

# Paycheck Protection Program

Where Are We Now?  
An Up-to-Date Guide to the  
Paycheck Protection Program



# Coronavirus Resource Center

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, the Consolidated Appropriations Act, 2021, related regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take, and resources to help manage ongoing operations.

**DISCLAIMER:** This publication will be updated regularly to reflect any further changes in the key terms of the PPP resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed the principal criteria of the program and will endeavor to add updates, it is not possible to cover all of the (ever-changing) rules and guidance published by the SBA and Treasury. THIS PUBLICATION IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION.

## CARES Act Team

### Co-chairs



**Jeffrey A. Horwitz**  
Partner  
+1.212.969.3229  
jhorwitz@proskauer.com



**Andrew Bettwy**  
Partner  
+1.212.969.3180  
abettwy@proskauer.com



**Yuval Tal**  
Partner  
+1.212.969.3018  
ytal@proskauer.com



**Lauren K. Boglivi**  
Partner  
+1.212.969.3082  
lboglivi@proskauer.com



**Karen J. Garnett**  
Partner  
+1.202.416.6850  
kgarnett@proskauer.com



**Camille Higonnet**  
Partner  
+1.617.526.9738  
chigonnet@proskauer.com



**Vincent Indelicato**  
Partner  
+1.212.969.4248  
vindelicato@proskauer.com



**Patrick D. Walling**  
Partner  
+1.617.526.9732  
pwalling@proskauer.com



**Grant R. Darwin**  
Associate  
+1.212.969.3306  
gdarwin@proskauer.com



**Lara B. Miller**  
Associate  
+1.212.969.3546  
lmiller@proskauer.com



**Seok Whee (Jason) Nam**  
Associate  
+1.212.969.3887  
snam@proskauer.com

## **PAYCHECK PROTECTION PROGRAM – WHERE ARE WE NOW?** *An up-to-date guide to the Paycheck Protection Program*

*Last updated as of July 29, 2021*

Since the enactment of the Coronavirus Aid, Relief, and Economic Security Act (the “[CARES Act](#)”) on March 27, 2020, Congress has enacted subsequent laws and the U.S. Small Business Administration (the “[SBA](#)”) and the U.S Treasury Department (“[Treasury](#)”) have issued a sizable number of rules and additional guidance to implement the CARES Act’s marquee small business loan component – the Paycheck Protection Program (the “[PPP](#)”).

Under the CARES Act, as supplemented by companion legislation such as the Paycheck Protection Program and Health Care Enhancement Act (the “[PPPHCEA](#)”),<sup>i</sup> [HR 7010](#) (Paycheck Protection Program Flexibility Act of 2020 (the “[PPPFA](#)”)) and as extended under [S.4116](#), the total amount available for emergency lending under this unprecedented program reached \$659 billion. By the end of the initial PPP availability period in August 2020, approximately 5.2 million PPP loans had been issued by thousands of financial institutions to small businesses for an aggregate principal amount of approximately \$522 billion.

On December 27, 2020, the [Consolidated Appropriations Act, 2021](#) (the “[CAA](#)”), which provides \$900 billion in new COVID-19 relief funding, was signed into law. Title III of the CAA, the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (the “[Economic Aid Act](#)”), expands upon the PPP implemented by the CARES Act and related legislation. The Economic Aid Act appropriates a total of \$284.45 billion for the PPP, including the new Paycheck Protection Program Second Draw Loan Program (the “[Second Draw Program](#)” and loans made under such program, “[Second Draw Loans](#)”)<sup>ii</sup>, composed of \$147.45 billion of additional funding for the existing PPP and \$137 billion for the Second Draw Program. This additional funding for the existing PPP brought total appropriations for that program to \$806.45 billion.

Since the beginning of the program the SBA and Treasury have issued a number of Interim Final Rules and SBA Procedural Notices governing the PPP (collectively, generally referred to herein as the “[PPP Rules](#)”).<sup>iii</sup> The SBA and Treasury have also published: a borrower application form for all Schedule C (or F) filers using gross income ([SBA Form 2483-C](#)), a borrower application form for all other types of entities ([SBA Form 2483](#)), and lender application form ([SBA Form 2484](#)) for First Draw PPP loans; a borrower application form for all Schedule C (or F) filers using gross income ([SBA Form 2483-SD-C](#)), a borrower application form for all other types of entities ([SBA Form 2483-SD](#)), and lender application form ([SBA Form 2484-SD](#)) for Second Draw Loans; program “fact sheets” for borrowers and lenders; a summary of the applicable affiliation rules; a forgiveness application form ([SBA Form 3508](#)), simplified forgiveness application ([SBA Form 3508EZ](#)) for certain borrowers and a short forgiveness application form for borrowers of \$150,000 or less ([SBA Form 3508S](#)); and responses to certain [Frequently Asked Questions](#) (the “[FAQ](#)”) (which the SBA has updated numerous times) and [Frequently Asked Questions on Loan Forgiveness](#) (the “[Loan Forgiveness FAQ](#)”). In late 2020 the SBA published necessity questionnaires for each of [for-profit borrowers \(SBA Form 3509\)](#) and [non-profit borrowers \(SBA Form 3510\)](#) that must be completed and submitted by each PPP borrower that together with its

affiliates received PPP loans with an original principal amount of \$2 million or greater within ten business days of receipt of such amount from such lender.

On January 6, 2021, the SBA published two new Interim Final Rules: the [first](#) addresses the PPP and loans thereunder (referred to herein as “[PPP loans](#)” or “[First Draw PPP loans](#)”) as amended by the Economic Aid Act and amends, consolidates, and restates in a single document the rules governing borrower eligibility, lender eligibility, and loan application and origination requirements, as well as general rules on increases and loan forgiveness for PPP loans (the “[EAA Updated Rules](#)”); and the [second](#) provides rules implementing the Second Draw Program (the “[Second Draw Rules](#)”). The SBA also issued a consolidated [interim final rule](#) on January 19, 2021 governing all aspects of loan forgiveness and loan review. The latest [interim final rule](#) was issued by the SBA on July 28, 2021.

On March 11, 2021, the American Rescue Plan Act (the “[ARPA](#)”) was signed into law, which modifies the SBA affiliation rules for 501(c)(3) organizations, such that 501(c)(3) organizations that do not employ more than 500 employees **per physical location**, rather than together with its affiliates, will become eligible to receive loans. Moreover, an additional \$7.25 billion will be provided for the program. This additional funding for the existing PPP brings total appropriations for that program to \$813.7 billion.

On March 30, 2021, the PPP Extension Act, which extends the Paycheck Protection Program until May 31, 2021, was signed into law. The PPP Extension Act gives applicants two additional months to apply for a First Draw or Second Draw PPP loan and gives the SBA until June 30, 2021 to process loan applications.

This alert (I) summarizes the key terms of the PPP (as amended and supplemented by the Economic Aid Act, the EAA Updated Rules and the ARPA), (II) addresses certain frequently asked questions that Proskauer attorneys have addressed, and (III) provides a brief overview of the Federal Reserve’s Paycheck Protection Program Lending Facility, which is aimed at helping participating lenders originate more loans under the PPP loan for the many businesses, non-profits, and other eligible organizations in need of financial relief as a result of COVID-19.

**This client alert will be updated to reflect any further changes in the key terms of the PPP resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed below the principal criteria of the program and will endeavor to update this alert regularly, it is not possible to cover all of the rules and guidance published by the SBA and Treasury. THIS ALERT IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION. THIS ALERT IS UPDATED AS OF JULY 29, 2021.**

### **I. Key Terms of the Paycheck Protection Program**

- **Maximum Loan Amount:** Under the CARES Act, a borrower’s loan amount is equal to the lesser of: (i) 2.5x trailing 12 month average monthly payroll costs;<sup>iv</sup> and (ii) \$10 million. Per the EAA Updated Rules (updating prior PPP Rules), borrowers are permitted to use any of (i) the 12 month period prior to the date on which the loan is made, (ii) calendar year 2019, or (iii) calendar year 2020 as the base period (though in our experience, most borrowers have

and will utilize calendar year 2019 or 2020). The SBA has updated its step-by-step “[How to Calculate Loan Amounts](#)” guide for calculating the maximum loan amounts based on the business type of an applicant in the [EAA Updated Rules](#) (III.B.4). In determining a borrower’s average monthly payroll costs, a borrower should be consistent in the period it utilizes (i.e., a borrower should not mix 2019 and 2020 numbers). (See *below* for specific guidance on calculating total average monthly payroll costs for **Seasonal Employers** and **Self-Employed Applicants** and guidance as to **Partnerships**).

- **Single Corporate Group Cap:** The Interim Final Rule published on April 30, 2020 implemented a maximum cap of \$20 million on the total amount of PPP loans that a “single corporate group” can receive. Businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent. This rule applies to all loans not fully disbursed by a lender – as opposed to those spent by a borrower – as of April 30, 2020 (and to the undisbursed portion of any partially disbursed loans). SBA affiliation rules are disregarded and “[b]usinesses are subject to this limitation even if the businesses are eligible for the waiver-of-affiliation provision under the CARES Act or are otherwise not considered to be affiliates under SBA’s affiliation rules.” Consequently, this cap applies to businesses that otherwise benefit from the affiliation waivers (including those in the accommodations and food services sector with North American Industry Classification System (NAICS) code beginning with 72).

An applicant must (i) notify a lender if it has applied for or received PPP loans in excess of the \$20 million cap and (ii) withdraw or request cancellation of any pending PPP loan application or approved PPP loan that would cause the applicant to exceed such cap. Failure to deliver such notice and to withdraw/request cancellation is deemed use of PPP funds for an unauthorized purpose and the PPP loan would be ineligible for forgiveness. While not expressly stated in the Interim Final Rule, additional penalties (criminal and civil) may apply to applicants who fail to comply with such requirements and retain or receive PPP loan proceeds in excess of the cap.

The EAA Updated Rules suggest that Second Draw Loans received by PPP borrowers that are part of a single corporate group will not be counted toward that single corporate group’s \$20 million cap. However, all Second Draw Loans received by PPP borrowers that are part of a single corporate group will be subject to a \$4 million cap as described below.

- **Interest Rate:** While the CARES Act provides (and the Economic Aid Act affirmed) a maximum permitted interest rate of 4.00%, the EAA Updated Rules reaffirm the actual interest rate on PPP loans is **1.00%** per annum. The Economic Aid Act clarifies that interest is to be calculated on a non-compounding, non-adjustable basis. Such interest rate and non-compounding, non-adjustable terms apply to all go-forward PPP loans and existing PPP loans if agreed upon by the PPP lender and eligible recipient.
- **Payment Deferral:** All principal, interest, and fees on the PPP loan may be deferred until the date on which the determined forgiveness amount is remitted to the lender so long as the borrower submits a forgiveness application within 10 months of the end of its forgiveness covered period. If a borrower fails to apply for forgiveness of a covered loan within 10 months after the last day of the covered period, such borrower must make payments of principal, interest, and fees beginning no earlier than 10 months after expiration of the covered period.<sup>v</sup> The PPPFA implemented the above deferral period (which period originally could expire after 6 months) and FAQ 52 confirms that such extension of the deferral period applies automatically to all PPP loans such that no modification of a promissory note is necessary.

- **Loan Maturity:** PPP loans mature after 5 years, if made on or after June 5, 2020 (the enactment of the PPPFA), or 2 years, if made prior to June 5, 2020. The borrower and the lender of pre-June 5, 2020 loans may amend the terms of existing PPP loans to reflect the longer maturity date. Under the PPP Rules, the date a PPP loan is made (at least, for purposes of determining the maturity date) is deemed to be the date on which the SBA assigned a loan number to that loan.
- **Collateral/Personal Guarantee:** No collateral or personal guarantee is required.
- **Eligibility:**
  - **Generally:** Eligible applicants (assuming they meet applicable size and other eligibility requirements listed below) include:
    1. business concerns;
    2. 501(c)(3) non-profit organizations;
    3. tax-exempt veterans organizations (501(c)(19));
    4. tribal business concerns (described in §31(b)(2)(C) of the Small Business Act);
    5. sole proprietors, independent contractors, and other self-employed individuals;
    6. a business assigned to the “accommodation and food services” sector (NAICS code beginning with 72);
    7. electric cooperatives exempt from federal income taxation under 501(c)(12) of the Internal Revenue Code as eligible as “a business entity organized for profit” (added under the PPP Rules on May 14, 2020);
    8. cooperative housing corporations (added by the Economic Aid Act);
    9. news organizations that are majority owned or controlled by a NAICS code 511110 (Newspaper Publishers) or 5151 (Radio or Television Broadcasting) business or non-profit public broadcasting entity with a trade or business under such NAICS code (expressly added by the Economic Aid Act);
    10. 501(c)(6) non-profit organizations (added by the Economic Aid Act);
    11. destination marketing organizations (added by the Economic Aid Act);
    12. certain debtors in a bankruptcy proceeding (although generally if an applicant is a debtor in a bankruptcy proceeding it would be ineligible, the Economic Aid Act moderates this restriction for certain business concerns);
    13. all other 501(c) organizations not listed above, except 501(c)(4) organizations (i.e. social welfare organizations) (added by the ARPA); and
    14. internet publishing organizations (added by the ARPA).

An applicant must have been in operation on February 15, 2020 and either (A) had employees for whom salaries and payroll taxes were paid, or (B) paid independent contractors (as reported on Form 1099-MISC). A seasonal business will be considered to

have been in operation as of February 15, 2020, if the business was in operation for any 12-week period between May 1, 2019 and September 15, 2019.<sup>vi</sup>

An individual applicant is eligible if such individual (i) has self-employment income (such as an independent contractor or sole proprietor), (ii) was in operation on February 15, 2020, (iii) filed or will file a Form 1040 Schedule C for 2019, and (iv) has a principal place of residence in the United States.

Further, if a business was in operation on February 15, 2020, but has since changed ownership, it may apply for a PPP loan (assuming it is otherwise eligible). Similarly, if a change in ownership is effectuated through a sale of substantially all assets of a business that was in operation on February 15, 2020, the business acquiring the assets may apply for a PPP loan, even if the change in ownership results in a new TIN and even if the acquiring business was not in operation on February 15, 2020.

As noted above, the Economic Aid Act and the ARPA specifically identified as PPP loan-eligible the following, and established additional eligibility parameters specific to such entities/organizations:

- **Housing Cooperatives** – Cooperative housing corporations as defined in section 216(b) of the Internal Revenue Code of 1986 that employ not more than **300 employees**. In assessing eligibility, the SBA’s affiliation rules apply to Housing Cooperatives.
- **News Organizations** – Business concerns, which expressly include any individual station licensed by the FCC under title III of the Communications Act of 1934, and any public broadcasting entity (as defined in section 397(11) of the Communications Act of 1934)<sup>vii</sup> if the following eligibility requirements are satisfied: (i) it is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 (Newspaper Publishers) or 5151 (Radio or Television Broadcasting) or, with respect to a non-profit public broadcasting entity, has a trade or business that falls under such a code; (ii) it employs not more than 500 employees (or the applicable NAICS size standard) per physical location<sup>viii</sup>; and (iii) it makes a good faith certification that loan proceeds will be used to support expenses in producing or distributing locally focused emergency information. Such borrowers are referred to herein as “News Entities.” While such for profit News Entities were already covered as “business concerns” under one of the existing categories, the principal basis for the express addition is to recognize an individual “station” as an eligible applicant (i.e., an individual “concern” for purposes of the PPP) and to exempt such News Entities from the SBA’s affiliation rules, thereby allowing such News Entities that may be part of a larger corporate group to receive PPP loans.
- **501(c)(6) Organizations (Generally)** – A 501(c)(6) organization is eligible to receive a PPP loan so long as: (i) it is not a professional sports league or organization that has a purpose of promoting or participating in a political campaign or other activity; (ii) such organization does not receive more than 15% of its receipts from lobbying activities; (iii) lobbying activities of the organization do not comprise more than 15% of the total activities of the organization; (iv) the total cost of the organization’s lobbying activities did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and (v)

the organization does not employ more than **300 employees**. In assessing eligibility, the SBA's affiliation rules apply to an (otherwise eligible) 501(c)(6) organization. Such borrowers are referred to herein as "Eligible 501(c)(6) Organizations."

- ***Destination Marketing Organizations*** – "Destination Marketing Organizations," which are organizations that either are (a) described in 501(c) of the Internal Revenue Code and exempt from taxation under 501(a) of the Code, or (b) quasi-governmental entities or State political subdivisions, in each case, that are (i) engaged in marketing and promoting communities and facilities to business and leisure travelers through assisting the location of meeting and convention sites; providing travel information on area attractions, lodging accommodations, restaurants, and maps; and organizing group tours of local historical, recreational, and cultural attractions or (ii) engaged in and derive the majority of their operating budget from revenue attributable to providing live events, are eligible to receive PPP loans if: (w) the organization does not receive more than 15% of its receipts from lobbying activities; (x) lobbying activities of the organization do not comprise more than 15% of the total activities of the organization; (y) the total cost of the organization's lobbying activities did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and (z) the organization does not employ more than **300 employees**. In assessing eligibility, the SBA's affiliation rules apply to Destination Marketing Organizations.
- ***Businesses in Bankruptcy*** – The Economic Aid Act (Sec. 320) amends section 364 of the Bankruptcy Code, which governs post-petition financing, to permit a Bankruptcy Court (i) to authorize a debtor to obtain a PPP loan after notice and a hearing, and (ii) like the treatment afforded to a DIP lender, to grant "superpriority" administrative expense status to such claim if the SBA does not otherwise forgive the PPP loan. Importantly, because Sec. 320 only applies to those debtors authorized to operate in bankruptcy under section 1183, 1184, 1203, 1204, or 1304 of title 11, thereby excluding debtors authorized to operate under section 1106 and 1107 (i.e., chapter 11), it limits PPP loan eligibility to debtors in subchapter V (small businesses with no more than \$7.5 million of debt), chapter 12 (family farmers or fishermen), and chapter 13 (individuals).

While Bankruptcy Code section 1129(a)(9)(A) does not permit a debtor to confirm a plan of reorganization unless it pays all administrative claims in full in cash, the Economic Aid Act further provides that an eligible debtor can confirm a plan of reorganization that implicates an administrative expense claim derived from a PPP loan without paying the claim in full in cash, so long as the plan proposes to make payments on account of such claim when due under the terms of the PPP loan. Moreover, the Economic Aid Act also authorizes an eligible debtor to obtain a PPP loan on such terms even if a contract or loan agreement expressly prohibits the debtor from doing so. When read together, these amendments give enormous flexibility to certain, but not all, businesses seeking to restructure while also availing themselves of PPP benefits.

In contrast, the SBA rules governing ineligible businesses have remained the same, providing that if a PPP applicant or "its owner" is a debtor in a bankruptcy proceeding at the time it submits an application or at any time before the loan is disbursed, the applicant is ineligible to receive the PPP loan, and if the applicant



or its owner becomes a debtor in a bankruptcy proceeding after submitting the application but before the PPP loan is disbursed, the applicant or its owner must cancel the application. Notably, these rules do not address what an applicant needs to do if it received the PPP loan before it or its owner became a debtor in bankruptcy. Question 59 of the FAQs provides that if an eligible debtor filed for bankruptcy protection after disbursement of the PPP loan, that debtor is eligible for loan forgiveness, provided it meets all other criteria for loan forgiveness, which supports the argument that a PPP loan can be obtained at any time before bankruptcy proceedings commence.

Consequently, there is a clear conflict between provisions of the Economic Aid Act and the EAA Updated Rules. The SBA will need to resolve that conflict so that there is clear guidance for businesses in bankruptcy for which the Economic Aid Act provided relief as to their ability to access PPP funds.

