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CLIENT ALERT

UPDATE ON NEW PPP LOANS

January 13, 2021

On January 6, 2021, the U.S. Small Business Administration (“SBA”) issued two Interim Final Rules regarding loans under the Paycheck Protection Program (“PPP”), including new loans (“**First Draw PPP Loans**”) made to first-time and qualifying PPP borrowers and second round loans made to borrowers who have previously received a PPP loan (“**Second Draw PPP Loans**”). On January 8, 2021, the SBA issued two new forms of loan applications for the First Draw PPP Loans and Second Draw PPP Loans. Links to the new loan applications can be found at the end of this Client Alert.

Information about First Draw PPP Loans and Second Draw PPP Loans generally including which PPP borrowers qualify for a First Draw PPP Loan or a Second Draw PPP Loan, and the changes made to the PPP by the legislation enacted in late 2020, can be found in our prior Client Alert: <https://bswlaw.com/wp-content/uploads/2020/12/Client-Alert-Second-Round-PPP.pdf>. This Client Alert summarizes certain important provisions in some recent rules published by the SBA and the updated loan application for First Draw Loans and the new loan application for Second Draw Loans.

As with the initial SBA rules and guidance for the original PPP loans, some important items remain unclear or subject to interpretation and the SBA rules can change rapidly. Any applicant for a PPP loan should check for the latest SBA rules and guidance or consult with a professional that is well versed in such rules and guidance before submitting its PPP loan application.

When will new loan applications be accepted?

The window to apply or reapply for a First Draw PPP Loan opened on Monday, January 11, 2021. The window to apply for a Second Draw PPP Loan opened on Wednesday, January 13, 2021. The last day to apply for and receive any PPP loan is March 31, 2021. All applications must be made through an approved SBA lender.

Community-based lenders (including those serving under-served areas) are being afforded an exclusive 2-day window to submit PPP loan applications to the SBA. According to the SBA, other PPP lenders will be allowed to submit applications to the SBA “shortly thereafter,” but no specific date for submissions by such other PPP lenders has been set. Please check with your PPP lender to find out (a) if your PPP lender qualifies as a community-based lender, and (b) when they will begin accepting applications. However, it is important that borrowers submit their applications to their PPP lenders as soon as possible since demand for PPP loans may exceed the authorized funding.

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271 Whitney Avenue, New Haven, Connecticut 06511 • 203 772 2600 • bswlaw.com

What is the maximum loan amount for a Second Draw PPP Loan?

The maximum loan amount for a Second Draw PPP Loan is \$2 million. However, the maximum aggregate amount of Second Draw PPP Loans for a borrower and all of its affiliates is capped at \$4 million.

Who is eligible for a Second Draw PPP Loan?

Any existing PPP borrower is eligible if it: (1) has used, or will use, the full amount of its First Draw PPP Loan for eligible expenses; (2) employs no more than 300 employees, unless it satisfies certain exceptions including for businesses with a North American Industry Classification System code beginning with 72 (e.g. hotels and restaurants); (3) experienced a reduction in revenue of at least 25% in quarterly gross receipts in any one quarter of 2020 relative to same quarter for 2019 provided, however, if an otherwise eligible existing PPP borrower was not in existence in 2019 but was operational on February 15, 2020, it can compare the revenue for the second, third or fourth quarter of 2020 to the revenue to first quarter of 2020; and (5) is not otherwise ineligible (see below). It is unclear whether a borrower will qualify for a Second Draw PPP Loan if it has more than 300 employees but satisfies the alternative size test of less than \$15 million of combined tangible net worth and less than an average of \$5 million of net income during the last 2 full fiscal years.

Note that if a borrower's First Draw PPP Loan is under review by the SBA, or if the SBA has information that indicates the borrower may have been ineligible for a First Draw PPP Loan, then the lender will not receive an SBA loan number for the borrower's Second Draw PPP Loan until the issue has been resolved.

Note also that, as was the case with the prior PPP loan applications, the new loan applications require the applicant to certify that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." **We strongly encourage all borrowers to create and maintain a file of the documents they relied on in determining their eligibility for a PPP loan and the existence of economic uncertainty at the time of loan application.**

Who is ineligible for a Second Draw PPP Loan?

