

# Additional Relief Under the Paycheck Protection Program Is on Its Way

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## Who Needs to Know

All parties interested in participating in the PPP.

## Why It Matters

In addition to allocating \$284.45 billion in new funding, this package of laws include significant clarifications and modifications to the PPP that are important to borrowers and lenders.

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On December 27, 2020, the President signed into law the Consolidated Appropriations Act, 2021, which included the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the Act), the COVID-Related Tax Relief Act of 2020, and the Taxpayer Certainty and Disability Relief Act of 2020. These laws include significant clarifications and modifications to the Paycheck Protection Program (PPP), which terminated on August 8, 2020. The COVID-Related Tax Relief Act of 2020 solidifies the tax-free treatment of forgiven PPP loans. In addition to allocating \$284.45 billion to the PPP for 2021, the Act:

- renews the ability of eligible businesses that have not previously received a PPP loan to apply for and receive PPP loans through March 31, 2021,
- modifies the scope of businesses eligible for PPP loans,
- expands the scope of expenses for which a PPP loan can be used and that are eligible for forgiveness,
- simplifies the forgiveness mechanisms for PPP loan of \$150,000 or less,
- creates a framework for certain small businesses that previously received a PPP loan to obtain one additional PPP loan (a second draw PPP loan), and
- clarifies various matters relating to PPP lender reimbursement rates and liabilities.

This is a summary of the COVID-Related Tax Relief Act of 2020 and the Act as enacted on December 27, 2020. The Act requires the U.S. Small Business Administration (SBA) to issue regulations to carry out the Act no later than January 6, 2021. We expect that SBA will need to modify its prior, and establish new, regulations, guidance, and Frequently Asked Questions (FAQ) to conform with and implement the provisions of the Act. We understand that SBA expects to implement the next round of PPP lending authorized by the Act on January 11 with community development financial institutions (CDFIs) and smaller financial institutions and that all other financial institutions are expected to have access around January 13. Of course, this expected timing is subject to change.

In anticipation of this, SBA will likely start issuing interim final rules and guidance within the next few days. We are tracking these regulations and will provide updated guidance when appropriate.

## **MODIFICATIONS TO PAYCHECK PROTECTION PROGRAM**

### **Tax Matters**

#### ***Treatment of Forgiven PPP Loans***

The COVID-Related Tax Relief Act of 2020 reinforces the CARES Act's exclusion of forgiven PPP loan amounts from gross income for federal income tax purposes by providing that no deduction is to be denied, no tax attribute is to be reduced, and no basis increase is to be denied, by reason of such exclusion from gross income. For any borrower that is a partnership or S corporation, any amount so excluded from income is to be treated as tax exempt income and, except as provided by the secretary of the treasury (or the secretary's delegate), any increase in the adjusted basis of a partner's interest in a partnership with respect to any amount so treated as tax exempt income is to be equal the partner's distributive share of deductions resulting from costs giving rise to the forgiven PPP loan amounts.

#### ***Employee Retention Credit***

Previously, under Section 2301(j) of the CARES Act, a business that received a PPP loan was not eligible for the employee retention credit provided in Section 2301 of the CARES Act. The Taxpayer Certainty and Disability Relief Act of 2020 repealed clause (j) of Section 2301 of the CARES Act and now permits a business that previously received (or later receives) a PPP loan to claim this employee retention credit, so long as the credit is not sought for wages paid with proceeds of the PPP loan that have been forgiven. Thus, a business that received (or receives) a PPP loan and paid "qualified wages" in excess of the amount of the forgiven PPP loan, which is attributable to wages paid, is eligible to claim the credit, assuming that the business is otherwise eligible to claim the credit. This change is retroactive to the date of the enactment of the CARES Act (*i.e.*, March 27, 2020).

### **Renewal of PPP, Allocation Set Asides and Modifications to Eligibility for PPP Loans**

#### ***Renewal of PPP and Allocation Set Asides***

##### ***Renewal***

The Act renews the ability of eligible businesses to apply for and receive PPP loans through March 31, 2021. Thus, businesses that are eligible under the CARES Act (as amended by the Act) to receive a PPP loan, but have not received one to date, are able to receive a PPP loan in an amount equal to the lesser of \$10 million or 2.5x their average total monthly payments for "payroll costs" incurred or paid during the one-year period before the date the loan is made.<sup>[1]</sup> Except as described in this summary, the eligibility requirements (including with respect to size limitations, the applicant's "need" for the loan, and the applicability of SBA's affiliation regulations), the maximum loan amount and the scope of expenses for which a PPP loan can be used, and that are eligible for forgiveness, are the same as those that were in effect under the CARES Act and related regulations, guidance, and FAQs issued by SBA before December 27, 2020.

