2.5 months of the borrower's average monthly payroll costs incurred or paid by the borrower (a) during 2019 or 2020 (at the borrower's election), or (b) if the borrower is not self-employed, a sole proprietorship or an independent contractor, during the 12 months before the date on which the Second Draw PPP Loan is made; or
 - (2) \$2,000,000.
- **Seasonal Employers.** The maximum loan amount for a Second Draw PPP Loan to a borrower that is a seasonal employer (does not operate more than 7 months in any calendar year or that, during the preceding calendar year, had gross receipts for any 6 months of that year that were not more than 33.33% of the gross receipts of the seasonal employer for the other 6 months of that year), is the lesser of:
 - (1) the product obtained by multiplying (a) 2.5 (or 3.5 for any seasonal employer assigned a NAICS code beginning with 72), by (b) the average total monthly payments for payroll costs incurred or paid by the employer for any 12-week period between February 15, 2019 and February 15, 2020; or
 - (2) \$2,000,000.
- **Borrowers Not in Existence For 1 Full Year Prior to February 15, 2020.** The maximum loan amount for a Second Draw PPP Loan to a borrower that did not exist for the full 12-month period preceding February 15, 2020, but was in operation on February 15, 2020 (a "new entity") is the lesser of:
 - (1) the product obtained by multiplying (a) 2.5 (or 3.5 for any borrower assigned a NAICS code beginning with 72), by (b) the quotient obtained by dividing the sum of the total monthly payments for payroll costs incurred or paid by the borrower as of the date on which the borrower applies for the Second Draw PPP Loan by the number of months in which those payroll costs were paid or incurred; or

(2) \$2,000,000.

- ***Borrowers Assigned an NAICS Code Beginning with 72.*** The maximum loan amount for a Second Draw PPP Loan to a borrower that has an assigned NAICS code beginning with 72 (and is not a seasonal employer or “new entity”) is the lesser of:

(1) the product obtained by multiplying (a) 3.5 by (b) the total monthly payments for payroll costs incurred or paid by the borrower during either 2019 or 2020 (at the borrower’s election); or

(2) \$2,000,000.

- ***Farmers and Ranchers.*** The maximum loan amount for a Second Draw PPP Loan to a farmer or rancher that operates as a sole proprietorship or as an independent contractor, or is an eligible self-employed individual, and reports farm income or expenses on Schedule F (IRS Form 1040), and was in business on February 15, 2020, is calculated as follows:

(1) if the eligible farmer or rancher has no employees, the maximum loan amount is the product obtained by multiplying (a) 2.5 by (b) the gross income of the borrower in 2019 or 2020, as reported on Schedule F (IRS Form 1040), up to \$100,000, divided by 12.

(2) if the eligible farmer or rancher has employees, the maximum loan amount is the lesser of:

(a) the product obtained by multiplying (i) 2.5 by (ii) the gross income and employee payroll costs of the borrower in 2019 or 2020 (at the borrower’s election), as reported on Schedule F (IRS Form 1040), up to \$100,000, divided by 12, minus the average total monthly payment for employee payroll costs incurred or paid by the borrower during the same year elected by the borrower; or

(b) \$2,000,000.

- ***Self-Employed.*** The maximum loan amount for a Second Draw PPP Loan to a borrower that has income from self-employment and files a Form 1040 Schedule C, is calculated as follows:

(1) if the self-employed borrower has no employees, the maximum loan amount is the lesser of: the product obtained by multiplying (a) 2.5 (or 3.5 for a borrower assigned an NAICS code beginning with 72), by (b) the net profit of the borrower in 2019 or 2020, as reported on IRS Form 1040 Schedule C, up to \$100,000, divided by 12.

(2) if the self-employed borrower has employees, the maximum loan amount is the lesser of:

(a) the product obtained by multiplying (i) 2.5 (or 3.5 for a borrower assigned an NAICS code beginning with 72), by (ii) the sum of the net profit of the borrower in 2019 or 2020 (at the borrower’s election), as reported on IRS Form 1040 Schedule C, up to \$100,000, divided by 12, plus the average total monthly payment for employee payroll costs incurred or paid by the borrower during the same year elected by the borrower; or

(b) \$2,000,000.

- **Partnerships.** The maximum loan amount for a Second Draw PPP Loan to a borrower that files taxes as a partnership is the lesser of:

(1) the product obtained by multiplying (a) 2.5 (or 3.5 for a borrower assigned an NAICS code beginning with 72), by (b) the sum of net earnings from self-employment of individual general partners in 2019 or 2020 (at borrower's election), as reported on IRS Form 1065 K-1s, reduced by Section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed in oil and gas properties, multiplied by 0.9235, up to \$100,000, divided by 12, plus the average total monthly payment for employee payroll costs incurred or paid by the borrower during the same year elected by the borrower; or

(2) \$2,000,000.