Question 60 of the FAQs provides that borrowers that received a First Draw PPP loan and filed for bankruptcy protection after disbursement of the First Draw PPP loan are not eligible to apply for a Second Draw PPP loan.

For guidance on when a borrower who has previously filed for bankruptcy protection is no longer considered to be “presently involved in any bankruptcy” proceeding, see **Question 12** in [Section IV](#) below.

- **501(c) Organizations** – Other than 501(c)(3), (4), (6) or (19) organizations, a 501(c) organization is eligible to receive a PPP loan so long as: (i) such organization does not receive more than 15% of its receipts from lobbying activities; (ii) lobbying activities of the organization do not comprise more than 15% of the total activities of the organization; (iii) the total cost of the organization’s lobbying activities did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and (iv) the organization does not employ more than **300 employees**.
- **Internet Publishing Organizations** – Business concerns or other organizations that were not eligible to receive a PPP loan before the date of enactment of the ARPA, are assigned a NAICS code of 519130, certify in good faith as Internet-only news publishers or Internet-only periodical publishers, and are engaged in the collection and distribution of local or regional and national news and information (“[Internet Publishing Organizations](#)”) are eligible to receive a PPP loan if the following eligibility requirements are satisfied:
  - The business concern or organization employs not more than 500 employees (or the size standard established by the Administrator for that North American Industry Classification code) per physical location; and
  - The business concern or organization makes a good faith certification that proceeds of the loan will be used to support expenses at the component of the business concern or organization that supports local or regional news.
- **Ineligible Industries:** An applicant is not eligible if its business is in an ineligible industry or otherwise described as ineligible under 13 C.F.R. § 120.110 (also detailed in the SBA’s [Standard Operating Procedure \(SOP\) 50-10-6](#)), except where there is an express

exception under the CARES Act (such as for certain non-profits) or the PPP Rules. Key ineligible industries include businesses primarily engaged in lending or investment and passive investment in real estate.

The PPP Rules contain notable changes and clarifications to the scope of ineligible industries or businesses that would otherwise be ineligible under traditional SBA rules:

- ***Hedge Funds and Private Equity Firms are Not Eligible*** – Hedge funds and private equity firms are ineligible to receive PPP loans as they are “engaged in investment or speculation.” Portfolio companies of private equity funds *may* still be eligible if they meet applicable size standards after application of the affiliation rules and can make (after careful consideration) the “necessity” certification (each discussed below).
- ***Legal Gambling Businesses are Eligible*** – Businesses that derive revenue from legal gambling activities are now eligible for PPP loans regardless of the amount of the business’s revenue that is derived from gambling activities (as 13 C.F.R. § 120.110(g) no longer applies to the PPP).
- ***Certain Government-Owned Hospitals are Eligible*** – A state or local government-owned hospital that would otherwise be ineligible (under 13 C.F.R. § 120.110(j)) as a government-owned entity, is now eligible for a PPP loan if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.
- ***Most Businesses in Bankruptcy are Not Eligible*** – See ***Businesses in Bankruptcy*** above.
- ***PPP Lender Affiliate Restrictions*** – An Interim Final Rule published on April 20, 2020 narrowed the limitations in 13 C.F.R. 120.110 and 120.140 to provide that an (otherwise eligible) business owned (in whole or in part) by an outside director or equityholder of less than 30% of the equity in a PPP lender is permitted to receive a PPP loan from such PPP lender (so long as such business follows the same process as any similarly situated customer). Officers and key employees of a PPP lender (or businesses owned thereby) may not receive a PPP loan from the lender with which they are employed.

Other ineligible entities specifically identified in the PPP Rules include household employers (*i.e.*, individuals who employ household employees such as nannies or housekeepers); businesses 20% or more of which are owned by persons who are incarcerated, under indictment, or subject to other means by which formal criminal charges are brought, or have been convicted of a felony in the last five years involving fraud, bribery, embezzlement, or a false statement on a loan application or application for federal financial assistance; and businesses owned or controlled by any person that has ever obtained an SBA or other Federal loan (other than Federal student loans in general) that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.

The Economic Aid Act and the EAA Updated Rules provides that businesses and organizations in the following additional categories are now also expressly ineligible to receive a PPP loan:

- **Not in Operation on February 15, 2020** – A business/organization that was not in operation on February 15, 2020 (to be clear, this change reaffirms the existing limitation and has retroactive effect to the passage of the CARES Act as set forth in the Economic Aid Act).
- **Shuttered Venue Operators Grant Recipient** – A person or entity that receives a “Shuttered Venue Operators” grant under section 24 of the Economic Aid Act. Note that under the ARPA, if a person or entity applied for and received a PPP loan on or after December 27, 2020, any such PPP loan will reduce the Shuttered Venue Operators grant by the amount of the PPP loan. (For more information on the Shuttered Venue Operators program, please see our publication “[Front and Center: New SBA Grant Program for Shuttered Venue Operators](#)”.)
- **Public Issuer** – Beginning on December 27, 2020, an issuer of publicly traded securities registered on a national exchange (this would not apply to such issuers who have already received a PPP loan under the CARES Act). The Economic Aid Act clarifies that the fact that a News Entity’s affiliate (including any entity that owns or controls a News Entity) is a publicly-traded news organization does not render the News Entity itself ineligible. While the text of the Economic Aid Act suggests that this carve-out is intended to apply to publicly-traded news organizations, it is ultimately unclear and will need to be clarified in SBA rule making or FAQs.
- **Professional Sports League or Political Organization** – A 501(c)(6) organization that is a professional sports league or organization that has a purpose of promoting or participating in a political campaign or other activity.
- **Federal Official Ownership** – A business concern of which the President, the Vice President, the head of an Executive Department, or a Member of Congress (or the spouse of such person as determined under applicable common law), directly or indirectly, holds a controlling interest.

Under the EAA Updated Rules, borrowers with PPP loans made *before* December 27, 2020 must disclose any such controlling interest by not later than January 26, 2021 if any application was submitted for forgiveness *prior to* December 27, 2020 and within 30 days for all other forgiveness applications. While the language of the EAA Updated Rules is not clear, this disclosure requirement also appears to apply if any such government official is or holds a controlling interest in the principal executive officer or any individual performing a similar function of the borrower.

- **Business that has been Permanently Closed** – An entity that has gone out of business and has no intention of reopening is barred from receiving a PPP loan. The EAA Updated Rules make clear that an otherwise qualified borrower that has temporarily closed or suspended its business, but intends to reopen, remains eligible for a PPP loan.
- **Size Standard:** An applicant (taking into account its affiliates) must either:
  - **Existing Size Standards** – qualify as a “small business concern” by meeting the SBA’s existing SBA size standards for the applicable NAICS code, which are based on either employee headcount (full-time, part-time, or other basis) or 3-year average annual gross receipts;

- **Alternative Size Standard** – qualify as a “small business concern” by meeting the SBA’s “alternative size standard,” which requires that the applicant (together with its affiliates) have not more than **\$15 million** in tangible net worth *and* not more than **\$5 million** in average net income after Federal income taxes (excluding any carry-over losses) for the 2 full fiscal years before the date of the application (13 C.F.R. § 121.301(b)(2) is instructive as to how to calculate net income after Federal income taxes for pass-through entities);
- **Employee Headcount Standard** –
  - generally have (together with its affiliates) not more than 500 employees (on a full-time, part-time, or other basis),
  - in the case of Eligible 501(c)(6) Organizations, Destination Marketing Organizations, and Housing Cooperatives, not more than 300 employees (on a full-time, part-time, or other basis),
  - in the case of Eligible 501(c)(3) Organizations, not more than 500 employees per physical location of the organization,
  - in the case of other Eligible 501(c) Organizations (other than (501(c)(3), (4), (6) or (19) organizations), not more than 300 employees per physical location of the organization,
  - in the case of Eligible Internet Publishing Organizations, not more than 500 employees, or the size standard established by the Administrator for that North American Industry Classification code, per physical location, **if** the organization is majority owned or controlled by a business concern or organization that is assigned a North American Industry Classification System code of 519130, or
  - in the case of Eligible Electric and Telephone Cooperatives, not more than 300 employees per physical location (and these entities are not permitted to use the existing SBA size standards for their industry or the SBA’s alternative size standard).
- **Accommodations and Food Services** – be a business assigned to the “accommodation and food services” sector (NAICS code beginning with 72) having not more than 500 employees per physical location.
- **Affiliation:** When determining whether any of the above size standards are met, the SBA’s existing affiliation rules require a business to aggregate the number of its employees, receipts, or other applicable metric with that of its foreign and domestic affiliates. Applicants and entities are affiliates when one controls or has the power to control the other or such entities are under common control. Control is broadly defined in the SBA’s regulations, and encompasses affirmative and negative control rights, as well as equity-based and contractual control rights (including affiliation based on a management agreement). The SBA has confirmed that the pre-2020 version of 13 C.F.R. § 121.301(f), the affiliation rule for 7(a) loans, applies to the PPP. Relatedly, the SBA and Treasury have issued Affiliation Guidance with respect to the affiliation rules that apply to the PPP. There are some exceptions to the

application of the SBA's existing affiliation rules that are specific to the Paycheck Protection Program:

- **CARES Act Exceptions** – Under the CARES Act, the SBA's affiliation rules are waived for businesses in the accommodation and food service sector with an NAICS code beginning with 72, franchises assigned a franchise identifier code by the SBA, and businesses that receive assistance from an approved small business investment company under § 301 of the Small Business Investment Act of 1958 (e.g., SBIC portfolio companies).<sup>ix</sup> As a result of this exception, each hotel or restaurant location owned by a parent business (held within a separate legal entity) that employs not more than 500 employees can apply for a separate PPP loan, provided it uses a unique EIN. However, this waiver applies only when determining eligibility for an applicant business with the 72-code. The affiliation exemption does not apply when determining eligibility of an applicant that is not in such sector. Such applicant would be required to take into account the employees, receipts, or other applicable metric of all of its affiliates, *including* those operating in the accommodations or food service sector.
- **PPP Rules Exceptions** –
  - **Faith-Based Organizations** – Under the PPP Rules, affiliation rules are waived for faith-based organizations where the application of such rules would “substantially burden [such an] organization’s religious exercise.”
  - **Employee Stock Option Ownership** – Under the PPP Rules, a business that participates in an Employee Stock Ownership Plan (ESOP) does not trigger affiliation between the business and the ESOP.
- **Statutory Exceptions** – Under the SBA's existing regulations, the exceptions to the affiliation rules in 13 C.F.R. § 121.103(b) (but not the exception in 121.103(b)(5), which does not apply to 7(a) loans) continue to apply in the context of the PPP. While these exceptions should be reviewed in connection with any affiliation analysis, they are narrow and will not benefit most businesses (unless owned or controlled by certain tribal organizations or small business investment companies).
- **Economic Aid Act and the ARPA Exceptions (News Entities and Internet Publishing Organizations)** – Under the Economic Aid Act and the ARPA, the affiliation rules are waived for eligible News Entities and Internet Publishing Organizations. As a result, a News Entity location (*i.e.*, individual radio station) or an Internet Publishing Organization location that employs not more than 500 employees can apply for a separate PPP loan.
- **Calculating Employee Headcount:** Borrowers should use either of the following methods for purposes of determining employee headcount: (i) average employment over the same time periods as used for payroll costs (12 month-period preceding the loan date, calendar year 2019, calendar year 2020, or applicable period for seasonal businesses) to determine number of employees, for the purposes of applying an employee-based size standard; or (ii) average number of employees per pay period in the 12 *completed* calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if less than 12 months).
- **Inclusion of Foreign Employees** – In accordance with 13 C.F.R. § 121.301(f)(6), for both the PPP's 500 or fewer employee size standard and businesses otherwise seeking

to qualify as a “small business concern” on the basis of the employee-based size standard, an applicant **must count all of its employees and the employees of its U.S. and foreign affiliates**, absent a waiver of or an exception to the affiliation rules.<sup>x</sup>

- **Necessity**: Applicants are required to certify that the “*current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.*” All applicants (but especially **larger companies and portfolio companies of private equity sponsors**) should carefully review and be thoughtful about the implications of making this certification, including how it speaks to the applicant’s economic viability and the message it communicates to investors and the market). **When making a “necessity” assessment, applicants should create a thoughtful and detailed record supporting their determination and the process employed in that assessment.**
  - **Other Sources of Liquidity**: The SBA has clarified (in Questions 31 and 37 of the SBA FAQs) that while the CARES Act waives the “credit elsewhere” requirement, borrowers must nonetheless carefully review and make the “necessity” certification in good faith. In so doing, borrowers must take “into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.” This applies to both publicly traded and private companies.
  - **Large/Public Companies**: As a response to the much-reported receipt of PPP loans by certain publicly traded companies, the SBA previously clarified that it is **unlikely** that a company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to the SBA, upon request, the basis for its certification. While such guidance remains relevant to public companies that may have previously received a PPP loan, as noted above, under the Economic Aid Act, public companies will not be eligible for PPP loans going forward.
  - **Retraction and Safe Harbor**: Any borrower (whether publicly-traded or privately-owned) that applied for a PPP loan *prior* to April 24, 2020 and repaid the loan in full by **May 18, 2020** is deemed to have made the required certification in good faith.
  - **Review of the Necessity Certification**:
    - ***Borrowers of Less than \$2 million*** – As announced in Question 46 of the FAQ (published on May 13, 2020), a borrower that, together with its affiliates, received PPP loans with an original principal amount of **less than \$2 million** will be deemed to have made the “necessity” certification in good faith.
    - ***Borrowers of \$2 million or Greater*** – Question 39 of the FAQ (published on April 29, 2020) provides that the SBA will review all loans in excess of \$2 million, *in addition to other loans as appropriate*, following the lender’s submission of the borrower’s loan forgiveness application. Question 46 of the FAQ clarifies that a borrower’s “necessity” certification will be assessed as part of such review, and if the SBA determines in the course of its review that the borrower lacked an adequate basis for the “necessity” certification, the SBA will (i) seek repayment of the outstanding PPP loan balance and (ii) inform the lender that the borrower is not eligible for loan forgiveness. So long as the borrower repays the loan following

such notification, the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the “necessity” certification (though the SBA may of course refer any other issues identified).<sup>xi</sup>

- **Paycheck Protection Program Loan Necessity Questionnaire** – In addition, in late 2020, the SBA produced loan necessity questionnaires for each of [for-profit borrowers \(SBA Form 3509\)](#) and [non-profit borrowers \(SBA Form 3510\)](#) that must be completed and submitted by each PPP borrower that together with its affiliates received PPP loans with an original principal amount of \$2 million or greater to such PPP borrower’s lender within ten business days of receipt of such from such lender. Failure to complete such forms and provide required supporting documents may result in SBA’s determination that a PPP borrower was ineligible for its PPP loan, its PPP loan amount, or any forgiveness amount claimed. Each of these necessity questionnaires includes a portion titled “liquidity assessment” which includes specific questions about available funds immediately prior to a borrower’s PPP loan application, and the use of funds between March 13, 2020 and the end of a borrower’s loan forgiveness period (including as to any dividends or distributions, pre-payment of debt, compensation to employees in excess of \$250,000, and how many were so compensated).

While FAQ 53 states that the information that a borrower provides on the questionnaires will help the SBA assess the borrower’s certification in its loan application that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant,” as required by the CARES Act, the questionnaires do not specify whether any of the borrower’s responses will be dispositive as to whether a PPP loan was in fact necessary for a borrower completing the form, and consequently, there remains uncertainty around whether a borrower can make the certification of need when it may have access to other sources of liquidity. What constitutes “liquidity” or when would the use of such liquidity be “significantly detrimental”? What about a case where a borrower’s business has no cash or other readily available sources of liquidity, but the borrower’s owners, such as private equity or other funds, may have or be able to access such liquidity? This ambiguity is particularly problematic for hotels, restaurants, and other 72-code businesses that have faced severe reduction or even elimination of all revenues and that are owned by private equity sponsors, but are exempted from the affiliation rules, and are thus eligible to receive PPP loans if they are able to make the “necessity” certification. Both the legal and the public relations “judgments” will be made in hindsight, which leaves borrowers and their sponsors facing difficult choices in a crisis without any clear end.

- **Eligible Uses:** PPP loan proceeds may be used for:
  1. payroll costs, which include, among others, (i) costs related to the continuation of group health care, life, disability, vision, or dental benefits during periods of paid sick, medical, or family leave, and group health care, life, disability, vision, or dental insurance premiums, and (ii) employee salaries, commissions, or similar compensations (payroll costs is discussed in further detail below);

2. payments of interest on any mortgage (but not prepayment of or payment of principal);
3. rent (including under a lease agreement);
4. utility payments;
5. interest on any other debt obligations incurred before February 15, 2020;
6. refinancing an SBA EIDL Loan made between January 31, 2020 and April 3, 2020;
7. covered operations expenditures (added by the Economic Aid Act);
8. covered property damage costs (added by the Economic Aid Act);
9. covered supplier costs (added by the Economic Aid Act); and
10. covered worker protections expenditures (added by the Economic Aid Act).

The CARES Act provides that loan proceeds can also be used for any allowable use for which a 7(a) loan can be applied under the Small Business Act, which uses are set forth in 13 C.F.R. § 120.120 and include, e.g., inventory, supplies, and working capital. However, the PPP Rules list as permitted only those uses detailed above, and it remains unclear whether the SBA is restricting permitted uses to *only* those that are expressly listed above. Note further that some of the items listed above are not forgiveness-eligible, and any additional allowable uses not specifically listed in the CARES Act or the PPP Rules are not forgiveness-eligible.

In addition to the expansion of Payroll Costs (which are permitted PPP loan uses), the Economic Aid Act expands upon the categories of permitted uses for PPP loans to include the following (each of which is also a forgiveness-eligible use):

- **Covered Operations Expenditures** – Payments made for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records, and expenses.
- **Covered Property Damage Costs** – Costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 not covered by insurance or other compensation.
- **Covered Supplier Costs** – Expenditures made by an entity to a supplier of goods for the supply of goods that (1) are essential to the operations of the entity at the time at which the expenditure is made; and (2) are made pursuant to a contract, order, or purchase order (i) in effect at any time before the covered period with respect to the applicable covered loan; or (ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan.
- **Covered Worker Protection Expenditures** – Operating or capital expenditures to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance



issued by a State or local government beginning on March 1, 2020 and ending on the date on which the COVID-19 national emergency expires (per executive action by the President). Such expenditures may include purchase, maintenance, or renovation of assets that create or expand:

- a drive-through window facility;
- indoor, outdoor, or combined air or air pressure ventilation or filtration system;
- a physical barrier such as a sneeze guard;
- an expansion of additional indoor, outdoor, or combined business space;
- an onsite or offsite health screening capability;
- other assets relating to expenditures made to facilitate the adaptation of a business or entity in compliance with Covered Worker Protection Expenditures requirements as determined by the SBA in consultation with the Secretary of Health and Human Services and the Secretary of Labor; or
- the purchase of materials as described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation, filtering face piece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization, and/or other kinds of personal protective equipment, as determined by the SBA Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor.

Note, however, that Covered Work Protection Expenditures do not include residential property or intangible property. In addition, the Economic Aid Act expressly prohibits use of PPP loan proceeds for lobbying activities.<sup>xii</sup>

- **60% Payroll Cost Threshold:** The PPP Rules, as amended by the Interim Final Rules published June 11, 12, 17, 22, and 24 (the “PPPFA Revision Rules”), require borrowers to use at least 60% of PPP loan proceeds for payroll costs (the CARES Act itself does not impose such a requirement). Previously, the PPP Rules required 75% of the PPP loan proceeds be used for payroll costs. The Economic Aid Act does not change this requirement.
- **Independent Contractors:** A business **cannot** include independent contractors as “employees” either for purposes of calculating the loan amount (i.e., with payroll cost calculations) or amount of loan forgiveness. Independent contractors can themselves apply for PPP loans.
- **Required EIDL Refinancing:** On June 22, 2020, the SBA published [additional guidance](#) for when PPP loan proceeds must be used to refinance an EIDL loan. This guidance describes three scenarios:
  - An EIDL loan may not be refinanced with a PPP loan when the PPP borrower received the EIDL loan before January 31, 2020 or after April 3, 2020.

