

Client Alert

IMPORTANT GUIDANCE RELEASED – Interim Final Rules for the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the Economic Aid Act)

This alert updates, clarifies and supersedes all prior publications and communications from our firm on the subject matter discussed below based on updated guidance; and it is likely that there will be additional guidance in the future from the Small Business Administration and other government agencies that may conflict with prior guidance.

On December 27, 2020, President Trump signed into law the Economic Aid Act, which makes changes to the existing Paycheck Protection Program (PPP) and allocates an additional \$284.45 billion for a second round of PPP loans. For a summary of a number of key provisions of the Economic Aid Act, click [here](#).

Additional guidance pertaining to the first draw loans (First Draw PPP Loans) and second draw loans (Second Draw PPP Loans) of the Paycheck Protection Program has been released in the forms of a [First Draw PPP Loan Interim Final Rule](#) and a [Second Draw PPP Loan Interim Final Rule](#).

The First Draw PPP Loan Interim Final Rule (a) consolidates the previous interim final rules (and important guidance) issued to date governing borrower eligibility, lender eligibility, and PPP application and origination requirements for new PPP loans, and (b) provides general rules relating to loan increases and loan forgiveness. This Interim Final Rule is not intended to substantively alter or affect PPP rules that were not amended by the Economic Aid Act.

The Second Draw PPP Loan Interim Final Rule confirms that Second Draw PPP Loans are generally subject to the same terms and conditions as the First Draw PPP Loans (including the First Draw PPP Loan Interim Final Rule and the FAQs published by the SBA) except as otherwise provided. The Second Draw PPP Loan Interim Final Rule also confirms that the SBA will be revising the existing FAQs to conform to the Economic Aid Act as quickly as feasible. In addition, the Second Draw PPP Loan Interim Final Rule highlights the key differences between First Draw PPP Loans and Second Draw PPP Loans and provides guidance that builds on details specified in the Economic Aid Act.

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Key provisions of the two Interim Final Rules include the following:

- **Terms of Notes.** Notes issued pursuant to First Draw PPP Loans and Second Draw PPP Loans will be issued with the following terms:
 - Interest rate of 1% (non-compounding, non-adjustable).
 - Maturity of five years.
 - No personal guarantees or collateral will be required.
 - Repayment of the loan is potentially forgivable, in accordance with the PPP.
- **Interplay between First and Second Draw PPP Loans.**
 - A borrower must have obtained a First Draw PPP Loan before obtaining a Second Draw PPP Loan. Furthermore, the proceeds of the borrower's First Draw PPP Loan must be spent on or before the date on which the proceeds of its Second Draw PPP Loan are expected to be disbursed, which must occur within ten days of the approval of its Second Draw PPP Loan by the lender. The application for a First Draw PPP Loan can be found [here](#). The application for a Second Draw PPP Loan can be found [here](#).
 - The SBA will not approve a Second Draw PPP Loan for a borrower until any issues related to the borrower's First Draw PPP Loan are resolved.
- **Borrower Certifications.** With respect to both a First Draw PPP Loan and a Second Draw PPP Loan, an authorized representative of the borrower must make substantially the same certifications as previously required, including:
 - The borrower was operational as of February 15, 2020.
 - Current economic uncertainty makes the loan request necessary to support the ongoing operations of the borrower.
 - The borrower will use the loan proceeds for allowable uses, and at least 60% of the loan proceeds must be used to pay payroll expenses.

In addition, a borrower of a Second Draw PPP Loan must certify that it experienced a reduction in gross receipts of at least 25% (i) in at least one quarter of 2020 compared to the corresponding quarter of 2019 or (ii) if the borrower was operational in all four quarters of 2019, in 2020 compared to 2019.

In connection with the required certifications, if (i) the representative of the borrower knowingly makes a false statement to obtain a loan, such representative will be subject to additional liability such as charges for fraud, and could be subject to criminal proceedings and potentially prison time, and (ii) one of the borrower's shareholders, members or partners uses PPP funds for unauthorized purposes, the SBA will have recourse against the shareholder, member or partner for the unauthorized use.

- **Requisite Revenue Reduction.** To determine whether a borrower experienced the requisite reduction in gross receipts of at least 25%, the Second Draw PPP Loan Interim Final Rule generally defines "gross receipts" to include all revenue

in whatever form received or accrued (in accordance with the entity's accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered "total income" (or in the case of a sole proprietorship, independent contractor, or self-employed individual "gross income") plus "cost of goods sold," and excludes net capital gains or losses. The Second Draw PPP Loan Interim Final Rule also provides guidance on how to calculate receipts of affiliates or former affiliates, and specifically provides that if the borrower has acquired an affiliate, or has been acquired as an affiliate, gross receipts include the receipts of the acquired or acquiring concern.

- **Calculation Period for Payroll Costs.** With respect to calculating a borrower's payroll costs for the purposes of determining the maximum amount of a First Draw PPP Loan or Second Draw PPP Loan, a borrower may use the (i) twelve-month period prior to when the loan is made (for borrowers who are not self-employed), (ii) calendar year 2019 or (iii) calendar year 2020.
- **Corporate Group Borrowing Limit.** A single corporate group may receive no more than \$4 million of Second Draw PPP Loans in the aggregate, and no more than \$20 million of First Draw PPP Loans in the aggregate. For purposes of this limit, businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent.
- **Required Documentation.** A Second Draw PPP Loan borrower must generally submit the same documentation to substantiate its payroll cost calculations that is required for First Draw PPP Loans. The Second Draw PPP Loan Interim Final Rule lists the different types of documentation to be provided in different circumstances. No additional documentation is required if a borrower is using the same lender for its Second Draw PPP Loan as its First Draw PPP Loan and is relying on its calendar year 2019 figures for both loans. For loans with a principal amount of \$150,000 or less, no documentation is required at the time of application and may instead be provided with the forgiveness application or upon the SBA's request.

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