## *Allocation Set Asides*

Of the \$284.45 billion allocated to the PPP for 2021:

- not less than \$15 billion is for PPP loans made by CDFIs,
- not less than \$15 billion is for PPP loans made by:
  - insured depository institutions with consolidated assets of less than \$10 billion,
  - credit unions with consolidated assets of less than \$10 billion, or
  - institutions of the Farm Credit System with consolidated assets of less than \$10 billion (not including the Federal Agricultural Mortgage Corporation),
- not less than \$15 billion is for PPP loans that are:
  - made to qualifying businesses with not more than 10 employees, or
  - in an amount that is not more than \$250,000 and made to qualifying businesses that are located in low-income neighborhoods or moderate-income neighborhoods
- not less than \$35 billion is for PPP loans to qualifying businesses that have not previously received a PPP loan, and
- not less than \$25 billion is for second draw PPP loans to qualifying businesses that received an initial PPP loan and that are:
  - made to eligible entities with not more than 10 employees, or
  - in an amount that is not more than \$250,000 and made to qualifying businesses that are located in low-income neighborhoods or moderate-income neighborhoods.

The Act permits SBA to adjust these set aside allocations any time after January 21 if SBA determines that it is not reasonably expected that a type of entity to which a set aside has been allocated will make or receive, as applicable, the minimum amount of PPP loans necessary to meet the applicable allocation made to it, and it is reasonably expected that the total amount of PPP loans will equal substantially all of the amount permitted by available funds by March 31, 2021.

## ***Expansion of Eligibility for PPP Loans***

The Act also expands the scope of businesses that are eligible for PPP loans to include: (1) certain tax exempt organizations described in 501(c)(6) of the Internal Revenue Code; (2) so-called “destination marketing organizations;” and (3) housing cooperatives<sup>[2]</sup> that, when taken together with their affiliates, employ no more than 300 employees. The Act also significantly expands the ability of radio and television broadcast stations and newspaper publishers to obtain PPP loans.

### *501(c)(6) Organizations*

A 501(c)(6) nonprofit organization (other than a professional sports league or organizations with the purpose of promoting or participating in a political campaign or other activity) is eligible to receive a PPP loan if:

- the organization does not receive more than 15% of its receipts from lobbying activities;
- the lobbying activities of the organization do not comprise more than 15% of the total activities of the

organization;

- the cost of the lobbying activities of the organization did not exceed \$1 million during the most recent tax year of the organization that ended prior to February 15, 2020; and
- the organization (when taken together with its affiliates) employs not more than 300 employees.

#### *Destination Marketing Organizations*

A **destination marketing organization** is a nonprofit entity that is either (1) a tax exempt organization described in section 501(c) of the Internal Revenue Code or (2) a quasi-governmental entity or is a political subdivision of a state or local government, including any instrumentality of those entities that is:

- engaged in, and derives the majority of the operating budget of the entity from revenue attributable to, providing live events, *or*
- engaged in marketing and promoting communities and facilities to businesses and leisure travelers through a range of activities, including activities like assisting with the location of meeting and convention sites; providing travel information on area attractions, lodging accommodations, and restaurants; providing maps; and organizing group tours of local historical, recreational, and cultural attractions.

A destination marketing organization is eligible to receive a PPP loan if:

- the destination marketing organization does not receive more than 15% of its receipts from lobbying activities;
- the lobbying activities of the destination marketing organization do not comprise more than 15% of the total activities of the organization;
- the cost of the lobbying activities of the destination marketing organization did not exceed \$1 million during the most recent tax year of the destination marketing organization that ended prior to February 15, 2020; and
- the destination marketing organization (when taken together with its affiliates) employs not more than 300 employees.

#### *Radio and Television Broadcast Stations and Newspaper Publishers*

Pursuant to the operation of the PPP as initially structured by the CARES Act, radio and television broadcast stations (collectively, broadcasters) and newspaper publishers were eligible to receive PPP loans if they, when taken together with their affiliates, (1) employed not more than 500 employees or, if SBA established a number of employees size standard greater than 500 for the industry within which such businesses operate, the greater size standard SBA so established or (2) satisfied the alternative size test.<sup>[3]</sup> Newspaper publishers (which are assigned a North American Industrial Classification System (NAICS) code of 511110) benefit from a greater number of employees size standard because SBA established a number of employee size standard of 1,000 for that NAICS code. Although many broadcasters and newspaper publishers operate locally and independently of their parent entities and other affiliates, many of them were excluded from being able to receive a PPP loan due to SBA's affiliation regulations, which required them to include their parent entities and affiliates in the size determination — thereby resulting in them having greater than the requisite number of employees or not satisfying

the alternative size standard.