Businesses that are part of a single corporate group will not receive more than \$4,000,000 of Second Draw PPP Loans in the aggregate.

D. Use of Second Draw PPP Loans

- **Eligible Expenses.** Proceeds of a Second Draw PPP Loan can be used for:
 1. Payroll Costs (as defined below) (at least 60% of the Second Draw PPP Loan proceeds must be used for Payroll Costs).
 2. Costs related to the continuation of group health care, life, disability, vision, or dental benefits during periods of paid sick, medical, or family leave (including related insurance premiums).
 3. Mortgage interest payments (but not mortgage prepayments or principal payments).
 4. Rent payments.
 5. Utility payments.
 6. Interest payments on any other debt obligations that were incurred before February 15, 2020.
 7. Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020.
 8. Covered operations expenses (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).
 9. Covered property damage costs (costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that were not covered by insurance or other compensation).
 10. Covered supplier costs (expenditures made by a borrower for the supply of goods that (a) are essential to the operations of the borrower at the time at which the expenditure is made, and (b) is made pursuant to a contract, order or purchase order in effect at any time before the covered loan period or with respect to perishable goods, in effect before or at any time during the covered period).

11. Covered worker protection expenses (operating or capital expenditures to facilitate the adaptation of the business activities of any entity to comply with requirements established or guidance issued by the U.S. DHHS, CDC, OSHA, or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending on the date on which the national emergency with respect to COVID-19 expires, which may include expenditures to purchase, maintain, renovate or expand borrower assets (e.g., drive-through windows, outdoor business space, air or air pressure ventilation or filtration systems, physical barriers (e.g., sneeze guards), health screening capability) or to purchase respirators, masks, gloves, surgical gowns, and other personal protective equipment).
- ***Payroll Costs.*** Has the same meaning as with First Draw PPP Loans, and includes:
 1. Gross salaries, wages, commissions or similar compensation up to \$100,000 per year (\$8,333.33 per month) per employee whose principal place of residence is in the United States (because payroll costs are calculated on a gross basis, borrowers should not subtract federal taxes imposed and withheld, such as the employee’s share of FICA and income taxes required to be withheld from employees; however, employer-side federal payroll taxes imposed on salaries and wages are excluded from payroll costs for purposes of the PPP).
 2. Cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good faith employer estimate of such tips).
 3. Payments for vacation, parental, family, medical or sick leave (excluding any sick leave or family or medical leave wages for which a credit is allowed under Sections 7001 and 7003 of the Families First Coronavirus Response Act).
 4. Allowance for separation or dismissal.
 5. Payments for provision of employee benefits consisting of group health care or group life, disability, vision or dental insurance (including insurance premiums).
 6. Employer contributions to retirement plans (such as 401(k), SEP IRAs, Simple IRAs).
 7. Payments of state and local taxes assessed on such compensation.
 8. For independent contractors or sole proprietors, wages, commissions, income, or net earnings from self-employment or similar compensation.
 - ***Covered Period.*** For purposes of Second Draw PPP Loans, the term “covered period” has the meaning given under the PPP, except that it is extended to March 31, 2021 (see below for determination of “covered period” for purposes of loan forgiveness).

E. Second Draw PPP Loan Forgiveness

Second Draw PPP Loans are eligible for loan forgiveness on the same terms and conditions as First Draw PPP Loans, except that Second Draw PPP Loan borrowers with a principal amount of \$150,000 or less are required to provide documentation, with the loan forgiveness application, of revenue reduction if such documentation was not provided with the Second Draw PPP Loan application.

The Economic Aid Act redefines the term “covered period” for purposes of forgiveness of PPP loans made after December 27, 2020, including Second Draw PPP Loans, to mean the period beginning on the date of disbursement of the PPP Loan and ending on the date selected by the PPP borrower that occurs during the

period starting 8 weeks after the disbursement date and ending 24 weeks after the disbursement date. This will enable borrowers to better manage their workforce decisions by tailoring their covered periods to end before a reduction in workforce, thereby avoiding a potential Full Time Employee (FTE) reduction to the loan forgiveness amount.

