

January 11, 2021

### **New Loans and Loan Forgiveness under the Paycheck Protection Program**

The Paycheck Protection Program (the PPP), originally established under the Coronavirus Aid, Relief, and Economic Security Act (as amended, the CARES Act) and now renewed and expanded under the Consolidated Appropriations Act of 2021 (the CAA), through the mechanism of unsecured “forgivable loans” guaranteed to the PPP lender (PPP Lender) by the U.S. Small Business Administration (the SBA), assists eligible small businesses and nonprofits with certain operating costs paid by the borrower (the Borrower) during a specified “Covered Period” (defined below) using such loan proceeds. The last date to apply for a PPP loan was August 8, 2020, but other loan and grant programs (including Economic Injury Disaster Loans (EIDL) also administered by the SBA) remained (and remain) available.

#### **New Loans and Second Draw PPP Loans**

The CAA has now reopened the PPP and applications for first and second draw PPP loan borrowers can now be made again until March 31, 2021 (provided funds remain available). The SBA portal reopened January 11, 2021 – initially limited until January 13 to certain community financial institutions as participating lenders. There are new eligibility criteria and restrictions for PPP loans under the CAA, including, a cap at \$2 million dollars and a Borrower must employ fewer than 300 employees. Eligible Borrowers interested in a PPP loan under the CAA should first identify a participating lender and review any requirements and the process such lender specifies.

For more general information on the CAA and its effects on the PPP, please see our Legal Alert [https://lawyersalliance.org/userFiles/uploads/legal\\_alerts/Provisions\\_of\\_the\\_Consolidated\\_Appropriations\\_Act\\_of\\_2021\\_Relevant\\_to\\_Nonprofits\\_Legal\\_Alert.pdf](https://lawyersalliance.org/userFiles/uploads/legal_alerts/Provisions_of_the_Consolidated_Appropriations_Act_of_2021_Relevant_to_Nonprofits_Legal_Alert.pdf). For more general information about the original PPP under the CARES Act, and bearing in mind the modifications identified in our CAA alert and this one, please see the legal alert that Lawyers Alliance released on March 31, 2020: [https://lawyersalliance.org/userFiles/uploads/legal\\_alerts/Paycheck\\_Protection\\_Program\\_CARES\\_Act\\_Legal\\_Alert\\_March\\_2020.pdf](https://lawyersalliance.org/userFiles/uploads/legal_alerts/Paycheck_Protection_Program_CARES_Act_Legal_Alert_March_2020.pdf).

#### **Loan Forgiveness under the PPP**

This alert is focused primarily on the process, from the Borrower’s perspective, for the Borrower to apply to their lender for forgiveness of an existing PPP loan. The CAA makes certain changes to that process that are mainly advantageous to the Borrower. These include:

1. a simplified application for loans of \$150,000 or less;
2. expansion of what qualifies as eligible expenses (both payroll and non-payroll);
3. flexibility to the Borrower in selecting its Covered Period (defined below);
4. elimination of the reduction of the forgiveness amount by the amount of any EIDL advance; and
5. the possibility of qualifying for the employee retention tax credit (ERTC) with respect to wages not paid for with forgiven PPP proceeds.

Due to these changes, further guidance and revisions to existing forms provided by the SBA and by PPP lenders is anticipated. As it remains possible that there will be further relevant changes affecting

forgiveness, Borrowers with a PPP loan in excess of \$150,000 or whose current situation may not result in 100% forgiveness should consider continuing to wait to submit their forgiveness application. All Borrowers whose Covered Period has expired should nevertheless proceed to prepare the appropriate supporting documentation and seek advice with respect to any questions as to the calculations, required and advisable supporting documentation and timing of submission of the forgiveness application (see *PPP Forgiveness Application* below). In addition, Borrowers may now retroactively apply for the ERTC and should keep in mind likely upcoming deadlines if claiming such credit on 2020 Q4 employment tax returns (due January 31, 2021).

Payments by the Borrower to their PPP Lender of both principal and interest on a loan under the PPP are deferred until the Borrower's application to their PPP Lender for forgiveness of the loan is determined. If the Borrower does not apply for forgiveness within 10 months after the last day of the Borrower's covered period, then repayment of the loan is no longer deferred and the Borrower must begin making loan payments to their PPP lender in accordance with the original loan repayment schedule. The CAA has changed the definition of "Covered Period" to mean the period between the date (the "Loan Origination Date") the Borrower received or receives the PPP loan proceeds (or the date the SBA assigned or assigns such loan a loan number, if earlier) and a date selected by the Borrower which is between eight and 24 weeks from the Loan Origination Date. Prior to the CAA, Borrowers had to choose a Covered Period of either eight or 24 weeks (and ending on December 31, 2020 at the latest).

A Borrower may apply to their PPP lender for up to 100% loan forgiveness (i.e., the entire principal amount and all accrued interest), if the Borrower used the proceeds of the PPP loan for eligible expenses in the specified proportions (60% payroll and 40% other) within the Borrower's Covered Period. A Borrower can apply for forgiveness of the appropriate proportion of their loan at any time up to the maturity date of the loan (5 years from the date of receipt by the Borrower of the loan proceeds, in most cases). The lender must issue a decision to the SBA on a PPP loan forgiveness application not later than 60 days after receipt of a complete loan forgiveness application from the Borrower. The SBA then has 90 days to make their decision and notify the lender. Repayment by the Borrower of principal and interest on any unforgiven portion of a PPP loan begins on the earlier of 10 months after the last day of the Covered Period or when the SBA remits the loan forgiveness funds to the lender.