The following applicants are not eligible for a Second Draw PPP Loan:

- Entities the securities of which are listed on a national securities exchange (i.e., publicly traded companies);
- Businesses whose primary activity is engaging in political activities or lobbying;
- Businesses with significant ties to China or Hong Kong (including an entity that is organized under the laws of China or Hong Kong, has 20% or more ownership by China, or has a resident of China on its board of directors);
- Businesses that receive a grant for shuttered venue operators;
- Businesses required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938; and
- Businesses in which the President, Vice President, head of an Executive department, or a Member of Congress, or the spouse of any such person, has a controlling interest.

Note that under the new loan application, an applicant that (1) is an entity the securities of which are listed on a national securities exchange, (2) is a business that receives a grant for shuttered venue operators, or (3) is a business in which President, Vice President, head of an Executive department, or a Member of Congress, or the spouse of any such person, has a controlling interest, are also no longer eligible to receive a First Draw PPP Loan.

How are a borrower's gross receipts calculated?

In order to be eligible for a Second Draw PPP Loan, a borrower must demonstrate that it experienced a revenue reduction of 25% or more in 2020 compared to 2019. **In determining whether the revenue reduction test has been satisfied, the SBA is requiring that the gross receipts of the borrower must be aggregated with the gross receipts of all its affiliates.**

Generally, "gross receipts" are considered the "total income" or "gross income" plus the "cost of goods sold" reported on a borrower's IRS tax return, and exclude net capital gains or losses. Note that gross receipts do not include the forgiveness of a First Draw PPP Loan, capital gains and losses, 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 borrower or its employees), proceeds from transactions between a borrower and its domestic or foreign affiliates, or amounts collected for another party by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, are included in gross receipts.

For nonprofits, veterans' organizations, news organizations, 501(c)(6) organizations and eligible destination marketing organizations, "gross receipts" has the meaning given in Section 6033 of the Internal Revenue Code of 1986.

It is not clear if a PPP borrower can exclude non-recurring, extraordinary or non-cash items in calculating gross receipts. While a borrower appears to be allowed to use either cash or accrual accounting in calculating gross receipts, it is not clear if (a) a borrower that has historically used one accounting method (e.g., the cash method) can use another method (e.g., the accrual method) which has different revenue recognition rules, or (b) if a borrower and its affiliates must all use the same accounting method.

Does a borrower have to submit documentation regarding its revenue reduction calculation?

For a Second Draw PPP Loan of \$150,000 or more, the borrower must submit documentation (such as financial statements) to its lender at the time of loan application to support its calculation of a 25% decline in gross receipts, and the lender is required to perform a good faith review of the borrower's documentation to confirm the dollar amount and percentage of the borrower's revenue reduction. For a Second Draw PPP Loan of less than \$150,000, the borrower is not required to submit such documentation at the time of loan application, but the borrower will be required to provide such documentation when it applies for loan forgiveness.

Who is eligible to modify their existing PPP loan?

Any existing PPP borrower that did not receive loan forgiveness by December 27, 2020 and either (a) previously returned some or all of its original PPP loan or (b) did not accept the full amount for which it was eligible.

What SBA form do I use if I am eligible to modify my existing PPP loan?

It does not appear that the updated application form for a First Draw PPP Loan (SBA Form 2483) can be used by an existing borrower that is seeking to modify its original PPP loan and the SBA has not yet published an application form to request such a modification. Borrowers should contact their existing PPP lenders to request guidance on how to proceed.

Additional Information.

A one-page summary of First Draw PPP Loans can be found here:

<https://home.treasury.gov/system/files/136/Top-line-Overview-of-First-Draw-PPP.pdf>

The new loan application for First Draw PPP Loans (SBA Form 2483) can be found here:

<https://home.treasury.gov/system/files/136/PPP-Borrower-Application-Form.pdf>

A one-page summary of Second Draw PPP Loans can be found here:

<https://home.treasury.gov/system/files/136/Top-line-Overview-of-Second-Draw-PPP.pdf>

The new loan application for Second Draw PPP Loans (SBA Form 2483-SD) can be found here:

<https://home.treasury.gov/system/files/136/PPP-Second-Draw-Borrower-Application-Form.pdf>