F. Second Draw PPP Loan Application and Underwriting

- *Applicant Documentation*

1. The applicant must submit a completed and signed SBA Paycheck Protection Program Second Draw Borrower Application Form 2483-SD to an SBA-approved Section 7(a) lender (e-signatures or e-consents can be used regardless of the number of owners but borrowers should be prepared to provide “wet signatures” in due course). The authorized representative of the applicant will be required to make various certifications when executing the Loan Application. Knowingly making a false statement on the Loan Application is punishable under the law, including imprisonment of not more than 5 years and/or a fine of up to \$250,000 under 18 USC §§ 1001 and 3571; imprisonment of not more than 2 years and/or a fine of not more than \$5,000 under 15 USC § 645; and imprisonment of not more than 30 years and/or a fine of not more than \$1,000,000 under 18 USC § 1014.
2. The applicant must submit the following documentation with the completed and signed Loan Application:
 - (a) If the applicant is not self-employed, (i) the applicant’s Form 941 (or other tax forms containing similar information), state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or 2020 (whichever was used to calculate payroll), or equivalent payroll processor records, (ii) evidence of any retirement and employee group health, life, disability, vision and dental insurance contributions, and (iii) if a partnership, the applicant’s IRS Form 1065 K-1s.
 - (b) If the applicant is self-employed and has employees, (i) the applicant’s 2019 or 2020 (whichever was used to calculate the loan amount) IRS Form 1040 Schedule C, Form 941 (or other tax forms or equivalent payroll processor records containing similar information) and state quarterly wage unemployment insurance tax reporting forms for each quarter in 2019 or 2020 (whichever was used to calculate loan amount), or equivalent payroll processor records, (ii) evidence of any retirement and employee group health, life, disability, vision and dental insurance contributions, and (iii) a payroll statement or similar documentation from the pay period that covered February 15, 2020, to establish that the application was in operation on February 15, 2020.
 - (c) If the applicant is self-employed and has no employees, (i) the applicant’s 2019 or 2020 (whichever was used to calculate the loan amount) IRS Form 1040 Schedule C, (ii) a 2019 or 2020 (whichever was used to calculate loan amount) IRS Form 1099-MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record that establishes that applicant is self-employed, and (iii) a 2020 invoice, bank statement, or book of record to establish that the applicant was in operation on February 15, 2020.
 - (d) For loans with a principal amount greater than \$150,000, documentation confirming the 25% reduction in gross receipts, which might include (i) relevant tax forms (including annual tax forms), or (ii) if relevant tax forms are not available, a copy of the applicant’s quarterly income statements or bank statements. Lenders must

perform a good faith review of the applicant's calculations and supporting documents concerning revenue reduction.

(e) Additional documentation to substantiate payroll costs will not be required if the applicant: (i) used calendar year 2019 figures to determine its First Draw PPP Loan amount; (ii) used calendar year 2019 figures to determine its Second Draw PPP Loan amount (instead of calendar year 2020); and (iii) the lender for the applicant's Second Draw PPP Loan is the same as the lender that made its First Draw PPP Loan. The lender may request additional documentation if the lender believes it would be useful in conducting lender's good-faith review of the borrower's loan amount calculation.

3. If an applicant's First Draw PPP Loan is under review by the SBA and/or information in SBA's possession indicates that the applicant may have been ineligible for a First Draw PPP Loan, the 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 for the Second Draw PPP Loan until the issues related to the First Draw PPP Loan is resolved.

- ***Loan Underwriting***

The lender must:

1. Confirm receipt of the borrower certifications contained in the SBA Paycheck Protection Program Second Draw Borrower Application Form 2483-SD;
2. Confirm receipt of information demonstrating that borrower was either an eligible self-employed individual, independent contractor, or sole proprietorship with no employees or had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;
3. Confirm the dollar amount of average monthly payroll costs for 2019 or 2020 by reviewing the payroll documentation submitted with the Loan Application; and
4. Perform a good-faith review of the applicant's calculations and supporting documents concerning revenue reduction if the Second Draw PPP Loan amount is greater than \$150,000.

- ***Lender Reliance of Applicant Certifications***

The lender can rely on any certification or documentation submitted by an applicant for a Second Draw PPP Loan or an eligible recipient or eligible entity that (a) is submitted pursuant to all applicable statutory requirements, regulations and guidance related to the PPP loan program, and (b) attests that the applicant, eligible recipient or eligible entity, as applicable, has accurately provided the certification or documentation to the lender in accordance with the statutory requirements, regulations and guidance related to PPP loans.

An enforcement action may not be taken against a lender that relies on such certifications or documentation, and the lender shall not be subject to any penalties related to PPP loan origination or forgiveness if (a) the lender acts in good-faith on that reliance, and (b) all other relevant federal, state, local and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the PPP loan.

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