The Act significantly expanded the ability of broadcasters and newspaper publishers to receive PPP loans by including as eligible recipients any business concern (which, for this purpose, includes any station which broadcasts pursuant to a license granted by the Federal Communications Commission (FCC) under Title III of the Communications Act of 1934) that (1) employs not more than 500 employees or, if SBA established a number of employees size standard, greater than 500 for the industry within which such businesses operate, the greater size standard SBA so established, **on a per physical location basis** or (2) is nonprofit organization or a public college or university (or a wholly owned corporation of any such college or university) that is a “public broadcasting entity” (as defined by Section 397(11) of the Communications Act of 1934

[\[https://www.law.cornell.edu/uscode/text/47/397\]](https://www.law.cornell.edu/uscode/text/47/397) if such broadcaster or newspaper publisher:

- is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 (newspaper publishers) or 5151 (radio and television broadcasting) or, with respect to a “public broadcasting entity,” has a trade or business that falls under such a code; and
- makes a good faith certification that proceeds of the PPP loan will be used to support expenses at the component of such broadcaster or newspaper publisher that produces or distributes locally focused or emergency information.

As a further enhancement to this expansion of eligibility for broadcasters and newspaper publishers, the Act added an additional waiver of SBA’s affiliation rules with respect to eligibility for a PPP loan for (1) any business concern (which, for this purpose, includes any station that broadcasts pursuant to a license granted by the FCC under Title III of the Communications Act of 1934) that employs not more than 500 employees or, if SBA established a number of employees size standard greater than 500 for the industry within which such businesses operate, the greater size standard SBA so established, per physical location and is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 (newspaper publishers) or 5151 (radio and television broadcasting) or (2) any nonprofit organization that is assigned a NAICS code beginning with 5151.

### ***Restrictions on Eligibility for PPP Loans***

The Act provides that the following businesses are not eligible to receive a PPP loan even if they would otherwise satisfy the eligibility requirements:

- any business or organization that was not in operation on February 15, 2020,
- any person or entity that receives a grant under the Shuttered Venue Operator Grant program established under the Act, and
- effective from and after December 27, 2020, any issuer whose securities are listed on a national securities exchange (a publicly traded company). However, the Act provides that SBA will not consider whether any entity affiliated with a broadcaster or newspaper publisher (including any entity that owns or controls such broadcaster or newspaper publisher) is a publicly traded company for purpose of this exclusion.

### **Additional Expenses Eligible for Use and Forgiveness**

The Act expands the scope of expenses for which a PPP loan can be used and that are eligible for forgiveness. Specifically, the Act added employer paid group life, disability, vision, or dental insurance benefits to the types of compensation payments that are included in “payroll costs” for purposes of calculating the PPP loan amount and for which PPP loan proceeds can be used and are eligible for forgiveness. In addition, the existing expense categories for which PPP loan proceeds can be utilized<sup>[4]</sup> has been expanded by the Act to include “covered operations expenditures,” “covered property damage costs,” “covered supplier costs,” and “covered worker protection expenditures.” Importantly, each of these expenditures is also eligible for forgiveness. It should be noted, though, that no more than 40% of the total amount forgiven with respect to a PPP loan can be attributable to eligible expenses that are not “payroll costs.”

The Act defines these additional expense categories as follows:

- A **covered operations expenditure** is a payment 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.
- A **covered property damage cost** is a cost 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.
- A **covered supplier cost** is an expenditure made by an entity to a supplier of goods for goods that:
  - are essential to the operations of the entity at the time at which the expenditure is made; and
  - is made pursuant to a contract, order, or purchase order that is in effect at any time before the origination date of the applicable PPP loan or, with respect to perishable goods, in effect before the origination date of, or at any time during the covered period, with respect to the applicable PPP loan.
- A **covered worker protection expenditure** is an operating or a capital expenditure to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a state or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the president with respect to COVID–19 expires, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19. Covered worker protection expenditures do not include residential real property or intangible property, but may include:
  - the purchase, maintenance, or renovation of assets that create or expand:
    - a drive-through window facility;
    - an indoor, outdoor, or combined air or air pressure ventilation or filtration system;
    - a physical barrier, such as a sneeze guard;
    - an expansion of additional indoor, outdoor, or combined business space;
    - an onsite or offsite health screening capability; or
    - other assets relating to compliance with the requirements or guidance related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19, as determined by the administrator of SBA in consultation with the secretary of health and human services and the secretary of labor; and
  - the purchase of:
    - “covered materials” described in 44 C.F.R. 328.103(a) [<https://www.law.cornell.edu/cfr/text/44/328.103>], or any successor regulation;
    - particulate filtering face-piece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or

- other kinds of personal protective equipment, as determined by the administrator of SBA in consultation with the secretary of health and human services and the secretary of labor.

Unless a PPP loan recipient has received forgiveness before December 27, 2020, the expansion of the scope of expenses for which a PPP loan can be used and that are eligible for forgiveness will apply to all PPP loans, whether made before, on or after December 27, 2020.

### **Prohibition on Use of Proceeds for Lobbying Activities**

The Act provides that none of the proceeds of a PPP loan may be used for:

- lobbying activities, as defined in Section 3 of the Lobbying Disclosure Act of 1995,
- lobbying expenditures related to a state or local election, or
- expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or executive order proposed or pending before Congress or any state government, state legislature, or local legislature or legislative body.

