GIBSON DUNN

Small Business Administration Publishes Interim Final Rules for First Draw and Second Draw PPP Loans

Client Alert | January 14, 2021

Last week, the Small Business Administration (the “SBA”) issued two interim final rules incorporating changes to the Paycheck Protection Program (the “PPP”) prescribed by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, Pub. L. 116-260 (the “Economic Aid Act”). The Act extended the authority to make PPP loans to first and second-time PPP borrowers through March 31, 2021, and changed certain PPP requirements, including establishing additional eligibility criteria for applicants seeking a second PPP loan. One of the interim final rules governs new PPP loans made under the Economic Aid Act and pending loan forgiveness applications for existing PPP loans (the “First IFR”). The other interim final rule governs second draw PPP loans (the “Second IFR”). This alert will focus on some of the key provisions of these interim final rules.[1]

First IFR

The First IFR consolidates the interim final rules and significant guidance previously issued by the SBA regarding the PPP originally established under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) to provide a single regulation governing borrower and lender eligibility, loan application requirements and loan origination requirements, as well as general rules regarding PPP loan increases and forgiveness. The First IFR expressly states that it is not intended to substantively change any existing PPP rules that were not amended by the Economic Aid Act, and that the SBA plans to issue a consolidated rule governing PPP loan forgiveness and the loan review process.

Notable amendments to the rules governing the PPP implementing the changes required by the Economic Aid Act include the following:

- Certain new types of organizations that meet the PPP eligibility requirements are eligible to receive new PPP loans including:
    - Certain nonprofit business associations (other than professional sports leagues and organizations formed to promote or participate in a political campaign) that do not employ more than 300 employees;[2]
    - Certain news organizations that employ no more than 500 employees (or, if applicable, the employee size standard established by the SBA for the entity’s industry) per location;[3]
    - Destination marketing organizations[4] that meet the requirements described in this alert for section 501(c)(6) organizations;[5] and
    - Housing cooperatives that employ no more than 300 employees.
- Certain business concerns that may have been eligible for PPP Loans under prior rules are ineligible to receive new PPP loans. These business concerns include:
    - Public companies (i.e., companies whose securities are listed on a national

Related People

Michael D. Bopp

Alisa Babitz

Courtney M. Brown

securities exchange); and

  - Recipients of grants under the Shuttered Venue Operator Grant program established by the Economic Aid Act.

- All new PPP borrowers may use 2019 or 2020 for purposes of calculating their maximum loan amount.
- A PPP borrower's forgiveness amount will not be reduced by the amount of an Economic Injury Disaster Loan ("EIDL") advance received by the borrower. Similarly, when calculating the maximum amount of a new PPP loan that will be used to refinance an EIDL made between January 31, 2020 and April 3, 2020, borrowers should not include the amount of an EIDL advance as this advance does not need to be repaid.
- PPP loan proceeds (including PPP loans made prior to December 27, 2020, as long as the SBA has not already remitted a loan forgiveness payment to the lender with respect to the loan) may be used to pay for goods that are essential to the borrower's operations, investments in facility modifications, personal protective equipment required for the borrower to operate safely and business software and cloud computing services that help facilitate the borrower's business operations.
- Recipients of new PPP loans may select a covered period between eight and 24 weeks.
- The SBA will forgive a PPP loan of $150,000 or less if the borrower signs and submits a one-page certification that, among other things, requires the borrower to describe the number of employees it was able to retain because of the PPP loan. The SBA has not published the certification to date.

Second IFR

The Economic Aid Act gives PPP loan recipients the opportunity to receive, for the first time, a second PPP loan. However, the eligibility requirements are narrower than those for initial PPP loans as we first described in our recent client alert, *Coronavirus Relief Package Passed by Congress Would Revive Paycheck Protection Program and Provide Additional Relief to Eligible Businesses*. Each potentially eligible borrower must be an eligible recipient of an initial PPP loan and: (1) together with its affiliates, employ 300 or fewer employees (compared to the 500 employee standard for initial PPP loans); however, hotels and restaurants with a NAICS code beginning with 72 and certain news organizations are exempt from the affiliation rules and may employ 300 or fewer employees per physical location; (2) have used, or will use, the first PPP loan funds on eligible expenses before the second PPP loan is disbursed; and (3) demonstrate at least a 25% reduction in revenue in at least one quarter of 2020 relative to 2019. Borrowers whose initial PPP loans are under review will not receive a second loan until their eligibility for the first loan is confirmed.

Second draw PPP loans are eligible for loan forgiveness under the same terms as initial PPP loans, including the changes to the forgiveness rules set forth in the First IFR. Most borrowers' maximum second draw loan amount is capped at 2.5 times monthly payroll costs up to $2 million, although eligible hotels and restaurants may receive a second draw loan of up to 3.5 times monthly payroll costs up to $2 million.