- An EIDL loan is not required to be refinanced with a PPP loan when (a) the PPP borrower received funds from an EIDL loan from January 31, 2020 through April 3, 2020, and (b) the PPP borrower used the EIDL loan for purposes other than payroll costs.
- A PPP loan must be used to refinance the full amount of the EIDL loan when (a) the PPP borrower received funds from the EIDL loan from January 31, 2020 through April 3, 2020, and (b) the PPP borrower used the EIDL loan funds to pay payroll costs.

The Economic Aid Act also provides for a renewal and expansion of the EIDL loan program in response to the COVID-19 pandemic, and it is reasonable to expect that SBA guidance on this topic may be updated in the future. For information regarding the renewed and expanded EIDL program under the Economic Aid Act, see [Where Are We Now? – Paycheck Protection Program Redux](#).

- **Payroll Costs for Self-Employed Applicants:** Self-employed borrowers who filed (or are eligible to file) a Form 1040 Schedule C for 2019 or 2020 may use loan proceeds for: (i) (A) for borrowers that use *net profit* to calculate loan amount, owner compensation equal to total average monthly net profit for 2019 or 2020 (whichever year was used to calculate the maximum loan amount) up to a maximum annualized amount of \$100,000, or (B) for borrowers that use *gross income* to calculate loan amount, proprietor expenses (business expenses plus owner compensation) equal to total average monthly gross income for 2019 or 2020 (whichever year was used to calculate the maximum loan amount) up to a maximum annualized amount of \$100,000, provided that in no event shall the amount in (A) or (B) exceed \$20,833; (ii) payroll costs to employees with a principal place of residence in the US (if any); (iii) mortgage interest, rent, or utility payments that can be claimed as a business expense deduction on Form 1040 Schedule C for 2019 or 2020; (iv) interest payments on any loan incurred prior to February 15, 2020; (v) refinancing of any EIDL obtained between January 31, 2020 and April 3, 2020; and (vi) covered operations expenditures, property damage costs, supplier costs, and worker protection expenditures. Further, the PPP Rules indicate that an applicant that did not claim (or was not entitled to claim) such mortgage interest, rent, or utility payments on its 2019 or 2020 Form 1040 Schedule C (whichever period is used) **cannot** use the loan proceeds for such expenses during the initial 24-week period (or 8-week period) following the first disbursement of the loan. The 40% limitation on non-payroll cost uses applies to self-employed applicants.

Under the PPPFA Revision Rules and SBA Form 3508 the maximum amount of total payroll costs of a self-employed borrower that is forgivable with respect to a 24-week covered period is \$20,833 and for an 8-week covered period is \$15,385, even if the self-employed borrowers can pay themselves more from the PPP loan and remain under the \$100,000 annualized cap. No changes to these amounts were expressly included in the EAA Updated Rules.

- **Student Workers:** Student workers generally count as employees unless (a) the applicant is an institution of higher education (as defined in Department of Education Federal Work-Study regulations) and (b) the student worker's services are performed as part of a Federal Work-Study Program or a substantially similar State or political subdivision program. Institutions of higher education must exclude all work study students when determining PPP loan eligibility and exclude payroll costs for work

study students from the calculation of payroll costs used to determine their PPP loan amount.

- **Payroll Costs:**

- **Included:** “Payroll Costs” generally include the following compensation for employees (and not any independent contractors) whose principal place of residence is in the US: (i) salary, wage, commission, or similar compensation; (ii) cash tips or equivalents; (iii) payment for vacation, parental, family, medical, or sick leave; (iv) allowance for dismissal or separation; (v) payment required for the provision of group health care benefits, including group life, disability, vision, or dental insurance premiums (but excluding expenses for group health care benefits paid by employees (or beneficiaries of the plan) either pre-tax or after tax, such as the employee share of their health care premium); (vi) payment of any retirement benefit; and (vii) payment of state or local taxes assessed on employee compensation. The SBA has indicated that payroll costs are calculated on a gross basis without regard to federal taxes imposed or withheld.

Additionally, the Economic Aid Act (as previously affirmed in an August 11, 2020 FAQ) expressly included group life, disability, vision, or dental insurance benefits as Payroll Costs and such addition is retroactive to the enactment of the CARES Act.

- ***Calculating Total Average Monthly Payroll Costs to Determine a PPP loan Amount*** – Potential new PPP applicants are encouraged to refer to the step-by-step maximum loan amount calculation guide contained in the EAA Updated Rules.
  - ***Applicants Generally*** – Other than for the specific categories identified below, an applicant’s payroll costs for purposes of calculating a PPP loan amount is based upon (i) the 12 months prior to the date of a PPP loan, (ii) 2019, or (iii) 2020, aggregate payroll costs for employees whose principal place of residence is the US.
  - ***Seasonal Employer’s Loan Amount*** – The Economic Aid Act provides that seasonal employers can calculate average total monthly payroll costs using any 12-week period between February 15, 2019 and February 15, 2020. Further, the Economic Aid Act redefines a seasonal employer to mean an entity that does not operate for more than seven (7) months in any calendar year, or during the preceding calendar year had gross receipts for any six (6) months of that year that were not more than 33.33% of the gross receipts of such employer for the other six (6) months of that year.
  - ***Self-Employed Applicant Loan Amount*** – When calculating payroll costs for purposes of determining a borrower’s loan amount, such compensation for self-employed applicants that filed (or will file) a Form 1040 Schedule C (or F) for 2019 or 2020 will be:
    - (A) for self-employed applicants with no employees, equal to 2.5 times the average monthly net profit **or** gross income amount computed therein (subject to an annualized \$100,000 cap), not to exceed \$20,833; or

(B) for self-employed applicants with employees, equal to 2.5 times the average monthly net profit **or** gross income (less the self-employed applicant's employee payroll costs) amount computed therein (subject to an annualized \$100,000 cap), not to exceed \$20,833.

- For self-employed applicants that have employees, payroll costs for such employees are calculated using:
  - 2019 or 2020 gross wages and tips paid to such employees with a principal place of residence in the US (using 2019 or 2020 IRS Form 941 Taxable Medicare wages & tips from each quarter) *plus* any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips (net of any amounts paid to any individual employee in excess of \$100,000 annualized cap); and
  - 2019 or 2020 employer group health, life, disability, vision, and dental insurance contributions and retirement contributions listed on the 2019 or 2020 Form 1040 Schedule C or F and state and local taxes assessed on employee compensation.
- **Partnerships with General Operating Partners** – Partners in a partnership may not submit a separate PPP loan application as a self-employed individual. Self-employment income of general active partners may be reported as a payroll cost on a PPP loan application filed by or on behalf of the partnership. The SBA's step-by-step maximum loan amount calculation guide confirms that payroll costs for self-employment income for individual U.S.-based general partners is calculated using 2019 or 2020 Schedule K-1 (IRS Form 1065) net earnings from self-employment (reduced by any section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties) multiplied by 0.9235<sup>xiii</sup>, subject to a \$100,000 annualized cap (as prorated for the period during which the payments are made or the obligation to make the payments is incurred).
- **Farmers and Ranchers** – While not detailed here, the SBA has provided (and updated in the EAA Updated Rules) step-by-step guidance for calculating total monthly average payroll costs (and therefore the maximum PPP loan amount) for farmers and ranchers who operate as a sole proprietorship, independent contractor, or self-employed individual.
- **Excluded:** Payroll costs **do not** include: (i) cash compensation (*i.e.*, gross amount before deductions for taxes, employee benefits payments, and similar payments) of any individual employee in excess of an annual salary of \$100,000, as prorated for the period during which the payments are made or the obligation to make the payments is incurred; (ii) federal income taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period (includes Federal Insurance

Contributions Act and Railroad Retirement Act taxes and income taxes required to be withheld from employees); (iii) qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act; and (iv) premiums taken into account in determining the credit allowed under section 6432 of the Internal Revenue Code of 1986<sup>xiv</sup>. In addition, forgiveness cannot be requested for any “qualified wages” that allowed the employer to claim ERTCs from “payroll costs” (see below under Tax Matters).

- **Period for Calculating Payroll Costs:** SBA guidance indicates that borrowers (other than self-employed applicants) can calculate their aggregate payroll costs using data either from the trailing 12 months, calendar year 2019, or calendar year 2020. Seasonal businesses may use average monthly payroll for the period between February 16, 2019 and June 30, 2019 or March 1, 2019 and June 30, 2019.
- **Ability for PPP Borrowers to Request an Increase in Loan Amount:**
  - ***Returned a Portion of PPP loan*** – if a borrower returned a portion of its PPP loan amount before December 27, 2020, such borrower may reapply for a PPP loan (and distinct from a Second Draw Loan) in an amount equal to the difference between the amount retained and such applicant’s maximum loan amount; or
  - ***Declined a Portion of PPP loan*** – if a borrower declined to accept part of its PPP loan before December 27, 2020, such borrower may request that the PPP lender modify such borrower’s PPP loan to increase the loan amount to the maximum amount for which such borrower is eligible.

These provisions would apply even if the full loan had already been disbursed and a lender had already issued a Form 1502 with the SBA.

- **Loan Forgiveness:** On May 22, 2020 the SBA published [Interim Final Rules](#) on loan forgiveness (the “Forgiveness Rules”), which have been subsequently amended on [June 22, 2020](#) and [October 8, 2020](#). In addition, on May 22, 2020, the SBA published an [Interim Final Rule](#) on SBA loan review procedures and related borrower and lender responsibilities, on July 23, 2020, the SBA published [Guidance](#) on Procedures for Lender Submission of PPP loan Forgiveness Decisions to SBA and SBA Forgiveness Loan Reviews (“Review Rules”), and on August 4, 2020, the SBA published an [FAQ on PPP loan Forgiveness](#). On January 19, 2021, the SBA and Treasury published an [Interim Final Rule](#) on loan forgiveness requirements and loan review procedures as amended by the Economic Aid Act, consolidating prior rules related to forgiveness and review of PPP loans including with respect to forgiveness of Second Draw Loans. On January 19, 2021, the SBA and Treasury released an updated version of [SBA Form 3508](#), which implements the changes contained in the Economic Aid Act, a simplified forgiveness application, [SBA Form 3508EZ](#), and a further simplified one page forgiveness application, [SBA Form 3508S](#), specifically for borrowers with a PPP loan of \$150,000 or less. SBA Forms 3508, 3508EZ and 3508S are referred to below together as the “forgiveness applications”. With respect to eligibility to use SBA Form 3508EZ see **Question 9** below.
- **Forgiveness Amount:** Under the PPP Rules, up to the entire principal amount and any accrued interest on a PPP loan is eligible for forgiveness if applied toward forgiveness-eligible uses. Generally, a borrower is **eligible** for a forgiveness amount that is the lesser of (i) its full PPP loan amount (no mention of interest), (ii) the sum of all forgiveness-eligible costs spent during the covered period as reduced for employee compensation and full-

time employee equivalent (“FTE”) headcount reductions (discussed below), and (iii) the quotient obtained by dividing the amount of the loan used for payroll costs during the covered period and 0.6 (such that the amount forgiven is not less than 60% of such payroll costs).

- **Covered Period:** As revised under the Economic Aid Act, the covered forgiveness-eligible period begins on the date of the origination of the covered loan and ends on a date selected by the eligible recipient that occurs during the period beginning 8 weeks after origination and ending 24 weeks after the origination date (*i.e.*, a borrower can select a covered period between 8 and 24 weeks). As affirmed under the EAA Updated Rules, the Economic Aid Act does not alter the existing PPP Rules, which dictate whether certain expenses incurred or paid during a borrower’s covered period are forgiveness-eligible.
  - **Alternative Covered (Payroll) Period** – The EAA Updated Rules remove the construct of an “alternative covered period” (previously included in the PPP Rules and forgiveness applications). The EAA Updated Rules do not expressly indicate whether such change is retroactive, such that if a borrower has *already* applied for (but not yet received) forgiveness utilizing the alternative covered period, it is unclear if such borrower would be required to update its forgiveness application. The expectation would be that the removal of the alternative covered period only applies to PPP loans made in 2021.
- **Forgiveness-Eligible Costs:** Forgiveness-eligible costs include payroll costs, interest payments on mortgages on real or personal property (*e.g.*, auto loans) existing before February 15, 2020 (but excluding interest on unsecured credit), rent under leases in place before February 15, 2020, and payments for utilities (including gas, water, telephone, internet access, transportation (including transportation utility fees assessed by state and local governments), and electricity (including supply charges, distribution charges, and other charges such as gross receipts taxes)), for which service began before February 15, 2020, in each case **incurred or paid** during a 24-week (or 8-week) covered period. Payments of rent or interest on leases and mortgages that existed prior to February 15, 2020 and were renewed or refinanced after such date are eligible for loan forgiveness as well. In addition, the Economic Aid Act expands upon eligible covered expenses to include (i) covered operations expenditures, (ii) covered property damage costs, (iii) covered supplier costs, and (iv) covered worker protection expenditures (described above).

To receive loan forgiveness, a borrower must use at least **60%** of the loan amount for payroll costs. The PPP Rules (as reaffirmed in the EAA Updated Rules) interpret this requirement as a proportional limitation on the loan forgiveness amount such that 60% of the loan forgiveness amount requested must have been used on payroll costs, rather than a threshold requirement that 60% of the total loan amount must be used on payroll costs *before* a loan can be forgiven. If payroll costs represent less than 60% of the total loan forgiveness amount requested by a borrower, then the forgiveness amount is proportionately reduced until payroll costs constitute 60% of the total forgiveness amount. The Economic Aid Act does not alter the 60% payroll cost use requirement.

- **Eligible Payroll Costs** – Payroll costs are considered paid on the day that paychecks are distributed or the borrower *originates* an ACH credit transaction. Payroll costs are considered incurred on the day that the employee’s pay is earned. Payroll costs incurred but not paid during the borrower’s last pay period of the covered period are eligible for forgiveness if paid on or before the next regular

payroll date. Otherwise, payroll costs must be paid during the covered period. Payroll costs for employees not performing work but still on the borrower's payroll are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work).

- **Costs of Furloughed Employees** – If a borrower pays furloughed employees their salary, wages, or commissions during the covered period, those payments are eligible for forgiveness as long as they do not exceed an annual salary of \$100,000, as prorated for the period during which the compensation/payment is made or the obligation to pay is incurred (however, the reduced hours for such furloughed employees will impact the forgiveness amount under the current rules and Form 3508),
- **Increased Compensation/Bonuses** – An employee's hazard pay, commissions, tips and bonuses are eligible for loan forgiveness (as a supplement to salary or wages) so long as the employee's total compensation does not exceed \$100,000 on an annualized basis.
- **Certain Owner-Employees/Partners/Self-Employed Individuals** – Forgiveness-eligible payroll costs for owner-employees (with an ownership stake of 5% or more in either a C- or S-corporation), partners, and self-employed individuals cannot exceed 2.5 months' worth of compensation received in the year used to calculate the PPP loan amount (that is, 2019 or 2020), capped at \$20,833 per individual in total across all businesses. (Note that owner-employees with less than a 5% ownership stake in a C- or S-corporation are not subject to the owner-employee compensation rule contemplated in this section.) The individual's total compensation may not exceed \$100,000 on an annualized basis, prorated for the applicable covered period (for example, if a borrower elects to use an eight-week covered period, the amount of loan forgiveness is calculated as the lesser of eight weeks' (8/52) of 2019 or 2020 compensation or \$15,385 per individual in total across all businesses.

The total amount of compensation of owners who work at their business that is eligible for forgiveness depends on the business type. If total compensation across businesses that receive a PPP loan exceeds the \$20,833 cap, owners can choose how to allocate the capped amount across different businesses.

- **C Corporations:** The employee cash compensation of a C-corporation owner-employee (an owner who is also an employee (including where the owner is the only employee)), is eligible for forgiveness up to the amount of 2.5/12 of his or her 2019 or 2020 employee cash compensation up to a \$20,833 cap, with cash compensation defined as it is for all other employees to include cash compensation plus employer retirement and health, life, disability, vision, and dental insurance contributions made on their behalf (i.e., the same as for employees generally). Payments other than for cash compensation should be included on lines 6-8 of PPP Schedule A of SBA Form 2508 (or lender equivalent), for borrowers using that form, and do not count towards the \$20,833 cap per individual.
- **S Corporations:** The cash compensation of an S-corporation owner-employee (an owner who is also an employee) is eligible for loan

forgiveness up to the prorated amount of their 2019 or 2020 cash compensation up to a \$20,833 cap, with cash compensation defined as cash compensation plus employer retirement contributions made on their behalf. Employer contributions for health, life, disability, vision, and dental insurance are not eligible for additional forgiveness for S-corporation employees with at least a 2% stake in the business, including for employees who are family members of an at least 2% owner under the family attribution rules of 26 U.S.C. 318, because those contributions are included in cash compensation. The eligible non-cash compensation payments should be included on lines 7 and 8 of PPP Schedule A of SBA Form 2508, for borrowers using that form, and do not count towards the \$20,833 cap per individual.

- Self-employed Schedule C (or Schedule F) Filers: The compensation of self-employed Schedule C (or Schedule F) individuals, including sole proprietors, self-employed individuals, and independent contractors, that is eligible for loan forgiveness is limited to either the prorated amount of 2019 or 2020 net profits or gross income as reported (or to be reported) on IRS Form 1040 Schedule C (or F) line 31 or line 7, as applicable, subject to the \$20,833 cap (see question 10 of [“Paycheck Protection Program: How to Calculate Maximum Loan Amounts – By Business Type”](#)), excluding any qualified sick leave equivalent amount for which a credit is claimed under section 7002 of the Families First Coronavirus Response Act (FFCRA) or qualified family leave equivalent amount for which a credit is claimed under section 7004 of FFCRA. Separate payments for health insurance, retirement, or state or local taxes are not eligible for additional loan forgiveness; health insurance and retirement expenses may not be added to the forgiveness amount. If the borrower did not submit its 2019 IRS Form 1040 Schedule C (or F) to the lender when the borrower initially applied for the loan, it must be included with the borrower’s forgiveness application.
  - If a Schedule C (or F) filer elects to use gross income to calculate its loan amount on a First Draw PPP loan and the borrower reported more than \$150,000 in gross income on the Schedule C (or F) that was used to calculate the borrower’s loan amount, the borrower will not automatically be deemed to have made the statutorily required certification concerning the necessity of the loan request in good faith, and the borrower may be subject to review by the SBA of its necessity certification (i.e. the less than \$2 million loan necessity safe harbor will not apply to these borrowers).
- General Partners: The compensation of general partners that is eligible for loan forgiveness is limited to the prorated amount of their 2019 or 2020 net earnings from self-employment that is subject to self-employment tax, which is computed from 2019 IRS Form 1065 Schedule K-1 box 14a (reduced by box 12 section 179 expense deduction, unreimbursed partnership expenses deducted on their IRS Form 1040 Schedule SE, and depletion claimed on oil and gas properties) multiplied by 0.9235, all subject to the \$20,833 cap. Compensation is only eligible for loan forgiveness if the payments to partners are made during the covered period. Separate payments for health insurance, retirement, or state or local taxes are not



eligible for additional loan forgiveness. If the partnership did not submit its 2019 IRS Form 1065 K-1s when initially applying for the loan, it must be included with the partnership's forgiveness application.