This provision is effective as of December 27, 2020 and applies to all PPP loans made on or after December 27, 2020. Thus, it does not apply to PPP loans made before December 27, 2020. Given that PPP loans are only permitted to be used for a defined set of purposes (*i.e.*, payroll costs, interest on any covered mortgage obligation, any covered operations expenditure, any covered property damage cost, any payment on any covered rent obligation, any covered utility payment, any covered supplier cost, and any covered worker protection expenditure), it would seem that SBA will need to issue regulations and guidance to assist PPP loan recipients with respect to how they need to track the extent to which any permitted uses of a PPP loan might implicate this prohibition (such as the use of PPP loan proceeds to pay the salaries and wages of employees who engage in lobbying activities) so that they can comply with this prohibition.

### **Ability for PPP Borrowers to Reapply or Request an Increase in Loan Amount Due to Updated Regulations**

The Act requires SBA to issue regulations or guidance no later than January 6 to allow a recipient of a PPP loan that has not received forgiveness as of December 26, 2020 and that returned amounts disbursed under that PPP loan or that did not accept the full amount of the PPP loan for which the recipient was approved to reapply for an amount equal to the difference between the amount retained and the maximum amount available (in the case of a recipient that returned amounts disbursed) or to request a modification to increase the amount of the loan to the maximum amount available (in the case of a recipient that did not accept the full amount of the loan).

### **Loan Forgiveness Matters**

#### ***Selection of the “Covered Period” for Loan Forgiveness***

The Act modifies the definition of “covered period” for purposes of PPP loan forgiveness. Before this change, the “covered period” during which a recipient of a PPP loan has to spend the loan proceeds was 24 weeks, with the sole exception that a recipient of a PPP loan originated before June 5, 2020 had the ability to select either an eight-



week or 24-week covered period, although SBA permitted recipients to apply for forgiveness any time before the end of the covered period if the recipient spent all of the PPP loan proceeds. Now, the covered period for all PPP loans made on or after December 27, 2020 is the period beginning on the date on which the PPP loan is originated and ending on any date selected by the recipient, which is between eight and 24 weeks after the loan origination date.

### ***Coordination with Employee Retention Credit Modifications***

The Act modified the extent to which “payroll costs” can be included in the forgiveness calculation to conform with the ability of a PPP loan recipient that paid “qualified wages” in excess of the amount of the forgiven PPP loan attributable to wages to claim the employee retention credit provided by Section 2301 of the CARES Act, assuming that the business is otherwise eligible to claim the credit. This modification provides that payroll costs do not include “qualified wages” taken into account in determining the credit allowed under Section 2301 of the CARES Act or “qualified wages” taken into account in determining the credit allowed under subsection (a) or (d) of Section 303 of the Taxpayer Certainty and Disaster Relief Act of 2020.

### ***Application of Requirement to Restore FTEs or Wages/Salaries or for Exemptions Based Upon the Lack of Employee Availability on Reduction in Loan Forgiveness***

Under the CARES Act, the amount of forgiveness for a PPP loan is subject to reduction if the recipient of that PPP loan reduces the average number of full-time equivalent employees (FTEs) during the covered period as compared to the average number of FTEs during a prior reference period of the recipient’s choosing, unless the recipient restores the FTEs by December 31, 2020 or unless certain exemptions based upon the lack of employee availability apply. The Act clarifies that the deadline for restoring such FTE’s or determining whether an exemption has been met with respect to a PPP loan made on and after December 27, 2020 is the last day of the covered period for that PPP loan.

The amount of forgiveness for a PPP loan is also subject to reduction if the recipient of that PPP loan reduces the wages or salaries of certain employees<sup>[5]</sup> by more than 25% unless the reduction in wages or salary is restored by December 31, 2020. The Act clarifies that the deadline for restoring such wages and salaries with respect to a PPP loan made on or after December 27, 2020 is the last day of the covered period for that PPP loan.

The Act also permits SBA and Treasury, jointly by regulation, to modify any date relating to limits on forgiveness in a manner consistent with the purposes of the PPP to help businesses retain workers and meet financial obligations. However, the deadline established by the Act for restoring FTEs or determining the applicability of an exemption based upon the lack of employee availability or for restoring wages or salaries as being the last day of the applicable covered period for PPP loans made on or after December 27, 2020 cannot be so modified.

### ***Repeal of Economic Injury Disaster Loan (EIDL) Advance Reduction in Loan Forgiveness***

The Act repealed the requirement in Section 1110(e)(6) of the CARES Act that the amount of any EIDL advance made to a PPP loan recipient be subtracted from the loan forgiveness amount. This repeal is effective as if Section 1110(e)(6) were not included in the CARES Act. To implement this repeal, SBA is required to issue rules not later than January 11 that ensure the equal treatment of all borrowers that received an EIDL advance with respect to



the repeal of Section 1110(e)(6) of the CARES Act. These rules are required to consider PPP loan recipients that completed the loan forgiveness process before December 27, 2020.

