



Financial Services & Products ADVISORY ■

JANUARY 14, 2021

Paycheck Protection Program Restart and New Interim Final Rules

by *[Sanford Brown](#), [Bart Nebergall](#), [Cliff Stanford](#), and [Seth Buchwald](#)*

The Small Business Administration (SBA), in consultation with the Treasury Department, approved two interim final rules, effective January 6, 2021, governing the latest iteration of the Paycheck Protection Program (PPP). The rules implement changes to the PPP set forth in the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, enacted on December 27, 2020.

The PPP was originally established under the Coronavirus Aid, Relief, and Economic Security (CARES) Act and expired on August 8, 2020. The Economic Aid Act extends the authority of the SBA to administer an additional round of the PPP through March 31, 2021, revises certain aspects of the PPP, and allows certain eligible businesses that previously participated in the PPP program to take out a second loan under the PPP, known as a "Second Draw Loan."

The first of the interim final rules (IFR) promulgated under the Economic Aid Act revises the PPP rules to match the Economic Aid Act, sets forth updated rules for borrowers obtaining PPP loans for the first time, known as "First Draw Loans," and consolidates and restates the over 20 previously approved IFRs governing the PPP. The second IFR sets forth rules governing Second Draw Loans.

General Changes to Paycheck Protection Program and the First IFR

Significant changes to the PPP related to First Draw Loans and other general changes set forth in the Economic Aid Act and the first IFR include:

- The list of non-payroll expenses eligible for forgiveness was expanded to include costs for group life, disability, dental, and vision insurance benefits plans; costs for certain software and cloud computing services; costs related to property damage from civil unrest in 2020 that was not covered by insurance or other compensation; costs related to certain essential supplies; and costs to facilitate compliance with requirements or guidance issued by governmental agencies for safety concerns related to the COVID-19 pandemic. The regulations continue to require that the non-payroll portion of a PPP loan may not exceed 40 percent of the loan amount to be eligible for complete forgiveness.
- The list of eligible PPP borrowers was expanded to include 506(c)(6) organizations, housing cooperatives, destination marketing operations, and eligible news organizations.

This alert is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

- Existing PPP borrowers that did not receive loan forgiveness by December 27, 2020 may: (1) reapply for a First Draw Loan if they previously returned their First Draw Loan funds; or (2) if eligible, request to modify their First Draw Loan amount if they originally did not accept the full amount for which they were eligible.
- The SBA will create simplified rules and forms for forgiveness. PPP borrowers with PPP loans less than \$150,000 are subject to a reduced document production requirement, and certain documentation may be delivered with their forgiveness application rather than with their loan application.
- Borrowers may use 2019 or 2020 financials for the purpose of calculating their maximum PPP loan amount, which prevents lower earnings in 2020 from reducing the maximum amount of their loan.
- A PPP borrower may select any duration between eight weeks and 24 weeks for the covered period, which is the period in which PPP proceeds must be exhausted. The duration of the covered period does not affect the calculation of the loan amount. Before the Economic Aid Act, a PPP borrower could select a loan forgiveness covered period of either eight weeks or 24 weeks but could apply for forgiveness before the end of the covered period if loan proceeds had been completely exhausted.
- Certain entities, such as publicly traded companies and businesses controlled by the President, Vice President, heads of executive departments, and members of Congress, or their spouses, are not eligible to participate in the PPP moving forward.
- Lender fees generally remain constant; however, for loans of not more than \$50,000, the lender fee equals the lesser of 50 percent of the loan or \$2,500. The SBA believes that the higher fee structure for smaller loans will reduce the focus on large PPP loans and the accompanying larger fees. Further, the rule explicitly states that a lender is only responsible for paying fees to an agent if the lender directly contracts with the agent, clearing up an issue that has been heavily litigated.
- The Economic Aid Act and related rules make clear that PPP proceeds may not be used for lobbying activities or expenditures.
- Interest will not be compounded on PPP loans moving forward; however, this change will not affect existing PPP loans.
- Borrowers are required to make additional certifications that were not set forth in the original PPP loan application, including that the borrower is not an issuer of securities listed on a national exchange and will not obtain a shuttered venue operator grant from the SBA.
- Lenders must continue to certify that they have obtained the required borrower certifications and that the lender has reviewed the borrower application; however, the rules have been revised to clearly state that lenders that rely on borrower certifications and related documentation shall not be the subject of an enforcement action or subject to penalties if the lender relies on the certifications in good faith and complies with all other relevant law applicable to lenders making PPP loans.