- **LLC Owners:** LLC owners must follow the instructions that apply to how their business was organized for tax filing purposes in the reference year used to determine their loan amount.
- **Group Health Care Benefits** – Employer expenses for employee group health care benefits that are paid or incurred by the borrower during the covered period are payroll costs eligible for loan forgiveness. However, payroll costs do not include expenses for group health care benefits paid by employees (or beneficiaries of the plan) either pre-tax or after tax, such as the employee share of their health care premium. Forgiveness is not provided for expenses for group health benefits accelerated from periods outside the covered period.

If a borrower has an insured group health plan, insurance premiums paid or incurred during the covered period qualify as “payroll costs,” as long as the premiums are paid during the applicable period or by the next premium due date after the end of the applicable period.

- **Retirement Benefits** – Generally, employer contributions for employee retirement benefits that are paid or incurred by the borrower during the covered period qualify as “payroll costs” eligible for loan forgiveness. The employer contributions for retirement benefits included in the loan forgiveness amount as payroll costs cannot include any retirement contributions deducted from employees' pay or otherwise paid by employees. Forgiveness is not provided for employer contributions for retirement benefits accelerated from periods outside the covered period.
- **Eligible Non-payroll Costs** – An eligible non-payroll cost must be paid or incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period. As explained in the Forgiveness Rules, eligible non-payroll costs include any amounts paid during the covered period (regardless of when incurred if incurred *prior to* the covered period) and costs incurred during the covered period even if paid following the covered period. Other than in the case of mortgage interest, which the Forgiveness Rules expressly state cannot be prepaid, there is no express exclusion from eligible non-payroll costs for prepayments of utility or rental expenses.
- **Deductible Expenses:** The IRS had held that expenses that gave rise to PPP loan forgiveness were not deductible. The CAA reverses this rule and permits taxpayers whose PPP loans are forgiven to deduct the expenses relating to their loans to the extent they would otherwise qualify as ordinary and necessary business expenses. This rule applies retroactively to the effective date of the CARES Act so that expenses paid using funds from PPP loans previously issued under the CARES Act are deductible regardless of when the loan was forgiven.
- **Reduction in Forgiveness Amount:** The loan amount eligible for forgiveness will be reduced (i) **first**, dollar-for-dollar by the amount of any salary cut for any employee employed by the borrower during the covered period that is in excess of 25% of such employee's total salary or wages for the most recent full quarter before the covered period

and either (A) did not receive annualized compensation of \$100,000 or more in any pay period in 2019 or 2020 or (B) was not employed by the employer in 2019 or 2020; and (ii) **second**, proportionally for reductions in the average number of FTEs during the covered period compared to the average number of FTEs per month during a reference period selected by the borrower. The borrower can select one of the following reference periods: February 15, 2019 to June 30, 2019, January 1, 2020 to February 29, 2020, or, in the case of seasonal employers, average number of FTEs per month between February 15, 2019 to June 30, 2019; between January 1, 2020 and February 29, 2020; or any consecutive 12-week period between February 15, 2019 and February 15, 2020. Note, in the case of seasonal employers, if such seasonal employer elects to use a 12-week period between February 15, 2019 and February 15, 2020 to calculate its maximum PPP loan amount, the employer must use the same 12-week period as the reference period for calculation of any reduction in the amount of loan forgiveness. Form 3508 contains a worksheet that provides step-by-step instructions for calculating such reductions.

- **Reduction in Salary or Wages** – For purposes of calculating reductions in the loan forgiveness amount, the borrower should only take into account decreases in salaries or wages (not total compensation (e.g., bonus reductions)).
- **FTE Reduction Exception** – As detailed in SBA Form 3508, no reductions are required for the following categories of employees and the borrower can include the FTE calculation of such employees in its calculation of average FTE for the covered period (as if such employee were still employed). Categories (1) and (2) below are expressly contemplated in the PPPFA.
  - (1) any positions for which the borrower made a good-faith, written offer to rehire an individual who was an employee on February 15, 2020 and the borrower was unable to hire similarly qualified employees for unfilled positions **on or before** (a) December 31, 2020, for a PPP loan made before December 27, 2020 or (b) the last day of the covered period, for a PPP loan made on or after December 27, 2020;
  - (2) any positions for which the borrower made a good-faith, written offer to restore any reduction in hours, at the same salary or wages, during the covered period and the employee rejected the offer; and
  - (3) any employee who during the covered period (a) was fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of hours.

A borrower cannot include the FTE calculation for such employees if the position was filled by a new employee (*i.e.*, borrower cannot double-count such former and replacement employee for the same position). *For example, if during the selected covered period a borrower fired for cause an employee with an average of 20 hours paid per week, the borrower can include 0.5 FTE in its average FTE calculations even though that employee is no longer employed. However, if the borrower filled the position of the fired employee with a new employee and that new employee has an average of 30 hours paid per week, the borrower can include only the 0.75 FTE for the new employee.* Further, while not required to be submitted with its application, the borrower must retain documentation supporting the applicability of these exceptions (see **Question 8** below).

The FTE Reduction Exceptions apply to **all employees**, including employees who made more than \$100,000 in 2019 or 2020.

- **Average FTE** – Average FTE during the covered period is determined using the average number of hours paid per week, divided by 40, and rounded to the nearest tenth. This calculation is done on an employee-by-employee basis and the maximum FTE for each employee is capped at 1.0 (*for example: (i) if the average number of hours paid per week for an employee is 45, that employee counts as 1 FTE and (ii) if the average number of hours paid per work for an employee is 30, that employee would count as 0.75 FTE*). Borrowers can use a simplified method that assigns 1.0 for employees who work 40 hours or more per week and 0.5 for those who work fewer, but should note that doing so may understate FTEs if a borrower's employees are working less than 40 but more than 20 hours per week. New employees not employed during the reference period can be included in the calculation of average FTE for the covered period.
- **No Double Penalty for Salary Decline Due to FTE Reduction** – Under the Forgiveness Rules, to ensure that borrowers are not doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction. (*The SBA provides the following example: "An hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE of 1.0) and the borrower reduced the employee's hours to 20 hours per week during the covered period (FTE of 0.5). There was no change to the employee's hourly wage during the covered period. Because the hourly wage did not change, the reduction in the employee's total wages is entirely attributable to the FTE reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee."*)
- **Safe Harbors to Forgiveness Reduction:**
  - **Salary/Hourly Wage Reduction Safe Harbor** – The safe harbor for reductions in salary/wages of applicable employees must be assessed on an employee-by-employee basis.
    - **Pre-Economic Aid Act PPP loans** – A borrower who received a loan prior to the Economic Aid Act (December 27, 2020) is exempt from a reduction with respect to an employee if both: (1) the borrower reduced that employee's compensation by more than 25% in the period beginning February 15, 2020 and ending April 26, 2020; and (2) the *average* annual salary or hourly wages of that employee as of December 31, 2020 is equal to or greater than that employee's annual salary or hourly wages as of February 15, 2020.

Form 3508 (PPP Schedule A Worksheet) indicates that this safe harbor applies if the reduction is restored as of the *earlier* of December 31, 2020 and the date that the forgiveness application is submitted. Therefore, borrowers were not required to wait until year-end to restore compensation and submit a forgiveness application. Borrowers could restore compensation levels at an earlier time, and, once restored, utilize the safe

harbor in a forgiveness application. It remains, however, an open question as to how long such restored compensation must be preserved.

- **Post-Economic Aid Act PPP loans** – For a borrower who received a loan after the enactment of the Economic Aid Act, such loan is exempt from a reduction with respect to an employee if both: (1) the borrower reduced that employee’s compensation by more than 25% in the period beginning February 15, 2020 and ending April 26, 2020; and (2) the *average* annual salary or hourly wages of that employee as of the last day of the covered period for such loan is equal to or greater than that employee’s annual salary or hourly wages as of February 15, 2020.
- **What does “average” mean?** – The implication of “average” in this context is unclear. Is it sufficient for compensation to be restored by December 31, 2020 to the same annualized salary amount or hourly wages that an employee was receiving on February 15, 2020 (*for example, if an employee was making \$5,000 per month (\$60,000 annualized salary) as of February 15 and is reduced to \$3,000 per month on March 1, does that employee simply need to be restored to \$5,000 per month going-forward as of December 31*)? Does “average” imply that an employee needs to be “caught up” so the average salary or hourly wages for year-to-date as of December 31, 2020 (or for post-Economic Aid Act PPP loans, the end of the covered period for a PPP loan) is equal to or greater than annual salary or hourly wages as of February 15, 2020 (*for example, would the employee need to receive \$8,000 to make up for \$2,000 less in monthly compensation for March – June, so that the employee’s average annualized salary as of December 31 is the same as on February 15 (\$60,000)*)? This is a critical question, as being required to deliver make-up payments will likely prove untenable for many employers. In our experience, the general practice to date has been to assume that the salary or the hourly wages of a given employee as of the last day of the covered period needs to be equal to or greater than that employee’s salary or hourly wages as of February 15, 2020 to qualify for this safe harbor, reading out the “average.”
- **Employee Availability FTE Reduction Safe Harbor (FTE Reduction Safe Harbor 1 in Form 3508)** –
  - **Pre-Economic Aid Act PPP loans** – The PPPFA added an exemption (that applies during the period beginning February 15, 2020 and ending December 31, 2020) from the reduction in loan forgiveness for reduction of the number of FTEs if a borrower in good faith is able to document an inability to return to the same level of business activity as such business was operating before February 15, 2020 due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the director of the CDC, or OSHA (or any state or local government shutdown orders issued pursuant to such guidance) during the period beginning on March 31, 2020 and ending on December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirements related to COVID-19.

This safe harbor is captured in the [Interim Final Rule](#) on loan forgiveness published on June 22, 2020, and protects a borrower broadly from any reductions in FTE levels between February 15, 2020 and the end of the covered period due to compliance with requirements/guidance of the above federal departments (or any state or local government shutdown orders issued in compliance with such federal requirements or guidance). The borrower must expressly certify as to the applicability of this safe harbor. Important questions remain with respect to this safe harbor:

- Does this safe harbor provide complete coverage from an FTE-based reduction to the forgiveness amount regardless of the duration or the extent of the reduction in the level of business activity? For example, if a borrower was required to operate at half capacity for only 3 weeks of the period between February 15, 2020 and the end of the covered period, does this safe harbor nonetheless provide complete protection? The answer appears to be yes and in our experience this has been the general practice to date.
- How is “same level of business activity” defined? Is this purely a measure of physical operations (e.g., a business was required to close, operate at less than full capacity, or provide curb-side pickup/delivery/take-away services), or can it be measured in terms of economic reductions (e.g., if a business remained completely open, but due to COVID-19 and related federal guidelines/requirements suffered a decline in demand for its services)?
- **Post-Economic Aid Act PPP loans** – Form 3508 has been updated to reflect the changes under the Economic Aid Act, and the exemption period for a PPP loan made after December 27, 2020 applies from March 1, 2020 until the last date of the covered period for any such loan.
- **FTE Reduction Safe Harbor (FTE Reduction Safe Harbor 2 in Form 3508)** –
  - **Pre-Economic Aid Act PPP loans** – Borrower is exempt from the reduction in loan forgiveness for reduction of the number of FTE employees if both of the following conditions are met: (1) the borrower **reduced** its average FTE levels in the period beginning February 15, 2020 and ending April 26, 2020; and (2) the borrower restored, by **not later than December 31, 2020**, its total FTE levels to its total FTE levels for the pay period inclusive of February 15, 2020. Borrower is instructed to calculate FTE for each relevant period (February 15 to April 26, 2020, the pay period inclusive of February 15, 2020, and total FTE as of December 31, 2020) using the same calculation methods required for determining average FTE during the covered period (described above).

Form 3508 (PPP Schedule A Worksheet) indicates that FTE Reduction Safe Harbor 2 applies if the reduction is restored as of the earlier of December 31, 2020 and the date that the forgiveness application is submitted. Borrowers were not required to wait until year-end to restore

FTE levels and submit a forgiveness application. Borrowers could restore FTE levels at an earlier time, and, once restored, utilize this safe harbor in a forgiveness application. It remains, however, an open question as to how long such restored FTE levels must be preserved. Note that, as written, the condition in Form 3508 and the Forgiveness Rules that the borrower must have reduced average FTE employees during the February 15 to April 26, 2020 period seems to imply that so long as the borrower had any reduction during that period *all reductions* (whether during that period or after) could have been cured by December 31, 2020. This conflicts with prior guidance that suggested that reductions occurring *after* April 26, 2020 were incurable.

- **Post-Economic Aid Act PPP loans** – Under the Economic Aid Act, the restoration must instead occur by the end of the covered period for a PPP loan made after December 27, rather than December 31, 2020, and Form 3508 has been updated accordingly.
- **All or Nothing Test** – The FTE reduction safe harbor appears to be an “all or nothing” test and any partial restoration in total FTE as of December 31, 2020 for pre-Economic Aid Act PPP loans and the end of the applicable covered period for post-Economic Aid Act PPP loans below the total FTE for the pay period inclusive of February 15, 2020 is insufficient for the safe harbor.
- **Simplified Option** – Form 3508 (PPP Schedule A Worksheet) provides borrowers a simplified option to determine if an FTE-based reduction in the forgiveness amount is required. If a borrower “has not reduced the number of [its] employees or the average paid hours of [its] employees between January 1, 2020 and the end of the Covered Period,” then the borrower is not subject to an FTE-based reduction. While not a “safe harbor,” this provision is effectively a short-cut around the morass of calculating a borrower’s FTE-based reduction to the forgiveness amount. Note however that it is unclear if this option is conditioned on (i) no reductions *on average* between January 1, 2020 and the end of the covered period as compared to the numbers of employees or average paid hours as of January 1, 2020 (such that reductions restored during the covered period) would not affect the availability of this safe harbor), or (ii) no reductions at all, at any time during such period (even if restored).
- **Open Questions on FTE Reductions:** Some important questions remain open, including:
  - If a borrower restored or restores employee compensation or FTE levels prior to the end of the applicable period (whether December 31, 2020 or the end of the covered period for the applicable PPP loan) and submits a forgiveness application availing itself of the applicable safe harbor, how long does such restored compensation/FTE level need to be preserved? There is no guidance related to if and what a borrower is required to do after December 31, 2020 or the end of the covered period. Would there be any consequences to a borrower reducing its FTE count and/or reducing compensation to employees at that point in time? Form 3508 does require the borrower to provide the number of its employees as of the date it applied for the loan and as of the date it applied for forgiveness. Is that meaningful

in any way? Given that the loan forgiveness process is likely to last several months after the end of the covered period, this could be an important issue.

- It remains unclear how a fully-furloughed employee who is not receiving compensation, but continues to receive benefits from the borrower, is to be treated for purposes of calculating (and reducing) the forgiveness amount. While the Forgiveness Rules indicate that a reduction in an employee's wages/salary that is the result of a reduction in hours does not create a "double penalty" for purposes of reducing the forgiveness amount (such that only the FTE-based reduction applies), what about a fully-furloughed employee who has had their hours eliminated (and as a result their compensation reduced to \$0)? Is it indeed the case that if a borrower was forced to fully furlough 50% of its workforce, in part to ensure sufficient funds to continue to pay for the healthcare benefits for such employees, that the borrower may suffer a 50% reduction in its forgiveness amount?

- **Forgiveness Application Review Process:**

- **Application Review Flag:** Borrowers that, together with their affiliates, received PPP loans in excess of \$2 million are required to check a box on Form 3508 to so indicate. This will be used to flag applications required to be reviewed by the SBA.
- **Certifications and Materials:** Borrowers must certify (among other certifications) that the dollar amount for which forgiveness is requested (i) was used only for eligible expenses, (ii) has been appropriately reduced (for compensation or average FTE reductions), (iii) includes payroll costs equal to at least 60% of the forgiveness amounts, and (iv) for any owner-employee or self-employed individual/general partner, does not exceed **2.5 months** of compensation for the year used to calculate the PPP loan amount, capped at \$20,833 in total per individual across all businesses. The application also reinforces that there are potential criminal charges for false claims in connection with the information provided in the application or supporting documents or if funds were knowingly used for unauthorized purposes. Form 3508 includes a fulsome list of materials that a borrower must submit and/or prepare and maintain with respect to its application for forgiveness (see **Question 8** below), and makes clear that the borrower must retain all such materials for 6 years and provide SBA authorized representatives access upon request.
- **Forgiveness Application Timing:** To receive loan forgiveness, a borrower must submit its Form 3508 together with the other materials required under Form 3508 or requested by the lender (see **Question 8** below) **within 10 months** of the completion of the covered period. The [Interim Final Rule](#) on loan forgiveness, published on June 22, 2020, clarifies that a borrower may submit a loan forgiveness application any time on or before the maturity date of the loan, **including before the end of the covered period**, if the borrower has used all of the loan proceeds for which the borrower is requesting forgiveness. As affirmed in the Loan Forgiveness FAQs, so long as a borrower submits its loan forgiveness application within that time frame, the borrower is not required to make any payments until the forgiveness amount is remitted to the lender by the SBA. If the loan is fully forgiven, the borrower is not responsible for any payments. If only a portion of the loan is forgiven, or if the forgiveness application is denied, any remaining balance due on the loan must be repaid by the borrower on or before the maturity date of the loan.

- **Forgiveness Application and Review for PPP loans of up to \$150,000:** Loans that are not more than \$150,000 may be forgiven if the PPP borrower submits a one (1) page certification, Form 3508S, which, consistent with the requirements of the Economic Aid Act, contains: (i) the number of employees the eligible recipient was able to retain because of the covered loan, (ii) the estimated amount spent on payroll costs, and (iii) the total loan value. A borrower with a loan of \$50,000 or less, other than any borrower that together with its affiliates received (x) First Draw PPP Loans totaling \$2 million or more or (y) Second Draw PPP Loans totaling \$2 million or more, has the additional benefit of being exempt from any reduction in the borrower’s loan forgiveness amount based on reduction in FTE employees or reductions in employee salary or wages that would otherwise apply. By completing such form, the PPP borrower attests that the information provided is accurate and that it complied with the requirements under section 7(a)(36). Such PPP borrower is required to retain records that affirm compliance with such requirements (as to employment records, for the four (4) year period following submission, and for other records, for the three (3) year period following submission). The Economic Aid Act expressly states that such PPP borrower is not required to submit as part of the forgiveness application process any additional application or documentation to substantiate forgiveness. This new easy application process for loans of not more than \$150,000 has retroactive effect, and applies to existing PPP loans and PPP loans made on or after the enactment of the Economic Aid Act. The SBA can review and audit such loans and access any records the borrower is required to retain.
  
- **Forgiveness Review for PPP loans in excess of \$150,000:** The Economic Aid Act does not alter the existing rules and processes for reviewing PPP loans with a principal balance in excess of \$150,000.
  - The Review Rules (as currently in effect) require the lender to confirm receipt of all requisite forgiveness documentation and to use such materials to confirm certain of the borrower’s calculations as part of a “good-faith review.” The lender may rely on borrower representations/certifications and the onus remains on the borrower to provide an accurate calculation of the loan forgiveness amount and to supply accurate information and calculations in its forgiveness application.<sup>xv</sup> If lenders identify errors in a borrower’s calculation or material lack of substantiation in the supporting documents, lenders are directed to work with the borrower to remedy the issue (*i.e.*, as opposed to denying forgiveness without an opportunity to ameliorate such deficiencies).
  
  - The lender must make a determination as to loan forgiveness not less than 60 days from receipt of a “complete application” and report its decision to the SBA. The lender must also notify the borrower of its decision.
  