In addition, the Act clarifies that a recipient of an EIDL that is for a purpose other than paying payroll costs and other allowable uses of a PPP loan is permitted to receive a PPP loan.

### ***Simplified Loan Forgiveness Application for PPP Loans of \$150,000 or Less***

The Act requires SBA to establish not later than January 20 a much more streamlined application to seek forgiveness for PPP loans of \$150,000 or less (whether made before, on or after December 27, 2020). This application is required to take the form of a certification of not more than one (1) page in length, which requires the PPP loan recipient (1) to attest that it has accurately provided the required certification and complied with the requirements of the PPP and (2) provide only the following information:

- a description of the number of employees the eligible recipient was able to retain because of the covered loan,
- the estimated amount of the covered loan amount spent by the eligible recipient on payroll costs, and
- the total loan value.

A recipient of a PPP loan of \$150,000 or less is required to retain all employment records relevant to the forgiveness application for the four-year period following submission of the application and all other relevant records for the three-year period following submission of the application.

To reinforce Congress' intent that the forgiveness mechanisms for PPP loans of \$150,000 or less be simplified, the Act states that no recipient of such a loan shall, at the time of the application for forgiveness, be required to submit any application or documentation in addition to the certification and information required to substantiate forgiveness. However, nothing in the Act is to be construed to exempt any PPP loan recipient from having to provide documentation independently to a lender to satisfy relevant federal, state, local, or other statutory or regulatory requirements, or in connection with an SBA audit relating to any PPP loan.

The Act preserves SBA's right to review and audit PPP loans of \$150,000 or less and, in the case of fraud, ineligibility, or other material noncompliance with applicable loan or loan forgiveness requirements, SBA's right to modify the amount of any such loan or the loan forgiveness amount with respect to any such loan.

### ***Forgiveness Audit Plan***

The Act imposes various requirements on SBA relating to the forgiveness and audit process for PPP loans. No later than February 10, SBA is required to submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives an audit plan that details the policies and procedures of SBA for conducting forgiveness reviews and audits of PPP loans, as well as the metrics that SBA will use to determine which PPP loans will be audited. In addition, no later than 30 days after the date on which SBA submits the audit plan, and each month thereafter, SBA is required to submit to each of these committees a report on SBA's forgiveness review and audit activities, including as to:

- the number of active reviews and audits,
- the number of reviews and audits that have been ongoing for more than 60 days, and
- any substantial changes made to the audit plan initially submitted.

These plans and reports may be useful for PPP loan recipients to evaluate the expected timing to receive forgiveness for their PPP loans, as well as matters that may impact whether and the extent to which their PPP loans may be audited.

## **Miscellaneous Matters**

***Calculation of Maximum Loan Amount for Farmers and Ranchers.*** The Act added a new calculation for the maximum PPP loan amount available for borrowers who (1) operate as a sole proprietor, as an independent contractor or as an eligible self-employed individual, (2) report farm income or expenses on Schedule F (or any equivalent successor schedule), and (3) were in business as of February 15, 2020. There are different calculations, depending upon whether the borrower has employees or does not have employees. If requested by any such borrower, a lender that made a PPP loan to such borrower may recalculate the maximum loan amount available to such borrower if doing so would result in a greater amount and may lend such greater amount to the borrower. This provision applied to all PPP loans (whether made before, on, or after December 27, 2020) other than with respect to PPP loans for which the borrower has received forgiveness before December 27, 2020.

***Definition of “Seasonal Employer.”*** The Act clarified that a “seasonal employer” is an employer that (1) does not operate for more than seven months in any calendar year or (2) during the preceding calendar year, had gross receipts for any six months of that year that were not more than one-third of the gross receipts of the employer for the other six months of that year. This clarification is effective as if included in the CARES Act and applies to all PPP loans (whether made before, on, or after December 27, 2020).

***Bankruptcy Provisions.*** The Act permits a bankruptcy court to authorize certain debtors in possession to receive PPP loans. This provision takes effect on (and will apply to any case that is pending (or which is commenced) on or after) the date on which a written determination by SBA is submitted to the director of the Executive Office for United States Trustees that, subject to satisfying any other eligibility requirements, any debtor in possession would be eligible for a PPP loan. To the extent that any PPP loan is extended to any debtor in possession and such loan is not forgiven, the loan will have a superpriority claim in the bankruptcy process. This provision sunsets on December 27, 2022.

***Conflicts of Interest.*** Entities in which any of the president, the vice president, the head of any executive department,<sup>[6]</sup> or a member of Congress, or any of the respective spouses of any of the foregoing, own or control (directly or indirectly) 20% or more (by vote or by value) of any class of equity security (any such entity, a covered entity), are subject to certain requirements under the Act. For purposes of determining whether an entity is a covered entity, (1) any warrant or right (other than a right to convert), to purchase, sell, or subscribe to a share or interest is considered an “equity security,” and (2) the securities owned, controlled, or held by two or more individuals who are related as spouses are aggregated.