Second Draw Loans and the Second IFR

Certain additional eligibility requirements apply to PPP borrowers desiring to obtain a Second Draw Loan. The borrower must: (1) not employ more than 300 employees in total or 300 employees per physical location for certain businesses, including hotels, restaurants, and certain news organizations; (2) have used or will use the full amount of its first PPP loan; and (3) demonstrate at least a 25 percent reduction in gross receipts between comparable quarters in 2019 and 2020.

Second Draw Loans are generally subject to the same rules and guidance governing First Draw Loans; however, there are significant differences between First Draw Loans and Second Draw Loans:

- A Second Draw loan is limited to 2.5 times the borrower's monthly average payroll costs or 3.5 times the borrower's monthly average payroll costs for borrowers assigned to NAICS industry code 72 (Accommodation and Food Services), up to \$2 million per PPP loan.
- A borrower applying for a Second Draw Loan may obtain the PPP loan from a lender other than their First Draw Loan lender. Lenders should carefully review PPP loan applications to ensure they are aware if the borrower is requesting a Second Draw Loan.
- Second Draw Loan borrowers are not required to submit additional payroll documentation if they utilize the same lender as their First Draw Loan and plan to determine the amount of their PPP loan using the same payroll data for both loans.

Tax Treatment

The Economic Aid Act confirms that otherwise-deductible qualified expenses paid for with PPP loan funds are tax deductible for U.S. federal income tax purposes for tax years ending after March 27, 2020. This was a much-anticipated legislative fix that supersedes the position the IRS took after the passage of the CARES Act, as set forth in IRS Notice 2020-32 and Revenue Ruling 2020-27. After the passage of the CARES Act, the IRS initially indicated that eligible PPP loan recipients may not deduct otherwise-deductible expenses if the payment of such expenses results in, or was expected to result in, forgiveness of a PPP loan. However, on January 6, 2021, in response to passage of the Economic Aid Act, the IRS issued Revenue Ruling 2021-2, which repeals the prior guidance and confirms that otherwise-deductible expenses paid for with PPP loan funds are deductible.

Additional Comments from the Small Business Administration and Treasury Department

As part of this latest round of the PPP, at least \$15 billion is set aside for small borrowers, small PPP loans, and borrowers in low- or moderate-income neighborhoods. To promote access for smaller lenders and their customers, the SBA is initially only accepting loan applications from community financial institutions, which include community development financial institutions, minority depository institutions, certified development companies, and microloan intermediaries. The PPP opened for such community financial institutions on January 11, 2021 and will open to all participating lenders at a later date to be determined by the SBA.

The SBA and the Treasury Department have noted that while only select financial institutions may be able to make PPP loans in the early stages of this round of the PPP, all lenders can access the application platform, allocate designated users, and review the resources for the site, which includes a user guide including instructions to upload applications and related information. The PPP platform site is located at <https://forgiveness.sba.gov>, and the SBA will continue to operate its lender hotline at 833.572.0502. The SBA and the Treasury Department will continue to issue additional guidance and updated forms in the coming days and weeks.

You can subscribe to future *Financial Services & Products* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any member of our [Financial Services & Products Group](#).

Sanford M. Brown
214.922.3505
sanford.brown@alston.com

Bart W. Nebergall
214.922.3460
bart.nebergall@alston.com

Clifford S. Stanford
404.881.7833
cliff.stanford@alston.com

Seth M. Buchwald
404.881.7836
seth.buchwald@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2021

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
 BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86.10.85927500
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
 DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
 FORT WORTH: 3700 Hulen Street ■ Building 3 ■ Suite 150 ■ Fort Worth, Texas, USA, 76107 ■ 214.922.3400 ■ Fax: 214.922.3899
 LONDON: 5th Floor ■ Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
 RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
 SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
 SILICON VALLEY: 1950 University Avenue ■ Suite 430 ■ East Palo Alto, California, USA 94303 ■ 650.838.2000 ■ Fax: 650.838.2001
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333