  - **Lender Confirmation Required for PPP Forgiveness Submissions** – The lender must confirm the following for each PPP forgiveness submission before the SBA will accept the submission:
    - (1) the submission accurately reflects the lender’s decision regarding the borrower’s loan forgiveness application;
  
    - (2) the information provided by the lender to the SBA with the submission accurately reflects the lender’s records for the PPP loan;



- (3) the lender has made its decision in accordance with the requirements set forth in Part III.2.a. of the [PPP Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities](#), as amended;
  - (4) the PPP loan has not been cancelled or repaid; and
  - (5) the lender has not issued a previous loan forgiveness decision to the SBA for this PPP loan, unless it is a resubmission following a rejection or a reconsideration of a denial without prejudice.
- **Lender Approves Forgiveness (All or Part)** – If a lender determines a borrower is entitled to forgiveness of all or a portion of the amount requested, the lender must request payment from the SBA when it delivers its forgiveness determination to the SBA.<sup>xvi</sup> The SBA will, not later than 90 days after the lender issues its decision to the SBA, remit the forgiveness amount to the lender, plus any interest accrued through the date of payment (previously, EIDL COVID-19 advances would have reduced this amount, but such a reduction was eliminated under the Economic Aid Act). This timeframe is subject to any SBA review of the loan/loan application, during which time a loan may not be forgiven (the SBA Review Process is discussed further below). The forgiveness process may take as many as 150 days assuming no issues that create delays (e.g., SBA/lender information requests, SBA undertakes a review of the loan/loan application).

Per the Review Rules, if the amount remitted by the SBA exceeds the remaining principal balance because the borrower made scheduled payments on the loan after the payment deferral date, the lender must pay the excess amount (including accrued interest) to the borrower.

- **Lender Denies Forgiveness (All or Part)** – If a lender issues its decision to the SBA that all or a portion of the requested forgiveness amount is to be denied, the lender must (i) provide the SBA a reason for such denial, and (ii) notify the borrower of such decision. The SBA has the right to review such determination in its sole discretion. Within 30 days of notice from the lender, a borrower may request that the SBA review the lender’s decision. While it appears that such review must be accomplished within the 90 day forgiveness-review period, the Review Rules are not clear and such review may exceed that time frame. If only a portion of the loan is forgiven or if the forgiveness request is denied, the balance must be repaid by the borrower on or before the 2-year maturity of the loan.
- **Reduction for EIDL Advances** – The CARES Act required that an EIDL advance (\$10,000) be deducted from a PPP loan borrower’s forgiveness amount. The Economic Aid Act removes this requirement, and it has retroactive effect to the enactment of the CARES Act.
- **PPP Forgiveness Platform** – Treasury and the SBA have published guidance on the procedures for lender submission of PPP loan forgiveness decisions to the SBA and SBA loan forgiveness reviews, which is available for [download](#). The SBA has partnered with a financial services technology provider – Goldschmitt-CRI – to make available a secure SaaS platform (the “[PPP Forgiveness Platform](#)”) to accept loan forgiveness decisions, supporting documentation, and requests for

forgiveness payments. The PPP Forgiveness Platform is available only to PPP lenders, not PPP borrowers. However, under the [Interim Final Rule](#) published on July 28, 2021, a PPP lender can choose to opt-in to the direct borrower forgiveness process, in which case the PPP Forgiveness Platform will provide a single secure location for all of that lender's borrowers with loans of \$150,000 or less to apply for loan forgiveness through the PPP Forgiveness Platform using the electronic equivalent of SBA Form 3508S. Upon receipt of notice that a borrower has applied for forgiveness through the PPP Forgiveness Platform, lenders will review the loan forgiveness application in the PPP Forgiveness Platform and issue a forgiveness decision to the SBA inside the PPP Forgiveness Platform.

The PPP Forgiveness Platform makes available a user interface for lenders to review certain loan forgiveness applications, upload required data and documentation, monitor the status of the forgiveness request, and respond to the SBA in case of an inquiry or if the SBA selects the loan for review. Lender submissions may be rejected by an initial screening process in the PPP Forgiveness Platform, including if they are incomplete or contain errors. If a lender submission is rejected, the lender will be notified by the PPP Forgiveness Platform. The lender must then correct the submission and resubmit it to the SBA. Lender correction of a submission will restart the 90-day period for the SBA to remit the payment.

- **Forgiveness Audit Plan:** The Economic Aid Act requires the SBA to present to Congress by February 10, 2021 (45 days after the December 27, 2020 enactment of the Economic Aid Act) an audit plan that details (i) policies and procedures that the SBA intends to use for conducting forgiveness reviews and audits of PPP loans and the metrics that will be used to determine which loans to audit. Within 30 days after the submission of such audit plan (and on a monthly basis thereafter), the SBA must submit to Congress a report on the forgiveness review and audit activities conducted that will include (i) the number of active reviews and audits, (ii) the number of reviews and audits that have been ongoing for more than 60 days, and (iii) any substantial changes made to the audit plan.
- **PPP in the Context of M&A Transactions:**
  - On October 2, 2020, the SBA published a procedural notice (Control No. 5000-20057) regarding PPP loans and changes of ownership (the "[Notice](#)"). The Notice describes the circumstances under which notice and consent of the PPP lender and the SBA may be required in connection with a "change of ownership" of a PPP borrower. The Notice further details the actions that the parties to a change of ownership transaction can take to negate the requirement of SBA approval.
  - **What constitutes a Change of Ownership:** For purposes of the PPP, a "change of ownership" will be considered to have occurred when (1) at least 20% of the common stock or other ownership interests of a PPP borrower ([including](#) a publicly traded entity) is sold or otherwise transferred, whether in one or more transactions, [including](#) to an affiliate or an existing owner of the entity, (2) the PPP borrower sells or otherwise transfers at least 50% of its assets (measured by fair market value), whether in one or more transactions, or (3) a PPP borrower is merged with or into another entity. Note that the guidance appears to apply only to a change in ownership of the PPP borrower itself and not to transactions in any parent entity.

- **Aggregation of Post-Approval Transactions:** All sales or transfers occurring following the approval date of the PPP loan (*i.e.* the operative date, not the disbursement date) are aggregated to determine whether a change of ownership has occurred or is occurring.
- **Publicly Traded Borrowers:** The applicability of the aggregation construct is somewhat limited in the case of publicly traded PPP borrowers. Only sales/transfers that result in one person or entity holding or owning at least 20% of the common stock or other ownership interest of the PPP borrowers are aggregated. As noted above, under the Economic Aid Act, public companies will not be eligible for PPP loans going forward.
- **No Approval Required:** The new guidance means that transfers of less than 20% of common stock or ownership interests or less than 50% of the assets of a borrower do not require SBA approval. These transactions may or may not require the PPP lender's approval, depending on the loan documentation.
- **Retention of Responsibility:** Notwithstanding a change of ownership, the PPP borrower remains responsible for: (1) performance of all obligations under the PPP loan; (2) certifications made in connection with the PPP loan application, including economic necessity; (3) compliance with all other applicable PPP requirements; and (4) obtaining, preparing, and retaining all required PPP forms and supporting documentation and providing such forms/documentation to the PPP lender or the SBA upon request. A change of ownership does not impact the SBA's rights and remedies in the case of fraud, false statements, and unauthorized uses of PPP loans with respect to the PPP borrower.<sup>xvii</sup>
- **Notices to the PPP Lender:** While most PPP loan Notes already provide that a PPP lender<sup>xviii</sup> must be notified and its consent obtained prior to the closing of a change of ownership, the Notice affirms that in all instances (which appears to cover instances where a PPP loan Note may be silent as to Lender consent/notices) the PPP borrower must deliver written notice to the PPP lender prior to the closing of a contemplated change of ownership transaction. That notice must include the agreements/documents that effectuate the transaction (*i.e.*, equity purchase agreement, merger agreement, asset purchase agreement, etc.). The language of the Notice suggests that the PPP lender must receive a notice regardless of whether there are restrictions on the change of ownership (discussed below).
- **Not Subject to Restrictions if PPP Note is Fully Satisfied at Closing:** The Notice provides that there are no restrictions on a change of ownership if, prior to the closing, the PPP borrower has either:
  - (a) repaid the PPP Note in full (which would seem to encompass, e.g., a payoff at the closing of an acquisition transaction as is typical for target indebtedness), or
  - (b) completed the loan forgiveness process and (i) the SBA has remitted funds to the PPP lender in full satisfaction of the PPP Note; or (ii) the PPP borrower has repaid any remaining PPP loan balance.
- **Restrictions Apply if the PPP Note is Not Fully Satisfied at Closing:** A change of ownership of a PPP borrower is subject to restrictions when it is not fully satisfied (either through payoff or forgiveness) prior to closing of the proposed transaction. Where the PPP loan remains outstanding as of closing and a change in ownership occurs, (i) in

certain instances only the PPP lender's consent will be required and (ii) in other instances the consent of both the lender *and* the SBA is required.

- **When is the SBA Prior Approval Not Required:** The Notice states that the prior approval of the SBA will not be required if the following conditions are met, in which case the PPP lender alone may approve the change of ownership:
  - **Equity Sale/Merger** – Common stock or other ownership interest in a PPP borrower may be sold/transferred without SBA approval if:
    - (a) **50% or less Transfer/Sale** – The sale/transfer is of 50% or less of the common stock or other ownership interest of the PPP borrower (for which purpose all post approval date transactions are aggregated); or
    - (b) **Completed Forgiveness Application and Escrowed Funds** – (i) The PPP borrower completes a forgiveness application reflecting its use of all of the PPP loan proceeds and submits it (with required supporting documents) to the PPP lender, and (ii) an amount equal to the outstanding balance of the PPP loan is deposited into an interest-bearing escrow account that is controlled by the PPP lender. Escrowed funds will be disbursed following the forgiveness process (including any appeal of an SBA decision) to first satisfy any remaining PPP loan balance (principal + interest) and then as directed by the transaction parties.
  - **Asset Sale** – 50% or more of a PPP borrower's assets (measured by fair market value) may be sold without SBA approval if the forgiveness application is completed and escrow established (as described above, including with respect to the release of escrowed funds).<sup>xix</sup>
- **When is the SBA Prior Approval Required:** If the conditions described above are not satisfied, then the PPP lender cannot unilaterally approve a change of ownership and the SBA's prior approval is also required.
  - **SBA Approval Request** – To obtain such SBA approval, the PPP lender must submit a request to the SBA. Note that it is the PPP lender and not the PPP borrower that must submit this request, which may have additional ramifications on transaction timing (e.g., as any follow-up SBA request would first have to be reviewed and relayed by the PPP lender). Such a request must include the following: (i) the reason that the PPP borrower cannot fully satisfy (i.e., repay) the PPP Note or escrow funds (as described above); (ii) the details of the requested transaction; (iii) a copy of the executed PPP Note; (iv) any LOI and the purchase or sale agreement setting forth the responsibilities of the PPP borrower, seller (if different from the PPP borrower), and buyer; (v) disclosure of whether the buyer has an existing PPP loan (and if so, the SBA loan number); and (vi) identification of all owners of 20% or more of the purchasing entity.
  - **Additional Risk Mitigation Measures** – The SBA (as it deems appropriate) may require “additional risk mitigation measures” as a condition to its approval. This broad language renders it difficult to ascertain what such additional mitigation measures may entail.

- **Asset Sales** – The SBA’s approval of a sale of 50% or more of a PPP borrower’s assets (measured by fair market value) will be conditioned on the purchasing entity assuming all of the PPP borrower’s obligations under the PPP loan (including responsibility for compliance with the PPP loan terms), which assumption must be explicitly addressed in the transaction agreement or in a separate assumption agreement that is submitted to the SBA.
  - **Timing** – The SBA will provide a determination within 60 days of its receipt of a complete request.
- **Additional Rules for ALL Sales/Transfers of Common Stock or Other Ownership Interests or Mergers:** For all equity sales/transfers or mergers constituting a change of ownership, whether or not the SBA’s prior approval is required (as described above), the Notice imposes the following additional obligations:
- **Retention of Obligations** – Without limiting the general language (described above) regarding retention of obligations, the Notice expressly provides that the PPP borrower (or if the PPP borrower is not the surviving entity in merger, the successor to the PPP borrower) will remain subject to all obligations under the PPP loan.
  - **Recourse Against Owners for Unauthorized Use** – The SBA will have (direct) recourse against any new owner(s) that use PPP funds for unauthorized purposes.
  - **Responsibilities if Owner(s)/Successor Have a PPP loan** – If any of the new owner(s) or the successor arising from such a transaction has a separate PPP loan, then, following the closing: (i) in the case of an equity sale/transfer, the PPP borrower and the new owner(s) are responsible for segregating and delineating PPP funds and expenses and providing documentation to demonstrate compliance with PPP requirements by each PPP borrower, and (ii) in the case of a merger, the successor is responsible for segregating and delineating PPP funds and expenses and providing documentation to demonstrate compliance with PPP requirements with respect to both PPP loans.
  - **PPP Lender Reporting Obligations** – Within 5 business days of closing, the PPP lender must notify the SBA (to the appropriate SBA Loan Servicing Center) of (i) the identity of the new owner(s); (ii) the new owner(s) ownership percentage(s); (iii) the TIN(s) of any owner(s) holding 20% or more of the equity in the business; and (iv) the location and size of any escrow account under the control of the PPP lender.
- **Acquisition Does NOT Cause Forfeiture of Employee Retention Tax Credit:** Whereas the CARES Act denied the Employee Retention Tax Credit (“ERTC”) to any employer that receives a PPP loan, and defined the term “employer” expansively, potentially causing acquiring corporations with ERTCs to lose or recapture those tax credits if they acquired a target company that had received a PPP loan, the CAA instead permits an employer that receives a PPP loan, whether by acquisition of a company with a PPP loan or direct application for a PPP loan, to receive an ERTC. This change applies retroactively to the effective date of the CARES Act. For additional information on the tax provisions contained in the CAA more broadly please see our *Tax Talks* blog post [Coronavirus: President Trump Signs Consolidated Appropriations Act, 2021; Summary of the Tax Provisions](#).

- **SBA Review Process:** Under the [Review Rules](#), the SBA has broad authority to review any PPP loan at any time, in its discretion (including after a loan is forgiven).
  - **Scope of Review:** The SBA may review: (i) borrower eligibility (based on the CARES Act, rules and guidance in effect at the time of its application, and its Form 2483), including the application of the SBA’s affiliation rules (see Size Standard and Affiliation above) and list of ineligible industries (as modified for the PPP) (see Ineligible Industries below); (ii) loan amount calculation and use of proceeds; and (iii) loan forgiveness amount claimed by the borrower. If the SBA undertakes a review of a PPP loan, it will notify the lender and the lender must notify the borrower in writing within 5 business days. A lender cannot approve any application for loan forgiveness until the SBA notifies the lender in writing that it has completed its review.
  - **SBA Requests:** If loan documentation submitted to the SBA or any other information indicates that a borrower may be ineligible for a PPP loan or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower, the SBA will (directly or via the lender) request additional information from the borrower and the SBA will consider all information provided in response. Failure to respond may result in a finding of ineligibility or that a borrower is ineligible for the loan amount/forgiveness amount claimed.
  - **SBA Determinations:** If the SBA determines that a borrower was ineligible for the PPP loan (*e.g.*, because the borrower lacked an adequate basis for the certifications made in its PPP loan application) the loan will not be eligible for loan forgiveness and the SBA will direct the lender to deny the forgiveness application. If the SBA determines that the borrower is ineligible for the loan amount or forgiveness amount claimed, the SBA will direct the lender to deny the loan forgiveness application in whole or in part, as applicable. Such denial may be in addition to the SBA’s exercise of other remedies (including, *e.g.*, repayment of the PPP loan) and may expose the borrower to penalties (discussed below under “Consequences of a False Filing”)
  - **Appeal of Final SBA Loan Review Decisions:** An Interim Final Rule published on August 11, 2020 contains a largely technical set of rules governing how a borrower can appeal to the SBA’s Office of Hearings and Appeals (the “OHA”)<sup>xx</sup> certain final “SBA Loan Review Decisions.” SBA Loan Review Decisions are limited to a final written finding by the SBA that a borrower (1) was ineligible for a PPP loan; (2) was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses; (3) is ineligible for PPP loan forgiveness in the amount determined by the lender in its full or partial approval decision issued to SBA; and/or (4) is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA. Only final SBA Loan Review Decisions can be appealed to the OHA, and only the borrower itself has standing to bring an OHA appeal (individual owners and lenders do not have such standing). An appeal petition must be filed within 30 calendar days after (i) the borrower’s receipt of the final SBA Loan Review Decisions, or (ii) notification by the lender of the final SBA Loan Review Decisions, whichever is earlier. In bringing any such appeal, the borrower has the burden of proof, by a preponderance of the evidence, to establish that the SBA Loan Review Decision was based on a clear error of fact or law. A prevailing appellant is not entitled to recover attorney’s fees.

To be clear, a borrower cannot file an OHA appeal of a decision made by a lender concerning a PPP loan. Such a borrower must first request an SBA review of a lender

decision (in accordance with the [Interim Final Rule on SBA Loan Review](#), as amended). If the SBA renders a decision that constitutes an SBA Loan Review Decision, then it appears such a decision would be subject to an OHA appeal. Under the [Interim Final Rule](#) published on July 28, 2021, the SBA provided that if a borrower files an appeal petition with OHA within 30 calendar days after the borrower's receipt of the final SBA Loan Review Decision, then the deferment period for the borrower's PPP loan will be extended until OHA issues a final decision on the appeal. The borrower should notify the lender of the appeal so that the lender can extend the deferment period. An appeal to OHA is an administrative remedy that must be exhausted before judicial review of a final SBA Loan Review Decision may be sought in a federal district court.

- **Credit Elsewhere**: The SBA has waived the requirement that a borrower not be able to obtain financing elsewhere (but see discussion of the “necessity” certification above).
- **Disbursements**: Lenders must make a one-time, full disbursement of a PPP loan within 10 calendar days of approval (the date on which the SBA assigns a loan number). Loans that have not been disbursed because a borrower fails to submit required loan documentation within 20 days of loan approval are cancelled.
- **Other Economic Considerations**: PPP loans are non-recourse obligations provided that the loan proceeds are used for permitted purposes. No yearly or guarantee SBA fees will be charged.
- **Lender Fee Limits**: Processing fees paid to lenders will be based on the balance of the loan outstanding at the time of final disbursement.
  - **Pre-Economic Aid Act Loans** – For PPP loans made prior to December 27, 2020, a lender will receive a fee equal to a percentage of such final disbursement as follows: (i) 5.00% for loans of not more than \$350,000; (ii) 3.00% for loans of more than \$350,000 and less than \$2 million; and (iii) 1.00% for loans of not less than \$2 million. Lenders may not collect any fees from the applicant.
  - **Post-Economic Aid Act Loans** -- PPP loans made on or after December 27, 2020 are subject to the following adjusted fee scale for lender processing reimbursement: (i) the lesser of \$2,500 and 50 percent of the balance of the financing outstanding at the time of disbursement, for loans of not more than \$50,000, (ii) 5.00% for loans of more than \$50,000 and not more than \$350,000; (iii) 3.00% for loans of more than \$350,000 and less than \$2.0 million; and (iv) 1.00% for loans of not less than \$2 million.

The Review Rules provide that if the SBA conducts a review of a PPP loan and determines that a borrower is ineligible, then the lender is not eligible for a processing fee. Lender fees are subject to claw-back within 1 year of disbursement of a PPP loan if the SBA determines that a borrower was ineligible. However, if the lender has received a processing fee on a loan that was cancelled or voluntarily terminated and repaid after disbursement (including if a borrower repaid the PPP loan proceeds to conform to the borrower's certification regarding the necessity of the PPP loan request), the SBA will not require the lender to repay the processing fee unless the lender is found guilty of an act of fraud in connection with the PPP loan.