If any covered entity submitted an application for forgiveness before December 27, 2020, the principal executive officer, or individual performing a similar function of the covered entity, is required to disclose to SBA no later than

January 26 that the entity is a covered entity. In addition, if any covered entity submits an application for forgiveness on or after December 27, 2020, the principal executive officer, or individual performing a similar function of the covered entity, is required to disclose to SBA within 30 days after submitting the application that the entity is a covered entity.

No covered entity is permitted to receive any PPP loan on or after December 27, 2020.

**Interest Calculation.** The Act clarifies that interest rate on PPP loans disbursed on or after December 27, 2020 is non-compounding and non-adjustable and provides that the lender and the PPP recipient are permitted to agree to apply this provision to any PPP loan disbursed before December 27, 2020.

## **PAYCHECK PROTECTION PROGRAM SECOND DRAW LOANS**

### **Generally**

The Act establishes a program under a new Section 7(a)(37) of the Small Business Act, which enables those person and entities that previously received a PPP loan to apply for and receive one second draw PPP loan if they satisfy certain eligibility criteria as described below and if, on or before the date on which the second draw PPP loan is expected to be disbursed, they have used or will use the full amount of the PPP loan previously received.

The proceeds of the second draw PPP loans can be used for the same purposes for which the proceeds of PPP loans can be used generally, including for the additional expense categories previously described.

Second draw PPP loans are also eligible for forgiveness in the same manner and to the same extent as PPP loans generally, including with respect to the forgiveness application mechanisms. However, now that a business that received (or receives) a PPP loan and paid “qualified wages” in excess of the amount of the forgiven PPP loan attributable to wages is eligible to claim the employee retention credit provided by Section 2301 of the CARES Act (assuming that the business is otherwise eligible to claim the credit), the “payroll costs” eligible for forgiveness do not include “qualified wages” taken into account in determining the credit allowed under Section 2301 of the CARES Act or “qualified wages” taken into account in determining the credit allowed under subsection (a) or (d) under Section 303 of the Taxpayer Certainty and Disaster Relief Act of 2020.

The Act requires SBA to issue guidance addressing barriers to accessing capital for minority, underserved, veteran, and women-owned business concerns for the purpose of ensuring equitable access to second draw PPP loans no later than January 6.

### **Eligibility Criteria**

#### **Generally**

Except as otherwise described below, a second draw PPP loan is available to any business concern, nonprofit organization, housing cooperative, veterans’ organization, tribal business concern, eligible self-employed individual, sole proprietor, independent contractor, or small agricultural cooperative that:

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employs not more than 300 employees or, if the applicant has a NAICS code beginning with 72 (Accommodation and Food Services), employs not more than 300 employees per physical location at the time the loan is disbursed (as applicable, the number of employees condition), and

- had gross receipts during the first, second, third, or fourth quarter in 2020 that demonstrate not less than a 25% reduction from the gross receipts<sup>[7]</sup> of the entity during the same quarter in 2019 (the gross receipts reduction condition). However, the gross receipts reduction condition can nevertheless be satisfied by an entity that was not in business throughout the entirety of 2019 as follows:
  - an entity that was not in business during the first or second quarter of 2019, but was in business during the third and fourth quarter of 2019, will satisfy the gross revenue receipts reduction condition if the entity had gross receipts during the first, second, third, or fourth quarter of 2020 that demonstrate not less than a 25% reduction from the gross receipts of the entity during the third or fourth quarter of 2019;
  - an entity that was not in business during the first, second, or third quarter of 2019, but was in business during the fourth quarter of 2019, will satisfy the gross receipts reduction condition if the entity had gross receipts during the first, second, third, or fourth quarter of 2020 that demonstrate not less than a 25% reduction from the gross receipts of the entity during the fourth quarter of 2019; and
  - an entity that was not in business during 2019, but was in operation on February 15, 2020, will satisfy the gross receipts reduction condition if the entity had gross receipts during the second, third, or fourth quarter of 2020 that demonstrate not less than a 25% reduction from the gross receipts of the entity during the first quarter of 2020.

501(c)(6) nonprofit organizations, destination marketing organizations, and the expanded universe of broadcasters and newspaper publishers now eligible for PPP loans will also be eligible for one second draw PPP loan assuming the eligibility criteria described above are satisfied.

### ***Application of SBA Affiliation Rules***

Under current SBA regulations, when counting the number of a business concern's employees, the employees of the concern and its affiliates (domestic and foreign) are counted. Thus, for purposes of determining whether an applicant for a second draw PPP loan has 300 or fewer employees, the applicant will need to apply SBA's affiliation regulations and count the employees of the applicant and its U.S. and non-U.S. affiliates unless one of the waivers provided in the CARES Act to the applicability of the affiliation requirements applies.<sup>[8]</sup> Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. There are also other circumstances when affiliation may be found that are very fact dependent. For more information on SBA's affiliation regulations, please see our April 1, 2020 article

[\[https://www.troutman.com/insights/sba-affiliation-regulations-impacting-eligibility-for-paycheck-protection-program-7a-loans.html\]](https://www.troutman.com/insights/sba-affiliation-regulations-impacting-eligibility-for-paycheck-protection-program-7a-loans.html).