### **Reductions of Forgiveness Amount**

Where the principal amount of a PPP loan is in excess of \$150,000, even where the Borrower has used or uses all of the PPP loan proceeds for eligible expenses within the Borrower's Covered Period, the amount of forgiveness may be reduced if the Borrower reduced or reduces certain salaries or employee headcount during the Covered Period and did or does not restore them by December 31, 2020 (for existing PPP loans) or the end of the Covered Period (for new PPP loans). Where not so restored, the forgiveness amount will be reduced on a dollar-for-dollar basis for each employee (excluding any that was not an employee or earned \$100,000 or more on an annualized basis at any point in 2019) whose compensation is reduced by more than 25% during the Covered Period by the amount of the reduction that exceeds 25%.

In addition, the forgiveness amount may be further proportionally reduced if, during the Covered Period, the Borrower reduced or reduces the average number of full-time equivalent employees (FTEs) (by way of comparison to the Borrower's average FTEs during one of certain specified reference periods as selected by the Borrower). Which employees are to be included, and which excluded, in the calculation of FTEs is subject to careful determination under the applicable law. Further, two separate

“safe harbors” relating to FTEs may exempt the Borrower from any reduction in the amount of forgiveness on that basis:

- If the Borrower restored or restores its average FTEs to the level that existed during the selected reference period no later than December 31, 2020 (for existing PPP loans) or the end of the Covered Period (for new PPP loans); or
- If the Borrower provides documentation demonstrating that the Borrower was not able to return to its February 15, 2020 level of activity due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirements related to COVID-19 (or any State or local government orders consistent with such Federal directives).

#### *Forgiveness Amount of PPP Loan of \$150,000 or less*

While more definitive guidance is likely to be forthcoming soon, as is currently the case for loans of \$50,000 or less, PPP loans of \$150,000 or less may not be subject to any of the above-described reductions in forgiveness amount.

#### *Forgiveness Amount of PPP loan greater than \$150,000*

The forgiveness amount for a PPP loan greater than \$150,000 is equal to the eligible (expanded) payroll costs *plus* eligible (expanded) non-payroll costs (up to a maximum of 40% of the amount of the PPP loan) *minus* the amount any qualifying employee’s salary or wages were reduced by more than 25% then multiplied by the applicable FTE reduction quotient.

### **PPP Forgiveness Application**

Applications for forgiveness are made by the Borrower to their PPP lender. PPP lenders are authorized to require their Borrowers to use any “lender equivalent form” such lender creates. There are currently three SBA PPP forgiveness application forms for a lender to require or adapt: Streamlined, EZ and Standard. Given the changes made by the CAA, it is likely that each of these forms will be revised in the very near future. They are available (links below) on the Treasury and SBA websites along with separate instructions.

#### *Streamlined or Simplified Application ([Form 3508S](#) and [instructions](#))*

If the PPP loan was for \$50,000 or less and the Borrower is not a part of an affiliated group which collectively has PPP loans aggregating in excess of \$2 million. This Form has not yet been revised to reflect the increase in the eligible PPP loan limit to \$150,000 or less.

#### *EZ Application ([Form 3508EZ](#) and [instructions](#))*

This form can be used if the PPP loan was over \$50,000 and

- The Borrower is a sole proprietor or independent contractor with no employees, **or**
- The Borrower did not reduce wages in excess of 25% during forgiveness period as compared to the period between January 1 and March 31, 2020, **and either**
- The Borrower did not reduce the number of employees or average paid hours of employees between January 1, 2020 and the end of the Covered Period, **or**
- The Borrower was unable to operate during the Covered Period at the same level of activity as at February 15, 2020, due to compliance with COVID-19-related guidance.

This Form also has not yet been revised to reflect the increase in the eligible PPP loan limit to \$150,000 for use of the simplified application.

*Standard Application ([Form 3508](#) and [instructions](#))*

If PPP loan was for more than \$50,000 and the Borrower does not meet the criteria for 3508EZ. This Form also has not yet been revised to reflect the increase in the eligible PPP loan limit to \$150,000 for use of the simplified application.

The SBA will also require a Borrower with a PPP loan in excess of \$2 million to complete a Loan Necessity Questionnaire. [Form 3509](#) will be required for for-profit Borrowers, and [Form 3510](#) will be required for nonprofit Borrowers of over \$2 million.

## **Documentation**

A Borrower should assemble and, even if not provided to their PPP lender with the forgiveness application, should retain all documentation necessary or advisable adequately to support the calculation of the forgiveness amount (including the reasoning or advice relied upon for such calculations). Such documentation would usually include at least:

*Payroll documentation*

Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees

- Tax forms (or equivalent reports) for the period that overlap with the Covered Period; and
- Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee benefit plans that the Borrower includes in the forgiveness amount

*Non-payroll documentation*

- mortgage interest payments: copy of lender amortization schedule and receipts verifying payments, or lender account statements;
- premises rent or lease payments: copy of current lease agreement and receipts or other evidence verifying eligible payments;
- utility payments: copies of invoices and receipts, cancelled checks or account statements; and
- as expanded under the CAA, covered operations expenditures, covered property damage costs; covered supplier costs, and covered worker protection expenditures: copies of receipts or other evidence verifying eligible payments.

## **Additional PPP Resources**

- SBA PPP FAQ for Lenders and Borrowers: <https://www.sba.gov/document/support-faq-lenders-borrowers>
- SBA Paycheck Protection Program: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>

***This alert is meant to provide general information only, not legal advice. If you have any questions about this alert, please contact [CAA@lawyersalliance.org](mailto:CAA@lawyersalliance.org) or visit our website at***

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