- **Agent Fee Limits:** The CARES Act authorizes the SBA to establish limits on fees that can be collected by agents that assist applicants in applying for the PPP. The PPP Rules provide that the fees of such agents will be paid by the lender out of the fees the lender receives from the SBA (*i.e.*, the agent may not collect fees from the borrower or be paid out of PPP loan proceeds). The Economic Aid Act clarifies that PPP loan recipients may not pay agents retained to prepare applications for a covered loan with covered loan proceeds and lenders are only permitted to pay fees for which the lender directly contracts the agent. Further, lenders are not required to repay reimbursement for loans unless found guilty of fraud in connection with the covered loan. The total amount an agent can collect from a lender for providing such assistance is capped at: (i) 1.00% for loans of not more than \$350,000 ( $\leq$ \$3,500); (ii) 0.50% for loans of more than \$350,000 and less than \$2 million (\$1,750 - ~\$9,999); and (iii) 0.25% for loans of at least \$2 million (\$5,000+).
- **Application:** Each applicant seeking a 7(a) loan under the PPP is required to submit a Paycheck Protection Program Borrower Application Form (SBA Form 2483) (or [SBA Form 2483-C](#) for Schedule C filers using gross income) to a participating lender (together with any other documentation required by the lender as part of the application process (see **Question 4** below)).
  - The SBA published [guidance](#) effective as of January 6, 2021, addressing potential barriers to accessing capital for minority, underserved, veteran, and women-owned businesses to ensure equitable access to Second Draw Loans. Most notably, the SBA announced that it will (i) accept PPP loan applications only from community financial institutions for at least the first two days when the PPP loan portal re-opens on January 11, 2021, (ii) direct [Lender Match](#) (the SBA's free online tool to connect potential borrowers with SBA-approved lenders) borrower inquiries to small lenders who can aid traditionally underserved communities, and (iii) match small business through Lender Match with Certified Development Companies (non-profit organizations, each with a specific regional focus, that are certified by the SBA to administer SBA loans), Farm Credit System lenders (a nationwide lending network of financial institutions that provide credit to the agricultural community), microloan intermediaries, and traditional smaller asset size lenders.
- **Burden of Assessing Eligibility/Certifications:** PPP Rules and related SBA guidance place the burden on borrowers to confirm their own eligibility (including calculating payroll costs, assessing affiliation, and determining employee headcount) and the accuracy of the information they supply to lenders, permit lenders to rely on borrower certifications in determining loan eligibility, and provide that the SBA will hold lenders harmless for a borrower's failure to comply with PPP criteria.
- **Consequences of a False Filing:** An applicant is required as part of both Form 2483 (Loan Application) and Form 3508 (Forgiveness Application) to certify that it understands that knowingly making a false statement in order to obtain an SBA-guaranteed loan is punishable by law (including by imprisonment and significant monetary fines). Penalties include:
  - **Criminal Penalties** – Potential criminal penalties for false statements or fraud in connection with a PPP loan include (i) imprisonment of not more than 5 years and/or a fine of up to \$250,000 (18 USC §§ 1001 & 3571); (ii) imprisonment of not more than 2 years and/or a fine of not more than \$5,000 (15 USC § 645(a)); and (iii) imprisonment of



not more than 30 years and/or a fine of not more than \$1 million (18 USC § 1014).<sup>xxi</sup> Beyond the penalties expressly referenced in the PPP loan application, criminal penalties under other federal fraud statutes or SBA-specific criminal statutes (e.g., regarding embezzlement or concealment) may apply. For further discussion on the subject of potential criminal risks see our client alert [Rear View Mirror: Criminal Exposure for Companies that Received PPP loans under the CARES Act](#).

- **Civil Penalties** – In addition to criminal penalties, the government can pursue civil fraud remedies under the civil False Claims Act (31 U.S.C. 3729-3733) or the Program Fraud Civil Remedies Act (31 U.S.C. 3801-3812).

The threat of enforcement of such penalties is bolstered by the answer to Question 39 of the SBA's FAQs (published on April 29, 2020) and reiterated in the answer to Question 46 (published May 13, 2020) which state that the SBA "will review all loans in excess of \$2 million, *in addition to other loans as appropriate*, following the lender's submission of the borrower's loan forgiveness application" (emphasis added). Given the potential risks and heightened scrutiny from Treasury, the SBA, the U.S. Justice Department (nationally and regionally), and the public and press more broadly of the companies receiving PPP loans, it is imperative the applicants carefully read and consider all certifications being made in Form 2483, Form 3508, and in any other documentation submitted to the SBA or a PPP lender.

## **II. Key Terms of the Second Draw Program**

Section 7(a) of the Small Business Act is amended to add a new section (37) for the Second Draw Program. The parameters and terms governing the administration, permitted uses, and forgivable uses of the PPP and PPP loans are largely also applicable to the Second Draw Program and Second Draw Loans. On January 6, 2021, the SBA announced the Second Draw Rules, which confirm that the majority of the terms of the PPP Rules, as well as the FAQs and other guidance about PPP loans under section 7(a)(36) of the Small Business Act, also apply to the Second Draw Program. Below are terms and conditions specific to the Second Draw Program.

- **Eligibility:** Under the Second Draw Program, the parameters for borrower eligibility are narrower than under the PPP. To be eligible for a Second Draw Loan, an applicant must be a business concern, non-profit organization eligible for a First Draw PPP loan, housing cooperative, veterans organization, Tribal business concern, eligible self-employed individual, sole proprietor, independent contractor, small agricultural cooperative, eligible 501(c)(6) organization or destination marketing organization, an additional covered non-profit entity, a News Entity, or an Internet Publishing Organization that:
  - **Prior (Eligible) Borrower** – (i) has received a PPP loan and (ii) on or before the expected date on which a Second Draw Loan is disbursed, has used, or will use full amount of such PPP loan (the Second Draw Rules clarified that (A) "the full amount" of the borrower's PPP loan includes the amount of any increase on such PPP loan made pursuant to the Economic Aid Act and (B) the borrower must have spent the full amount of its PPP loan on eligible expenses under the PPP rules to be eligible for a Second Draw PPP Loan);
  - **Size Test** – employs not more than **300 employees**; and
  - **Gross Receipts Revenue Test** – demonstrates a loss of **not less than 25%** of gross receipts during at least one quarter in 2020 as compared to the corresponding quarter in

2019. In the case of a borrower of a Second Draw Loan of not more than **\$150,000**, this test can be satisfied by submission of a certification that the entity meets the applicable revenue loss requirement and later documentation supporting that the revenue loss standard was in fact met prior to submitting for forgiveness of the borrower's Second Draw Loan. Under the Second Draw Rules, a borrower that was in operation in all four quarters of 2019 is deemed to have experienced the required revenue reduction if it experienced a reduction in annual receipts of 25% or greater in 2020 compared to 2019 and the borrower submits copies of its annual tax forms substantiating the revenue decline. Note that any forgiveness amount of a PPP loan that a borrower received in calendar year 2020 is excluded from a borrower's gross receipts, consistent with the purpose of the Second Draw Program, which is to deliver additional aid to small businesses that previously received a PPP loan.

- **How to Determine a Borrower's Gross Receipts** – the SBA and Treasury posted new [guidance](#), effective as of January 19, 2021, explaining what “gross receipts” means for for-profit businesses and for non-profit organizations.
  - *For for-profit businesses* – Generally, gross receipts are all revenue in whatever form received or accrued from whatever source (including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions), reduced by returns and allowances but excluding net capital gains and losses.

Gross receipts do not include:

- 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;
- proceeds from transactions between a concern and its domestic or foreign affiliates; and
- amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder, or customs broker.

Subcontractor costs, reimbursements for purchases a contractor makes at customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts.

- *For non-profit organizations* – Gross receipts means gross receipts within the meaning of section 6033 of the Internal Revenue Code of 1986, which is the gross amount received by the organization during its annual accounting period from all sources without reduction for any costs or expenses including costs of goods or assets sold, cost of operations, or expenses of earning, raising, or collecting such amount. Thus, gross receipts for eligible non-profit organizations includes:
  - The gross amount received as contributions, gifts, grants, and similar amounts without reduction for the expenses of raising and collecting such amount,

- The gross amount received as dues or assessments from members or affiliated organizations without reduction for expenses attributable to the receipt of such amounts,
    - Gross sales or receipts from business activities (including business activities unrelated to the purpose for which the organization qualifies for exemption, the net income or loss from which may be required to be reported on Form 990-T),
    - The gross amount received from the sale of assets without reduction for cost or other basis and expenses of sale, and
    - The gross amount received as investment income, such as interest, dividend, rents, and royalties.
  - The SBA's affiliation rules and waivers of such rules under the PPP are applicable to the Second Draw Program (except under the Second Draw Program the threshold for eligibility is 300 employees rather than 500 employees). **In calculating its applicable gross receipts, the borrower must include the gross receipts of its affiliates** (unless a waiver of affiliation applies) by adding the gross receipts of the borrower with the gross receipts of each of its affiliates. If the borrower has acquired an affiliate or been acquired as an affiliate during 2020, gross receipts includes the receipts of the acquired or acquiring business. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose. However, if a company acquired a segregable division of another company during 2020, gross receipts do not include the receipts of the acquired division prior to the acquisition. Similarly, the gross receipts of a former affiliate are not included. This exclusion of gross receipts of such former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if the borrower sold a segregable division during 2020, the gross receipts will continue to include the receipts of the division that was sold.
- **Number of Second Draw Loans:** An eligible borrower may only receive one (1) Second Draw Loan.
- **Ineligible Businesses and Organizations:** The following businesses or organizations are expressly ineligible to receive Second Draw Loans:
  - as with the PPP, businesses that are ineligible to receive SBA loans under 13 C.F.R. 120.110 (other than non-profits and certain religious organizations, which are permitted);
  - any business engaged in political or lobbying activities (including one organized for research or for engaging in advocacy in areas such as public policy or political strategy, or one that describes itself as a think tank in any public documents);
  - any business or entity that is **20%** or more (including as equity shares or a capital or profit interest in an LLC or partnership), directly or indirectly, owned by an entity created in or organized under the laws of or that has significant operations in the People's Republic of China ("PRC") or the Special Administrative Region of Hong Kong ("HK");

- an entity that retains as a member of the board of directors a person who is a resident of PRC;
  - any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938; or
  - a person or entity that receives a Shuttered Venue Operators grant under section 24 of the Economic Aid Act.
- **Second Draw Loan Amount:** Generally, an eligible Second Draw Loan borrower can receive a loan amount equal to the product of (i) average total monthly payroll costs incurred or paid during, at the borrower's election, calendar year 2019 or 2020 and (ii) 2.5, subject to a cap of \$2.0 million. However, there are a few notable variations on the Second Draw Loan amount calculations:
    - **Seasonal Employers** – as with PPP loans, seasonal employers can instead calculate their average total monthly payments for payroll costs using any 12-week period between February 15, 2019 and February 15, 2020;
    - **New Entities** – businesses or organizations that were not in existence during the one (1) year period preceding February 15, 2020<sup>xxii</sup> calculate their average total monthly payments for payroll costs by (i) determining the sum of the total monthly payments for payroll costs paid or incurred as of the date on which the entity applies for a Second Draw Loan and (ii) dividing that total by the number of months in which such payroll costs were paid or incurred; and
    - **NAICS 72 Entities** – businesses in the “accommodation and food services” sector (NAICS code beginning with 72) may receive a maximum loan amount equal to the product of (i) average total monthly payroll costs incurred or paid during, at the borrower's election, calendar year 2019 or 2020 and (ii) **3.5**, subject to a cap of \$2 million.
    - **Self-Employed Applicants** – (i) self-employed borrowers with no employees may receive a maximum loan amount equal to the product of (A) the average monthly total net profits or gross income (subject to an annualized \$100,000 cap) and (B) 2.5 (or 3.5 for borrowers assigned a NAICS code beginning with 72), subject to a cap of \$20,833 (or \$29,167 for NAICS code 72 borrowers), and (ii) self-employed borrowers with employees may receive a maximum loan amount, equal to the product of (A) the sum of (i) the average monthly total net profits or gross income (subject to an annualized \$100,000 cap) and (ii) the average monthly total payment for employee payroll costs incurred by the borrower and (B) 2.5 (or 3.5 for borrowers assigned a NAICS code beginning with 72), subject to a cap of \$2 million.
      - For self-employed applicants that have employees, payroll costs for such employees are calculated using:
        - 2019 or 2020 gross wages and tips paid to such employees with a principal place of residence in the US (using 2019 or 2020 IRS Form 941 Taxable Medicare wages & tips from each quarter) *plus* any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips (net of any amounts paid to any individual employee in excess of \$100,000 annualized cap); and

- 2019 or 2020 employer group health, life, disability, vision, and dental insurance contributions and retirement contributions listed on the 2019 or 2020 Form 1040 Schedule C or F and state and local taxes assessed on employee compensation.
- **Single Corporate Group Cap:** While the Economic Aid Act does not specifically address whether the general cap of \$20 million of total PPP loans received by a single corporate group will also take into account Second Draw Loans (although it implies that they do not), the Second Draw Rules provide that businesses that are part of a single corporate group shall in no event receive more than \$4,000,000 of Second Draw Loans in the aggregate.
- **Second Draw Loan Application and Documentation Requirements:** The Second Draw Rules provide that the documentation required to substantiate an applicant's payroll cost calculation is generally the same as the documents required for PPP loans. However, no additional documentation to substantiate payroll costs will be required if the applicant (i) used calendar year 2019 figures to determine its initial PPP loan amount, (ii) used calendar year 2019 figures to determine its Second Draw Loan amount, and (iii) the lender for the applicant's Second Draw Loan amount is the same as the lender that made the initial PPP loan. The lender may, however, request additional documentation if, on further review, the lender concludes that it would be useful in conducting the lender's good-faith review of the borrower's loan amount calculation.
- **Necessity:** As with First Draw PPP loans, applicants for Second Draw PPP loans are required to certify that the "*current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.*" However, (as Question 46 of the FAQs indicates) because Second Draw PPP loan borrowers must demonstrate that they have had a 25% reduction in gross revenues, all Second Draw PPP loan borrowers will be deemed to have made the required certification concerning the necessity of the loan in good faith.
- **Second Draw Loan to Borrower with Unresolved PPP Loans:** If a borrower's PPP loan is under review by the SBA and/or information in SBA's possession indicates that the borrower may have been ineligible for the PPP loan it received or for the loan amount it received, the lender will receive notification from the SBA when the lender submits an application for a guaranty of a Second Draw Loan and will not receive an SBA loan number until the issue related to the borrower's unresolved PPP loan is resolved.
- **Forgiveness of Second Draw Loans:** The forgiveness rules governing PPP loans (as amended by the Economic Aid Act) are also applicable to Second Draw Loans, including the requirement that 60.0% of the Second Draw Loan amount must be utilized for forgiveness-eligible payroll costs. Under the [Interim Final Rule](#) published on January 19, 2021, for Second Draw Loans in excess of \$150,000, the borrower must submit its loan forgiveness application for the First Draw PPP loan before or simultaneously with the loan forgiveness application for the Second Draw Loan, even if the calculated amount of forgiveness on the First Draw PPP loan is zero. Note that a Second Draw Loan borrower with a principal amount of \$150,000 or less is required to provide documentation of revenue reduction if such documentation was not provided at the time of loan application. Alternatively, under the [Interim Final Rule](#) published on July 28, 2021, a Second Draw Loan borrower with a principal amount of \$150,000 or less is not required to provide documentation of revenue reduction if its COVID Revenue Reduction Score<sup>xxiii</sup> meets or exceeds the value required for validation of such borrower's revenue reduction. The score itself would be sufficient documentation of revenue reduction. If, however, the score does not meet the value required for validation of the borrower's revenue

reduction, and if the borrower has not already provided documentation to the lender that validates the borrower's revenue reduction, the borrower must provide such documentation.

- **Lender Fee Limits:** Processing fees paid to lenders will be based on the balance of the loan outstanding at the time of final disbursement. Second Draw Loans are subject to the following adjusted fee scale for lender processing reimbursement: (i) the lesser of \$2,500 and 50 percent of the balance of the financing outstanding at the time of disbursement, for loans of not more than \$50,000, (ii) 5.00% for loans of more than \$50,000 and not more than \$350,000; and (iii) 3.00% for loans of more than \$350,000.

The Review Rules provide that if the SBA conducts a review of a PPP loan and determines that a borrower is ineligible, then the lender is not eligible for a processing fee. Lender fees are subject to claw-back within 1 year of disbursement of a PPP loan if the SBA determines that a borrower was ineligible. However, if the lender has received a processing fee on a loan that was cancelled or voluntarily terminated and repaid after disbursement (including if a borrower repaid the PPP loan proceeds to conform to the borrower's certification regarding the necessity of the PPP loan request), the SBA will not require the lender to repay the processing fee unless the lender is found guilty of an act of fraud in connection with the PPP loan.

### **III. Tax Matters**

The following summarizes key tax provisions of the CAA relevant to the PPP and related matters, including the ERTC. For additional information on the tax provisions contained in the CAA more broadly please see our *Tax Talks* blog post [Coronavirus: President Trump Signs Consolidated Appropriations Act, 2021; Summary of the Tax Provisions](#).

- **Expenses Related to PPP Loan Forgiveness are Deductible:** Under the CARES Act, the forgiveness of a PPP loan does not give rise to taxable cancellation of indebted income, or a loss of tax attributes. However, the IRS had held that expenses that gave rise to PPP loan forgiveness were *not* deductible. The CAA reverses this rule and permits taxpayers whose PPP loans are forgiven to deduct the expenses relating to their loans to the extent they would otherwise qualify as ordinary and necessary business expenses. This rule applies retroactively to the effective date of the CARES Act so that expenses paid using funds from PPP loans previously issued under the CARES Act are deductible regardless of when the loan was forgiven.
- **Eligibility for the Employee Retention Tax Credit:** The CARES Act provided an eligible employer with a refundable payroll tax credit equal to 50% of certain "qualified wages" (including certain health plan expenses) paid to its employees beginning March 13, 2020 through December 31, 2020 if the employer is engaged in a trade or business in 2020 and the wages are paid (i) while operation of that trade or business is fully or partially suspended due to a governmental order related to COVID-19 (the "suspension test") or (ii) during the period beginning in the first quarter in which gross receipts for that trade or business are less than 50% of gross receipts for the same calendar quarter of 2019 and ending at the end of the first subsequent quarter in which gross receipts are more than 80% for the same calendar quarter of 2019 (the "gross receipts test"). The ERTC can be used to offset all federal payroll taxes, including federal withholding taxes, and the employer's and employee's share of social security tax and Medicare, but not the federal unemployment tax.

The CAA makes several changes to the ERTC and extends the availability of the ERTC through July 1, 2021. As discussed briefly above, one such change is that, whereas the CARES Act denied the ERTC to any employer that receives a PPP loan, and defined the term “employer” expansively, potentially causing acquiring corporations with ERTCs to lose or recapture those tax credits if they acquired a target company that had received a PPP loan, the CAA instead permits an employer that receives a PPP loan to receive the ERTC. However, to prevent any double-dipping, an employer must either exclude “qualified wages” that allowed the employer to claim ERTCs from “payroll costs” for purposes of determining its loan forgiveness under the PPP (so as to reduce the amount of loan forgiveness), or exclude “payroll costs” that qualified for PPP loan forgiveness from “qualified wages” (so as to reduce the ERTC). This change applies retroactively to the effective date of the CARES Act.