### ***Business that are Not Eligible***

However, the following business concerns or organization are **not eligible** to receive a second draw PPP loan even if they otherwise satisfy the number of employees condition and the gross receipts reduction condition:

- any entity that is a type of business concern (or would be, if such entity were a business concern) described in 13 C.F.R 120.110 (such as lending companies, private clubs, and other businesses generally not eligible for SBA loans) or in any successor regulation or other related guidance or rule that may be issued by SBA, other

than a business concern described in subsection (a) (nonprofit businesses) or subsection (k) (businesses principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular setting) of 13 C.F.R 120.110 [<https://www.law.cornell.edu/cfr/text/13/120.110>]; or

- any business concern or entity primarily engaged in political or lobbying activities — such entities include any entity that is organized for research or for engaging in advocacy in areas, such as public policy or political strategy or otherwise describes itself as a think tank in any public documents;
- any business concern or entity:
  - for which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, 20% or greater of the economic interest of the business concern or entity, including as equity shares or a capital or profit interest in a limited liability company or partnership; or
  - that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China;
- any person required to submit a registration statement under Section 2 of the Foreign Agents Registration Act of 1938, or
- any recipient of a grant under the Shuttered Venue Operator Grant program established under the Act.

## Maximum Loan Amount

The maximum amount of a second draw PPP loan is **the lesser** of \$2 million and an amount determined by reference to the applicant's average monthly payment for "payroll costs" as follows:

- *In Most Instances*: 2.5x the average total monthly payments for payroll costs incurred or paid by the applicant during **either** the one-year period before the date on which the loan is made or calendar year 2019, as selected by the applicant.
- *In the Case of "Seasonal Employers"*: 2.5x the average total monthly payments for payroll costs incurred or paid by the applicant for any 12-week period between February 15, 2019 and February 15, 2020, as selected by the applicant.
- *In the Case of Applicants that Did Not Exist During the One-Year Period Preceding February 15, 2020*: 2.5x the amount determined by dividing (1) sum of the total monthly payments by the applicant for payroll costs paid or incurred by the eligible entity as of the application date by (2) the number of months in which those payroll costs were paid or incurred.
- *In the Case of Applicants Having a NAICS Code Beginning with 72 (Accommodation and Food Services)*: 3.5x the average total monthly payment for payroll costs incurred or paid by the eligible entity during **either** the one-year period before the date on which the loan is made or calendar year 2019, as selected by the applicant.

Under the CARES Act (as amended by the Act), **payroll costs** consist of:

- *As to Companies Having Employees*: the sum of payments of any compensation with respect to employees that is a:
  - salary, wage, commission, or similar compensation,

- payment of cash tip or equivalent,
- payment for vacation, parental, family, medical, or sick leave,
- allowance for dismissal or separation,
- payment required for the provisions of group health care or group life, disability, vision, or dental insurance benefits, including insurance premiums,
- payment of any retirement benefit, or
- payment of state or local tax assessed on the compensation of employees.
- *As to Self-Employed Persons and Individuals that Have Organized as a Sole Proprietor:* the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount not more than \$100,000 on an annualized basis, as prorated for the period during which the payments are being made or the obligation to make the payments is incurred.

However, payroll costs **do not include** the following:

- the cash compensation of an individual employee in excess of \$100,000 on an annualized basis, as prorated for the period during which the compensation is being paid or the obligation to pay the compensation is incurred,
- taxes imposed or withheld under Chapters 21 (social security and Medicare taxes, employee and employer portion), 22 (railroad retirement tax), or 24 (withholding obligations from employees) of the Internal Revenue Code during the applicable period,
- any compensation of an employee whose principal place of residence is outside of the United States, and
- qualified sick leave wages and qualified family leave wages, in each case, for which a credit is allowed under the Families First Coronavirus Response Act.

## **Required Certifications and Exceptions**

The Act provides that for a second draw PPP loan of not more than \$150,000, the applicant may submit a certification attesting that the applicant meets the applicable gross receipts reduction condition and, if the applicant so submits such a certification, the applicant must, on or before the date on which the applicant submits an application for forgiveness, produce adequate documentation that the applicant met such gross receipts reduction condition.

## **MATTERS PERTAINING TO PPP LENDERS**

### ***Hold Harmless Modifications***

The Act amends the CARES Act to provide that a PPP lender may rely on any certification or documentation submitted by a borrower for an initial PPP loan under Section 7(a)(36) of the Small Business Act or a second draw PPP loan under Section 7(a)(37) under the Small Business Act that:

- is submitted pursuant to all applicable statutory requirements, regulations, and guidance related to the initial or second draw PPP loan, and
- attests that the borrower has accurately provided the certification or documentation to the lender in accordance

with such statutory requirements, regulations, and guidance.