The Second IFR provides important clarifications for second draw PPP loan requirements under the Economic Aid Act:

- *First*, the 25% revenue reduction may be measured by comparing quarterly revenues (as established in the Economic Aid Act) *or* annual revenues. The Second IFR makes clear that eligible borrowers may use annual tax returns, in addition to quarterly statements, to demonstrate that they experienced at least a 25% reduction in revenue in 2020 as compared to 2019 to meet the revenue reduction criteria under the Economic Aid Act. An entity that was not in business during 2019, but was in operation on February 15, 2020, may satisfy the revenue reduction requirement for a second draw PPP loan if it had revenue during the second, third, or fourth quarter of 2020 that demonstrates at least a 25 percent reduction from the revenue of the entity during the first quarter of 2020.

- *Second*, borrowers may calculate payroll costs based on calendar year 2020 rather than, as provided in the Economic Aid Act, the 12-month period before the second loan is made. Noting that all second draw PPP loans will be made in 2021, the Second IFR states that this adjustment is not expected to make a significant difference in payroll costs while simplifying the payroll cost calculation and easing a borrower's administrative burden. Adjusted calculation methodologies apply to seasonal businesses.
- *Third*, borrowers must determine whether their revenue was reduced in 2020 as compared to 2019 by comparing their "gross receipts" for the relevant periods. "Receipts" for this purpose is defined consistent with "receipts" as defined in SBA's size regulations (§ 121.104) 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." Amounts forgiven in connection with initial PPP loans are not included in this definition.[6]
- *Fourth,* businesses that are part of a single corporate group may not collectively receive more than $4 million in second draw PPP loans in the aggregate. Given the maximum loan amount of $2 million, this cap is proportionately the same as the $20 million aggregate limit for first draw PPP loans to businesses that are part of a single corporate group. A borrower that has temporarily closed or temporarily suspended its business remains eligible for a second draw PPP loan, while a borrower that has permanently closed its operations is not.
- *Finally,* potential borrowers seeking more than $150,000 in a second draw PPP loan must submit documentation—such as annual tax forms or quarterly financial statements—at the time of their application to support the 25% reduction in revenue relative to 2019. Borrowers that receive less than $150,000 must submit such documentation prior to applying for loan forgiveness. If a borrower does not apply for loan forgiveness, this documentation is required upon request by the SBA.

---

[1] For additional details about the PPP please refer to Gibson Dunn's Frequently Asked Questions to Assist Small Businesses and NonProfits in Navigating the COVID-19 Pandemic and prior Client Alerts about the Program: Federal Reserve Modifies Main Street Lending Programs to Expand Eligibility and Attractiveness; President Signs Paycheck Protection Program Flexibility Act; Small Business Administration and Department of Treasury Publish Paycheck Protection Program Loan Application Form and Instructions to Help Businesses Keep Workforce Employed; Small Business Administration Issues Interim Final Rule and Final Application Form for Paycheck Protection Program; Small Business Administration Issues Interim Final Rule on Affiliation, Summary of Affiliation Tests, Lender Application Form and Agreement and FAQs for Paycheck Protection Program; Analysis of Small Business Administration Memorandum on Affiliation Rules and FAQs on Paycheck Protection Program; Small Business Administration Publishes Additional Interim Final Rules and New Guidance Related to PPP Loan Eligibility and Accessibility; Small Business Administration Publishes Loan Forgiveness Application; and Coronavirus Relief Package Passed by Congress Would Revive Paycheck Protection Program and Provide Additional Relief to Eligible Businesses.

[2] To be eligible, the business association must qualify for federal income tax-exempt status under section 501(c)(6) of the Internal Revenue Code and (1) it must not receive more than 15 percent of its receipts from lobbying activities; (2) its lobbying activities must not comprise more than 15 percent of its total activities; and (3) the cost of its lobbying

activities must not exceed $1,000,000 during its most recent tax year ended prior to February 15, 2020.

[3] To be eligible, the news organization must be majority owned or controlled by a NAICS code 511110 business (newspaper publishers) or 5151 business (radio networks, radio stations, television broadcasting), or a nonprofit public broadcasting entity with a trade or business under NAICS code 511110 or 5151, and must certify in good faith that proceeds of the loan will be used to support expenses at the component of the organization that produces or distributes locally focused or emergency information.

[4] The Economic Aid Act defines a "destination marketing organization" as (a) engaged in marketing and promoting communities and facilities to businesses and leisure travelers through a range of activities, including 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; or (b) engaged in, and deriving the majority of its operating budget from revenue attributable to, providing live events.

[5] In addition, to be eligible, the destination marketing organization must either be exempt from federal income taxation under section 501(a) of the Internal Revenue Code or be a quasi-governmental entity or political subdivision of a State or local government or their instrumentalities.

[6] The Second IFR also states that "receipts generally 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 exclude net capital gains or losses as these terms are defined and reported on IRS tax return forms."

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors:

Michael D. Bopp – Washington, D.C. (+1 202-955-8256, mbopp@gibsondunn.com)
Roscoe Jones, Jr. – Washington, D.C. (+1 202-887-3530, rjones@gibsondunn.com)
Alisa Babitz – Washington, D.C. (+1 202-887-3720, ababitz@gibsondunn.com)
Courtney M. Brown – Washington, D.C. (+1 202-955-8685, cmbrown@gibsondunn.com)

Related Capabilities

Public Policy