Additional changes (each of which is effective for calendar quarters beginning after December 31, 2020) are highlighted in the following chart and summarized below.

	<b>CARES Act</b>	<b>CAA</b>
<i>Limitations on credit</i>	50% of qualified wages; \$5,000 annual cap	70% of qualified wages; \$28,000 annual cap
<i>Eligibility of PPP borrowers</i>	Not eligible	Eligible (with election to exclude qualified wages from either payroll costs for PPP purposes or from calculation of credit). As noted above, this applies retroactively to the effective date of the CARES Act.
<i>Large employer threshold for additional limitations</i>	100 full-time employees	500 full-time employees
<i>Governmental organizations</i>	Not eligible	Certain governmental instrumentalities are eligible
<i>Availability</i>	Through December 31, 2020	Through July 1, 2021

- **Credit increased to 70% of qualified wages; cap on credit increased to \$28,000** – The CARES Act provided for a refundable payroll tax credit of 50% of certain “qualified wages,” capped at \$5,000/employee (50% of up to \$10,000 of qualified wages for all calendar quarters). The CAA increases the credit cap from \$5,000 for the year to \$7,000 (70% of \$10,000) for any calendar quarter. Accordingly, the CAA will increase the maximum amount of credit available in 2021 for each employee from \$5,000 to \$28,000.
- **Helpful changes to the gross receipts test** – Under the CARES Act, an employer qualified for the ERTC under the gross receipts test for the period beginning with the first calendar quarter for which gross receipts for the employer’s trade or business were less than 50% of gross receipts for the same calendar quarter of 2019 and ending at the end of the first subsequent quarter in which gross receipts were more than 80% for the same calendar quarter of 2019. Under the CAA, in 2021, an employer now qualifies for the period beginning in a calendar quarter in which the employer’s gross receipts are less than 80% (instead of 50%) of gross receipts for the same calendar quarter of 2019 and ending at the end of the first subsequent quarter in which gross receipts are more than 80% for the same calendar quarter of 2019. Furthermore, employers may elect to apply the gross receipts test based on gross receipts from the prior calendar quarter to determine their

eligibility for the ERTC. The CAA also makes the ERTC available in 2021 to employers that were not in existence in 2019 by permitting them to apply the gross receipts test based on 2020 gross receipts.

- **Large employer threshold** – For an employer with more than 100 full-time employees, the CARES Act imposed an additional restriction: the ERTC is available only with respect to wages paid to an employee who is not providing services due to circumstances described in (i) the suspension test or (ii) the gross receipts test. The CAA increases the threshold for this rule in 2021 to 500 full-time employees (so that employers with between 101 and 500 full-time employees would no longer be subject to this restriction).
- **Tax-exempt organizations and governmental entities** –
  - The CAA provides that, for purposes of the ERTC, the term “gross receipts” of a section 501(c) tax-exempt organization means the amounts the organization receives during its annual accounting period from all sources without subtracting any costs or expenses. This change applies retroactively to the effective date of the CARES Act.
  - Under the CARES Act, federal, state, or local governments (and their agencies) were not eligible for the ERTC. The CAA permits federal credit unions, public colleges and universities, and public medical and healthcare providers to receive the ERTC if they otherwise satisfy the requirements for the credit. For purposes of determining eligibility, public colleges and universities and public medical and healthcare providers are treated as being engaged in a trade or business.
- **Health plan expenses** – The CAA includes health plan expenses in the definition of “qualified wages” for purposes of the ERTC, including in cases where an employer furloughs employees but continues to provide health benefits to them. This change applies retroactively to the effective date of the CARES Act.
- **Social Security Tax Deferral**: The CARES Act permits employers to delay payment of the 6.2% **employer share** of the Social Security tax (but not the 1.45% employer share of the Medicare tax) from the date of enactment through December 31, 2020. The tax is payable over the following 2 years with half paid by December 31, 2021 and the other half by December 31, 2022. However, the deferral is **not** available for an employer who has a PPP loan forgiven. The deferral of the employer’s share of the Social Security tax was not extended by the CAA. On August 8, 2020, President Trump issued a [memorandum](#) permitting employers to defer payment of the Social Security portion of payroll taxes (i.e., the Old-Age, Survivors, and Disability Insurance tax under Section 3101(a) and Railroad Retirement Act Tier 1 tax under Section 3201(a)) for any employee with pre-tax wages or compensation during any biweekly pay period that were less than \$4,000 during the period between September 1, 2020 and December 31, 2020. The memorandum required the employers to withhold and pay the deferred payroll taxes from wages or compensation paid between January 1, 2021 and April 30, 2021. The CAA extends the repayment period to December 31, 2021. The longer period will result in less of the deferred amounts being subtracted from each paycheck.



#### IV. Frequently Asked Questions

- **Q1: What affiliation rules apply (for purposes of determining the number of employees of an applicant together with its affiliates)?** <sup>xxiv</sup>

**A:** According to the U.S. Treasury Department’s affiliation guidance, the four affiliation tests below are applicable to an affiliation assessment for purposes of determining eligibility under the PPP. The Treasury Department’s guidance (combined with language in the CARES Act rescinding the SBA’s February 2020 Interim Final Rule on affiliation standards) confirms that the pre-2020 SBA rules on affiliation (13 C.F.R. § 121.301(f)(1) – (4)) are the relevant affiliation rules for purposes of the PPP:

- Affiliation based on ownership;
  - Affiliation arising under stock options, convertible securities, and agreements to merge;
  - Affiliation based on management; and
  - Affiliation based on identity of interest between “close relatives.”
- **Q2: When is a minority shareholder deemed to have control (and therefore affiliation)?**

**A:** The SBA distinguishes between rights in respect of ordinary business actions and “extraordinary” business actions necessary to protect the minority investor’s investment. In instances where supermajority consent is required for **ordinary business actions**, the minority investor’s ability to block such actions gives rise to negative control and the investor will be **deemed an affiliate**. In contrast, a minority investor’s ability to block “**extraordinary**” **business actions** should **not** give rise to affiliation between a minority investor and the applicant. **Please note that this distinction is derived from SBA case law, not all of which is specific to the affiliation rules for 7(a) loan programs (like the PPP). Applicants are strongly encouraged to carefully assess any minority protections before determining that such protections do not give rise to affiliation.**

Examples of minority rights that have been determined to establish **control** by the minority investor and **result in affiliation** include the following:

- Making, declaring, or paying distributions or dividends other than tax distributions;
- Establishing a quorum at a meeting of stockholders (and likely, by extension, at a meeting of the board);

Examples of minority rights that are with respect to “extraordinary” business actions and have been determined **not to establish control** (and thus, **no affiliation**) include the following:

- Selling all or substantially all of the company’s assets;
- Placing an encumbrance or lien on all or substantially all of the company’s assets;
- Engaging in any action that could result in a change in the amount or

Examples of minority rights that have been determined to establish **control** by the minority investor and **result in affiliation** include the following:

- Approving or making changes to the company's budget or approving capital expenditures outside the budget;
- Determining employee compensation;
- Hiring and firing officers and executives;
- Blocking changes in the company's strategic direction;
- Establishing or amending an incentive or employee stock ownership plan;
- Incurring or guaranteeing debts or obligations;
- Initiating or defending a lawsuit;
- Entering into contracts or joint ventures; and
- Amending or terminating leases.

Examples of minority rights that are with respect to "extraordinary" business actions and have been determined **not to establish control** (and thus, **no affiliation**) include the following:

- character of a company's capital contributions;
- Changing the company's line of business;
- Engaging in a merger transaction (only applies to veteran-owned businesses);
- Issuing additional stock/equity;
- Amending the organizational documents of a company;
- Filing for bankruptcy;
- Amending the governing documents to materially alter the rights of the existing owners;
- Dissolving the company;
- Increasing, decreasing, or reclassifying the authorized capital of the company;
- Taking an action in contravention of a company's charter, bylaws, operating agreement, or similar governing documents;
- Disposing of the company's goodwill;
- Committing any act that would make it impossible for the company to carry on its ordinary course of business;
- Submitting a company's claim to arbitration;
- Entering into a confession of a judgment;
- Adding new members; and
- Approving an increase or decrease in the size of the company's board of directors or other governing body.

The SBA has confirmed that a minority shareholder can eliminate such affiliation if such shareholder "irrevocably waives or relinquishes" such rights.

- **Q3: When does a management agreement create "control"?**

**A:** Management agreements that give the management company sole discretion over the business operations with minimal oversight of the decision-making by the applicant, while not passive, create affiliation between the management company and applicant. However, affiliation is not created between the applicant and the management company if the management agreement includes “meaningful oversight” by the applicant over the management company’s activities. A management agreement that provides for the applicant business to do all of the following inherently provides for “meaningful oversight”: (i) approval of the annual operating budget; (ii) approval of any capital expenditures or operating expenses over a significant dollar threshold; (iii) control over bank accounts; and (iv) oversight over the employees operating the business.

- **Q4: In addition to the Form 2483, what other documentation are lenders asking for?**

- **A:** Lenders have generally requested the following, though they may request additional or alternative materials:

- IRS 940, 941, or 944 payroll tax forms for 2019, and if available, Q1 2020;
- Payroll processor records and other payroll reports/ledgers for 2019 and 2020 with corresponding bank statements (which should capture the following information: salary, wages, commission, or similar compensation; tips; vacation; parental, family, medical, or sick leave; group healthcare benefits; retirement benefits; and state or local taxes on employee compensation);
- 1099s for independent contractors;
- Documentation evidencing health insurance premiums under a group health plan;
- Documentation evidencing the sum of all retirement plan funding paid for by the applicant; and
- Organizational documents (articles of incorporation/organization, bylaws, operating agreement, partnership agreement, owners’ driver’s licenses, etc.) and tax identification numbers (EINs, SSNs or ITINs, as appropriate).

- **Q5: What non-profits are eligible for the PPP?**

**A:** Under the Cares Act, the Economic Aid Act, and the PPP Rules, the tax-exempt non-profit organizations described in section 501(c)(3) of the Internal Revenue Code (the “IRC”), the tax-exempt veterans organizations described in section 501(c)(19) of the IRC, News Entities, Eligible 501(c)(6) Organizations, and Destination Marketing Organizations are eligible for the PPP.

- **Q6: What information about PPP borrowers will/have become publicly available?**

**A:** Requests for information about a borrower may be denied unless the SBA has the written permission of the borrower or the information is subject to disclosure under the Freedom of Information Act (FOIA). FOIA requires the SBA to disclose, upon request, information supplied by borrowers as part of loan programs upon request, including:

- Statistics on the PPP (individual borrowers are not identified in the statistics) and

- Borrower information including: (i) names and commercial street and e-mail addresses; (ii) names of officers, directors, stockholders, or partners; and (iii) loan amount.

Treasury and the SBA have published loan-level data for PPP loans, which data is available for [download](#) on Treasury’s website. This data is bifurcated into PPP loans with a principal amount that is \$150,000 and greater and those with a principal amount that is less than \$150,000 and further categorized by state.

For PPP loans with a principal amount that is \$150,000 and greater, the available data includes for each loan: the loan amount range; borrower’s name, address, NAICS code, and legal entity type; demographic data (as to race/ethnicity, gender, and veteran status, which was optional to provide in the loan application); number of jobs retained; loan approval date; and the lender name. Nationwide data for such loans is aggregated in a single spreadsheet.

For PPP loans with a principal amount that is less than \$150,000, the name of the borrower is not disclosed. The available data includes for each loan: the specific loan amount; borrower’s city, state, zip code, NAICS code, and legal entity type; (optional) demographic data; number of jobs retained; loan approval date; and the lender name. Data for such loans can be downloaded for each state.

Proprietary data on a borrower is not routinely made available to third parties, and commercial or financial information obtained from a person is exempt from FOIA requests. Further, according to the SBA, materials and information *generally* exempt from FOIA requests include: financial statements; credit reports; business plans; fiscal projections; pricing or payroll information; corporate structures; personal and business tax returns; non-statistical information on pending, declined, withdrawn, or cancelled applications or on defaults or delinquencies; requests for size determinations; loan applications; and loan officers’ reports (among other materials and information). Under the Privacy Act, the SBA is also authorized to make certain “routine uses” of information protected by that Act (*e.g.*, disclosure of information maintained in SBA’s records when it indicates a violation or potential violation of law to the appropriate Federal, State, local, or foreign enforcement agency).

- **Q7: What should a borrower do if a rule change (or FAQ) alters a borrower’s eligibility?**

**A:** While there is greater clarity now around the risks associated with the necessity certification, there remains a broader issue of what actions an existing borrower must take when a PPP Rule or FAQ that alters or clarifies PPP eligibility would result in that borrower being ineligible. Question 17 of the SBA FAQs provides that borrowers “may rely on the laws, rules, and guidance available at the time of the relevant application” and do not need to take action based on updated guidance. However, leaning on Question 17 comes with potentially serious pitfalls. First, FAQ is not law or part of an Interim Final Rule, so it is uncertain how much weight an FAQ carries. Second, it is unclear whether the SBA draws a meaningful distinction between a *new* law, rule, or guidance that is a true change in the PPP as compared to a clarification, or less, a reassertion of an existing rule. The government may also take the position that the May 18, 2020 safe harbor period, while purportedly applying only to the necessity certification, allowed borrowers the opportunity to return funds and any borrower who chose not to do so, in effect, recertified that it was eligible for a PPP loan. A borrower whose eligibility is in question that retained its PPP

loan after May 18, 2020 may ultimately have to repay loan proceeds in full (potentially immediately or on an expedited basis) and perhaps even incur criminal and civil penalties (e.g., if a borrower has to re-certify as to eligibility in a forgiveness application) (see “Consequences of a False Filing” above).

- **Q8: In addition to the Form 3508 (as revised on June 16, 2020) (or Forms 3508EZ or 3508S), what other materials must be submitted as part of the loan forgiveness application and for how long must such materials be retained?**

**A:** Loans that are not more than \$150,000 may be forgiven if the PPP borrower submits a one page certification, Form 3508S, which, consistent with the requirements of the Economic Aid Act, contains: (i) the number of employees the eligible recipient was able to retain because of the covered loan, (ii) the estimated amount spent on payroll costs, and (iii) the total loan value. By completing this form, the PPP borrower attests that the information provided is accurate and that it complied with the requirements under section 7(a)(36). Such PPP borrower is required to retain records that affirm compliance with such requirements (as to employment records, for the four year period following submission, and for other records, for the three year period following submission). The Economic Aid Act expressly states that such PPP borrower is not required to submit as part of the forgiveness application process any additional application or documentation to substantiate forgiveness. This new easy application process for loans of not more than \$150,000 has retroactive effect, and applies to existing PPP loans and PPP loans made on or after the enactment of the Economic Aid Act. The SBA can review and audit such loans and access any records the borrower is required to retain.

The Economic Aid Act provides that for loans in excess of \$150,000, borrowers must generally submit the following (which expands upon the application requirements described in the CARES Act):

- documentation verifying the number of full-time equivalent employees on payroll and pay rates for the periods described in subsection (d) thereof, including —
  - (A) payroll tax filings reported to the Internal Revenue Service; and
  - (B) State income, payroll, and unemployment insurance filings;
- documentation, including cancelled checks, payment receipts, transcripts of accounts, purchase orders, orders, invoices, or other documents verifying payments on covered mortgage obligations, payments on covered rent obligations, payments on covered operations expenditures, payments on covered property damage costs, payments on covered supplier costs, payments on covered worker protection expenditures, covered lease obligations, and covered utility payments;
- a certification from a representative of the eligible recipient authorized to make such certifications that—
  - (A) the documentation presented is true and correct; and
  - (B) the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, make payments on covered

operations expenditures, make payments on covered property damage costs, make payments on covered supplier costs, make payments on covered worker protection expenditures, or make covered utility payments; and

- any other documentation the SBA Administrator determines necessary.

The forgiveness application requirements originally set forth in the CARES Act (and prior to the amendments under the Economic Aid Act) were detailed and clarified in SBA Form 3508 and the instructions to that form.

**Payroll Cost Documentation** – Documentation verifying the eligible cash compensation and non-cash benefit payments from the covered period, consisting of:

- Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees;
- Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the covered (payroll tax filings (*i.e.*, Form 941) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings); and
- Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee group health, life, disability, vision, or dental insurance and retirement plans that the borrower included in the forgiveness amount.

**Non-payroll Costs** – Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the covered period:

- **Business Mortgage Interest Payments** – Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the covered period; or lender account statements from February 2020 and the months of the covered period through one month after the end of the covered period verifying interest amounts and eligible payments;
- **Business Rent or Lease Payments** – Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the covered period or lessor account statements from February 2020 and from the covered period through one month after the end of the covered period verifying eligible payments;
- **Business Utility Payment** – Copy of invoices from February 2020 and those paid during the covered period and receipts, cancelled checks, or account statements verifying those eligible payments;
- **Covered Operations Expenditures** – Copy of invoices, orders, or purchase orders paid during the covered period and receipts, cancelled checks, or account statements verifying those eligible payments;
- **Covered Property Damage Costs** – Copy of invoices, orders, or purchase orders paid during the covered period and receipts, cancelled checks, or account

statements verifying those eligible payments, and documentation that the costs were related to property damage and vandalism or looting due to public disturbances that occurred during 2020 and such costs were not covered by insurance or other compensation;

- **Covered Supplier Costs** – Copy of contracts, orders, or purchase orders in effect at any time before the covered period (except for perishable goods), copy of invoices, orders, or purchase orders paid during the covered period, and receipts, cancelled checks, or account statements verifying those eligible payments;
  - **Covered Worker Protection Expenditures** – Copy of invoices, orders, or purchase orders paid during the covered period and receipts, cancelled checks, or account statements verifying those eligible payments, and documentation that the expenditures were used by the borrower to comply with applicable COVID-19 guidance during the covered period.
- **FTE Reference Period Documentation** – Documentation showing the average number of FTE employees on payroll per week employed by the borrower during the selected reference period (see “**Reductions in Forgiveness Amount**” above). Such documentation may include payroll tax filings and state quarterly business and individual employee wage reporting and unemployment insurance tax filings.
  - **Borrower is not required to submit (but must retain) the PPP Schedule A Worksheet included in Form 3508** (which is used to calculate average FTE during the covered period, list salary and compensation paid to employees during the covered period, confirm whether any related reductions to the forgiveness amount are required, and confirm whether any such reductions fall within the safe harbor exceptions) **and related documentation supporting the calculations in such worksheet, including (as clarified in Form 3508), if applicable:**
    - regarding any employee job offers and refusals, refusals to accept restoration of reductions in hours, firings for cause, voluntary resignations, written requests by any employee for reductions in work schedule, and any inability to hire similarly qualified employees for unfilled positions on or before (i) December 31, 2020 for a PPP loan made before December 27, 2020 or (ii) the last day of the covered period for a PPP loan made on or after December 27, 2020; and
    - supporting the certification that the borrower was unable to operate between February 15, 2020 and the end of the covered period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 (or for a PPP loan made on or after December 27, 2020 requirements established or guidance issued between March 1, 2020 and the last day of the covered period) 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 requirement related to COVID-19. This documentation must include copies of the applicable requirements for each borrower location and relevant borrower financial records.