With respect to a lender that relies on a certification or documentation described above related to an initial or second draw PPP loan, an enforcement action may not be taken against the lender, and the lender shall not be subject to any penalties relating to loan origination or forgiveness of the initial or second draw PPP loan, if the lender acts in good faith relating to loan origination or forgiveness of the initial or second draw PPP loan based on that reliance and all other relevant federal, state, local, and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the initial or second draw PPP loan.

### ***Reimbursement Rates for PPP Loans Made on and After December 27, 2020***

SBA is required, no later than five (5) days after the reported disbursement of the PPP loan made on or after December 27, 2020, to reimburse the lender as follows:

- for a loan of up to \$50,000, in an amount equal to the lesser of (1) 50% of the balance of the financing outstanding at the time of disbursement of the covered loan and (2) \$2,500,
- at a rate, based on the balance of the financing outstanding at the time of disbursement of the covered loan, of:
  - 5% for a covered loan of greater than \$50,000 up to \$350,000,
  - 3% for a covered loan of greater than \$350,000 and less than \$2,000,000, and
  - 1% for a covered loan of \$2,000,000 or greater.

The amount paid to the lender may not be required to be repaid by a lender unless the lender is found guilty of an act of fraud in connection with the PPP loan.

### ***Agent Matters***

The CARES Act provides that agents assisting a PPP recipient to prepare an application for a PPP loan are not permitted to collect a fee in excess of the limits established by SBA. The Act clarifies that if a PPP recipient knowingly retains an agent, such fees will be paid by the recipient and may not be paid out of the proceeds of the PPP loan and that a lender is only responsible for paying fees to an agent for services for which the lender directly contracts with the agent. This clarification is effective as if included in the CARES Act and applies to any PPP loan made before, on, or after December 27, 2020.

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[1] Although the CARES Act provides that the loan amount is equal to 2.5x the average total monthly payment for payroll costs incurred or paid by the applicant during either the one-year period before the date on which the loan is disbursed, existing SBA guidance permits (and the existing loan application form calls for) the applicant to use the average monthly payroll costs incurred or paid during the 2019.

[2] A housing cooperative as a “cooperative housing corporation” as defined in Section 216(b) of the Internal Revenue Code [<https://www.law.cornell.edu/uscode/text/26/216>].

[3] A concern satisfies the alternative size test if it has a maximum tangible net worth of not more than \$15 million and average net income after federal income taxes (excluding any carryover losses) for the previous two completed fiscal years of not more than \$5 million.



[4] Prior to December 27, 2020, PPP loans could be used for only the following purposes: (1) payroll costs; (2) payments of interest on any liability of the borrower that is a mortgage on real or personal property and that was incurred before February 15, 2020; (3) payments on any rent obligated under a leasing agreement in force before February 15, 2020; (4) payments for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020; and (5) payments of interest on any other debt obligations that were incurred before February 15, 2020. However, only the purposes described in clauses 1-4 were eligible for forgiveness.

[5] The employees to which a reduction in wages or salary will result in a reduction to forgiveness are employees who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay greater than \$100,000. This includes all employees whose employment with the PPP recipient started after December 31, 2019.

[6] Under 5 U.S.C. Section 101, the executive departments are: The Department of State; The Department of the Treasury; The Department of Defense; The Department of Justice; The Department of the Interior; The Department of Agriculture; The Department of Commerce; The Department of Labor; The Department of Health and Human Services; The Department of Housing and Urban Development; The Department of Transportation; The Department of Energy; The Department of Education; The Department of Veterans Affairs, and The Department of Homeland Security.

[7] For a 501(c)(3) nonprofit organization, a veterans' organization, a 501(c)(6) nonprofit organization, or other tax-exempt organization that is now eligible for PPP loans, gross receipts mean gross receipts within the meaning of section 6033 of the Internal Revenue Code.

[8] The CARES Act (as amended by the Act) provides that SBA's affiliation regulations are waived with respect to the eligibility for a PPP loan for the following business concerns:

- any business concern with no more than 500 (or in the case of a second draw PPP loan, 300) employees that, as of the date on which the PPP loan is disbursed, is assigned a NAICS code beginning with 72 (Accommodations and Food Services),
- any business concern operating as a franchise that is assigned a franchise identifier code by SBA,
- any business concern that receives financial assistance from a company licensed as a "small business investment company" (SBIC), and
- any business concern (which, for this purpose, includes any station which broadcasts pursuant to a license granted by the FCC under Title III of the Communications Act of 1934) that employs not more than 500 (or, in the case of a second draw PPP loan, 300) employees or, if SBA established a number of employees size standard greater than 500 (or, in the case of a second draw PPP loan, 300) for the industry within which such businesses operate, the greater size standard SBA so established, per physical location and is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 (newspaper publishers) or 5151 (radio and television broadcasting) or (2) any nonprofit organization that is assigned a NAICS code beginning with 5151.

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