- The borrower must retain all such documentation in its files for 6 years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.
- **Demographic Information** – Borrowers can complete an optional form on certain demographic information (including gender, race, ethnicity, and veteran status/relationship).
- **PPP Loan Necessity Questionnaires** – In late 2020, the SBA produced loan necessity questionnaires for each of for-profit borrowers (SBA Form 3509) and non-profit borrowers (SBA Form 3510) that must be completed and submitted by each PPP borrower that together with its affiliates received PPP loans with an original principal amount of \$2 million or greater to such PPP borrower’s lender within ten business days of receipt of such from such lender.
- **SBA Form 3508D** – If Form 3508 or Form 3508EZ is being submitted for a First Draw PPP loan approved on or before August 8, 2020, and the borrower is required to submit [SBA Form 3508D](#), Form 3508D must also be submitted to the SBA as part of forgiveness application. For loans made prior to December 27, 2020, if the President of the U.S., Vice President of the U.S., the head of an Executive department, or a Member of Congress, or the spouse of such person as determined under applicable common law, directly or indirectly holds a controlling interest in a borrower, the borrower must disclose this information to the SBA by submitting Form 3508D. Such disclosure must be made no later than January 26, 2021, if the borrower submitted an application for forgiveness before December 27, 2020, or no later than 30 days after submitting an application for forgiveness.
- **Q9: Which borrowers are eligible to utilize SBA Form 3508EZ?**

**A:** SBA Form 3508EZ is a simplified forgiveness application that can be utilized by a borrower that certifies that it falls into one of the two below categories. Form 3508EZ generally tracks Form 3508 and has similar documentation requirements, but eliminates steps that address the reduction in the forgiveness amount due to reductions in employee compensation or in FTE levels.

- **Category 1:** Borrower did not reduce:
  - (1) annual salary or hourly wages of any employee (that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) by more than 25% during the covered period compared to the most recent full quarter before the covered period ; **AND**
  - (2) the number of employees or the average paid hours of employees between January 1, 2020 and the end of the covered period. Form 3508EZ expressly states that in assessing eligibility under this second prong, borrowers should ignore reductions that arose from (i) an inability to rehire individuals who were employees on February 15, 2020 if the borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020 (or for a PPP loan made on or after December



27, 2020, the last day of the covered period), and (ii) hours that the borrower offered to restore and the employee refused.

- **Category 2:**

- (1) Borrower did not reduce annual salary or hourly wages of any employee (that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) by more than 25% during the covered period compared to the last full quarter before the covered period; **AND**
- (2) Borrower was unable to operate during the covered period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 (or for a PPP loan made on or after December 27, 2020, requirements established or guidance issued between March 1, 2020 and the last day of the covered period) 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 requirement related to COVID-19.

- **Q10: Should lenders report forgiveness of PPP loans to the IRS on Form 1099-C?**

**A:** Many lenders that forgive more than \$600 of a borrower's debt are ordinarily required to file a notice of the forgiveness with the IRS on "Form 1099-C, Cancellation of Debt" and issue a related statement to the borrower. Among other things, the filings allows the IRS to track and confirm that cancellation of indebtedness income is being properly reported by borrowers. Where a PPP borrower satisfies the statutory PPP loan program forgiveness requirements and obtains forgiveness, however, the forgiven loan amount is excluded from the PPP borrower's gross income. [Announcement 2020-12](#), the IRS clarified that the Form 1099-C and payee statement filings for regular loan forgiveness are not required where a PPP loan is forgiven because the borrower satisfies the statutory forgiveness requirements, and, indeed, that a lender that so forgives a PPP loan "should not" make these filings for the loan. The announcement states that this approach is intended to prevent confusion.

- **Q11: What happens if a borrower or lender committed an error that caused a borrower to receive a PPP loan amount that exceeds the borrower's correct maximum loan amount?**

**A:** According to SBA's recent [guidance](#), if the error was caused through a knowing misstatement in the loan application, the borrower may face a fraud charge. However, if a borrower in good faith mistakenly and incorrectly filled out the PPP loan application form and this resulted in the borrower receiving a PPP loan amount that exceeds the borrower's correct maximum loan amount, the borrower will not receive loan forgiveness for any amount that exceeds the correct maximum loan.

- **Q12: When is a borrower no longer considered to be presently involved in a bankruptcy proceeding if the borrower has filed a bankruptcy petition in the past?**

**A:** According to Question 67 of SBA's FAQs: (i) if a borrower has filed a Chapter 7 bankruptcy petition, the borrower is considered to be presently in a bankruptcy proceeding until the Bankruptcy Court has entered a discharge order in the case; (ii) if a borrower has filed a Chapter 11, 12 or 13 bankruptcy petition, the borrower is considered to be presently in a bankruptcy proceeding until the Bankruptcy Court has entered an order confirming the plan in the case; and (iii) regardless of Chapter, if the Bankruptcy Court has entered an order dismissing the case, the borrower is no longer presently in a bankruptcy proceeding. The discharge order, order confirming the plan or order dismissing the case, as applicable, must be entered prior to the date of the PPP loan application. Notwithstanding the foregoing, a borrower is ineligible for a PPP loan if, as a result of a bankruptcy filing, the borrower has permanently closed.

## **V. Overview of the Paycheck Protection Program Liquidity Facility**

On April 9, 2020 the Board of Governors of the Federal Reserve System introduced the Paycheck Protection Program Liquidity Facility (the "PPPLF") pursuant to section 13(3) of the Federal Reserve Act. The PPPLF came as part of a broader [announcement](#) by the Federal Reserve and [Treasury](#) regarding the implementation of new and expansion of existing Federal lending programs, including the now-terminated Main Street Lending Program aimed at making new loans available to small and medium sized businesses. Notably, the guidance provided that a borrower under the PPP could also borrow under the Main Street Lending Program. (For more on the Main Street Lending Program, see our client alert: [Where is Main Street?—Fed Provides Guidance on the Main Street Lending Program](#).)

The terms of the PPPLF are summarized in a [term sheet](#) released by the Federal Reserve in conjunction with its announcement, and further detailed in [frequently asked questions](#) published by the Federal Reserve. The purpose of the PPPLF is to increase liquidity for lenders participating in the PPP (a "PPP Lender")<sup>xxv</sup> so that they can engage in more expansive origination of PPP loans. Under the PPPLF, Federal Reserve Banks will extend credit to PPP Lenders in the form of non-recourse<sup>xxvi</sup> term loans ("PPPLF Loans") at an interest rate of 0.35%. PPP loans will serve as collateral for a corresponding PPPLF Loan (with such collateral valued at the principal amount of the PPP loan). PPP Lenders can borrow from the PPPLF an amount up to the principal amount of PPP loan collateral that it can pledge to the Federal Reserve. On April 30, 2020, the Federal Reserve [confirmed](#) that PPP Lenders will be able to pledge as collateral not only PPP loans that they originate, but also PPP loans acquired on the secondary market.

PPP Lenders seeking PPPLF Loans are required to pool all PPP loans that have the same maturity date, and will receive a single extension of credit secured by such pooled PPP loans. PPP Lenders will need to ensure that they simultaneously pledge all PPP loans with the same maturity date. There will be a separate extension of PPPLF credit for each maturity date of PPP loans that are pledged as collateral. PPP loans cannot be pledged as collateral until the PPP loan has been originated, and cannot be pledged in advance for an extension of credit at a later date.

The terms of a PPPLF Loan will be closely aligned with the underlying PPP loans serving as collateral. The principal amount and maturity period of a PPPLF Loan will be the same as that of the underlying pool of PPP loans. A PPP Lender is required to repay an extension of credit under the PPPLF whenever (i) the PPP Lender has been reimbursed by the SBA for loan

forgiveness (to the extent of the forgiveness), (ii) the PPP Lender has received payment from the SBA representing exercise of a loan guarantee, or (iii) the PPP Lender has received payment from the PPP borrower of an underlying PPP loan. In each such instance, the PPP Lender must promptly report to the lending Federal Reserve Bank any payments on pledged PPP loans so that the corresponding PPPLF Loan can be adjusted accordingly. The maturity of a PPPLF Loan will accelerate (i) in conjunction with the acceleration of an underlying PPP loan upon a default and resulting sale to the SBA by the PPP Lender of such PPP loan to realize on the 100% SBA guarantee, and (ii) to the extent of any loan forgiveness reimbursement received by a PPP Lender from the SBA in respect of the underlying PPP loan.<sup>xxvii</sup> PPP Lenders are not required to pay any fees to participate in the PPPLF and there are no prepayment penalties.

A PPP Lender seeking a PPPLF Loan must execute a [PPPLF Letter of Agreement](#) and make a [certification](#) that (i) it is not insolvent and (ii)<sup>xxviii</sup> it is unable to secure adequate credit accommodations from other banking institutions.<sup>xxix</sup> The Federal Reserve, through its discount window site, has produced: (i) a page with all information and guidance regarding the PPPLF for [depository institutions](#); and (ii) a page with all information and guidance regarding the PPPLF for [non-depository institutions](#).

The Federal Reserve publicly discloses certain information regarding the PPPLF. The Federal Reserve will report weekly (on an aggregate nationwide basis) balance sheet items related to the PPPLF. Further, the Federal Reserve produces a monthly report regarding the CARES Act-related lending facilities, including the PPPLF, detailing (i) names and details of participants in each facility, (ii) amounts borrowed and interest rate charged, and (iii) overall costs, revenues, and fees for each facility. Similar information will also be publicized by the Federal Reserve one year after the termination of the PPPLF. Such reports and information are available on the Federal Reserve's [PPPLF page](#).

All depository institutions that originate PPP loans are eligible to borrow under the PPPLF. On April 30, 2020, the Federal Reserve [confirmed](#) that other SBA-qualified PPP lenders, including depository institutions (*i.e.*, banks and credit unions) and non-depository institutions, such as community development financial institutions, small business lending companies licensed by the SBA, and some financial technology firms are eligible to borrow under the PPPLF.

The PPPLF has been extended and will remain in effect until June 30, 2021, unless further extended by Treasury and the Federal Reserve.

\*\*\*\*\*

**Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, the Consolidated Appropriations Act, 2021, related rules and regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.**

---

<sup>i</sup> Of the additional appropriated \$310 billion under the PPHCEA, \$60 billion was expressly allocated for guarantees of loans made by smaller banks, smaller credit unions, and community financial institutions (which encompass certain community

---

development financial institutions, minority depository institutions, and other institutions that provide financing to underserved and economically disadvantaged communities). The PPPHCEA also increased the funding available for the SBA's economic injury disaster loan ("EIDL") program (\$50 billion) and for the EIDL grant program introduced in the CARES Act (\$10 billion). Additionally, the PPPHCEA appropriated a total of \$100 billion to the Public Health and Social Services Emergency Fund, including \$75 billion to be distributed by the U.S. Department of Health and Human Services to certain eligible healthcare providers (e.g., hospitals) to reimburse expenses and lost profits attributable to coronavirus. Read more in our [client alert](#) on the health care funding under the PPPHCEA and the CARES Act (including grants from the Provider Relief Fund).

ii Section 37 of Section 7(a) of the Small Business Act.

iii The "PPP Rules" include (a) the Interim Final Rules: (i) an [Interim Final Rule](#) governing the PPP generally (published April 2, 2020); (ii) an [Interim Final Rule](#) regarding the application of the SBA's affiliation rules to the PPP (published April 2, 2020); (iii) an [Interim Final Rule](#) regarding additional eligibility criteria and requirements for certain pledges of loans (with a principal focus on certain self-employed applicants) (published April 14, 2020), (iv) an [Interim Final Rule](#) regarding certain requirements for promissory notes, authorizations, affiliation, and eligibility (published April 24, 2020); (v) an [Interim Final Rule](#) on additional criterion for seasonal employers; (vi) an [Interim Final Rule](#) on disbursements (published April 28, 2020); (vii) an [Interim Final Rule](#) on corporate groups and non-bank and non-insured depository institution lenders (published April 30, 2020); (viii) an [Interim Final Rule](#) on nondiscrimination and additional eligibility criteria (published May 5, 2020); (ix) an [Interim Final Rule](#) regarding extension of the limited safe harbor with respect to certification concerning need for PPP loan request (published May 8, 2020); (x) an [Interim Final Rule](#) on loan increases (published May 13, 2020); (xi) an [Interim Final Rule](#) on eligibility of certain electric cooperatives (published May 14, 2020); (xii) an [Interim Final Rule](#) on the treatment of entities with foreign employees; (xiii) an [Interim Final Rule](#) on the second extension of the limited safe harbor with respect to the necessity certification and lender reporting (published May 20, 2020); (xiv) an [Interim Final Rule](#) on Loan Forgiveness (published May 22, 2020), (xv) an [Interim Final Rule](#) on SBA loan review procedures and related borrower and lender responsibilities (published May 22, 2020), (xvi) an [Interim Final Rule](#) on the eligibility of certain telephone cooperatives (published June 5, 2020), (xvii) an [Interim Final Rule](#) amending the first Interim Final Rule in light of the PPPFA (published June 11, 2020), (xviii) an additional [Interim Final Rule](#) amending the first Interim Final Rule (published June 12, 2020), (xix) an [Interim Final Rule](#) (published June 17, 2020) amending the third (published April 14, 2020) and the sixth (published April 28, 2020) Interim Final Rules, (xx) an [Interim Final Rule](#) (published June 22, 2020) amending the fourteenth (published May 22, 2020) and fifteenth (published May 22, 2020) Interim Final Rules, (xxi) an [Interim Final Rule](#) (published June 24, 2020) amending the first Interim Final Rule (published April 2, 2020), (xxii) an [Interim Final Rule](#) on certain eligible payroll costs (published June 25, 2020), (xxiii) an [Interim Final Rule](#) on Appeals of SBA Loan Review Decisions Under the PPP (published August 11, 2020), (xxiv) an [Interim Final Rule](#) (published October 8, 2020) providing for additional revisions to loan forgiveness Interim Final Rule (published May 22, 2020 and amended June 22, 2020) and SBA loan review procedures and related borrower and lender responsibilities Interim Final Rule (published May 22, 2020 and amended June 22, 2020), (xxv) an [Interim Final Rule](#) (published January 6, 2021) incorporating the Economic Aid Act amendments required to be implemented by regulation within 10 days of enactment of Economic Aid Act, (xxvi) an [Interim Final Rule](#) (published January 6, 2021) implementing the key provisions of section 311 of the Economic Aid Act regarding Paycheck Protection Program Second Draw Loans, (xxv) an [Interim Final Rule](#) (published January 19, 2021) on loan forgiveness requirements and loan review procedures as amended by the Economic Aid Act, consolidating prior rules related to forgiveness and review of PPP loans including with respect to forgiveness of Second Draw Loans, (xxvi) an [Interim Final Rule](#) (published March 3, 2021) amending loan amount calculation for sole proprietors and independent contractors and eligibility disqualifiers, (xxvii) an [Interim Final Rule](#) (published March 18, 2021) implementing changes to the Paycheck Protection Program as amended by the American Rescue Plan Act, and (xxviii) an [Interim Final Rule](#) (published July 28, 2021) implementing changes to the Paycheck Protection Program to facilitate and streamline the application and review process for PPP loans of \$150,000 or less and extending the loan deferment period for those PPP loans where the borrower timely files an appeal of a final SBA Loan Review Decision, and (b) the SBA Procedural Notices: (i) [Guidance on Participation Sales for Paycheck Protection Program Loans](#), effective April 24, 2020, (ii) [Guidance on Whole Loans Sales of Paycheck Protection Program Loans](#) (Procedural Notice 5000-20024), effective May 1, 2020, (iii) [Refinance of EIDL Loans with PPP loan Proceeds and Lender Remittance of EIDL Refinance Proceeds to SBA](#) (Procedural Notice 5000-20032), effective June 19, 2020, (iv) [Extension of Authority to Guarantee Paycheck Protection Program Loans](#), effective July 6, 2020, (v) [Procedural Notice – PPP Lender Processing Fee Payment and 1502 Reporting Process](#) (Procedural Notice 5000-20028), effective July 13, 2020, (vi) [Procedures for Lender Submission of Paycheck Protection Program Loan Forgiveness Decisions to SBA and SBA Forgiveness Loan Reviews](#) (Procedural Notice 5000-20038), effective July 23, 2020, (vii) [Paycheck Protection Program Loans and Changes of Ownership](#) (Procedural Notice 5000-20057), effective October 2, 2020, (viii) [Guidance on Modifications to SBA Forms 3506, 3507 and 750 CA \(for purposes of PPP only\)](#) (Procedural Notice 5000-20074), effective January 6, 2021, (ix) [Guidance on Repeal of EIDL Advance Deduction Requirement for SBA Loan Forgiveness Remittances to PPP Lenders](#) (Procedural Notice 5000-20075), effective January 8, 2021, (x) [Guidance on First Draw Paycheck Protection Program Loan Increases After Enactment of the Economic Aid Act](#) (Procedural Notice 5000-20076), effective January 13, 2021, (xi) [Guidance on PPP Borrower Resubmission of Loan Forgiveness Applications Using Form 3508S, Lender Notice Responsibilities to PPP Borrowers, and Offset of Remittances to Lenders for Lender Debts](#) (Procedural Notice 5000-20077), effective January 15, 2021, (xii) [Guidance on PPP Excess Loan Amount Errors](#) (Procedural Notice 5000-20078), effective January 15, 2021, (xiii) [Guidance on PPP Procedures for](#)

---

[Addressing Unresolved Issues on Borrower First Draw PPP Loans](#) (Procedural Notice 5000-20083), effective January 26, 2021, (xiv) [Updated Guidance on PPP Lender Processing Fee Payment and 1502 Reporting Process](#) (Procedural Notice 5000-20091), effective February 8, 2021, (xv) [Revised Paycheck Protection Platform Procedures for Addressing Hold Codes on First Draw PPP Loans and Compliance Check Error Messages on First Draw PPP Loans and Second Draw PPP Loans](#) (Procedural Notice 5000-20092), effective February 10, 2021, (xvi) [Second Notice of Revised Procedures for Addressing Hold Codes and Compliance Check Error Messages on PPP Loans](#) (Procedural Notice 5000-808216), effective March 29, 2021, (xvii) [Second Notice on Modifications to SBA Forms 3506, 3507 and 750 CA \(for purposes of PPP only\)](#) (Procedural Notice 5000-808756), effective April 8, 2021, (xviii) [Updated Notice on First Draw Paycheck Protection Program Loan Increases After Enactment of the Economic Aid Act](#) (Procedural Notice 5000-809631), effective April 20, 2021, (xix) [Extension and Revision of Guidance on Whole Loan Sales of Paycheck Protection Program Loans](#) (Procedural Notice 5000-809242), effective April 30, 2021, and (xx) [Guidance on SBA Guaranty Purchases and Lender Servicing Responsibilities for PPP Loans](#) (Procedural Notice 5000-812316), effective July 15, 2021.

<sup>iv</sup> Plus any outstanding amount under a pre-existing EIDL made on or after January 31, 2020 and before April 3, 2020.

<sup>v</sup> The PPPFA provides a corresponding extension to the deferral date built into the secondary market sales provisions as well.

<sup>vi</sup> Under the Interim Final Rule published on May 13, 2020, if a seasonal employer received a PPP loan before the alternative criterion for determining its maximum loan amount (published on April 28, 2020) and would be eligible for a higher maximum loan amount under the alternative criterion, the lender may submit a request to the SBA to upsize and make an additional disbursement in respect of such PPP loan. The lender must have not yet submitted its initial SBA Form 1502 in respect of such PPP loan and the borrower must supply the lender with the required documentation to support the increase. All caps and limitations on PPP loan amounts apply to such an increased loan.

<sup>vii</sup> Defined as non-profit organization or organization otherwise subject to section 511(a)(2)(B) of the Internal Revenue Code of 1986 that is a public broadcasting entity. While not expressly stated, it should be presumed that the eligibility size standards generally applicable to PPP borrowers (e.g., a cap of 500 employees) apply to such entities.

<sup>viii</sup> Question 56 of the FAQ states that in case where a college or university operates or holds the license for public broadcasting stations, and the station is not a separate legal entity, the limit on the number of employees “per location” applies to the public broadcasting station itself and does not include other employees of a college or university that operates or holds the license for the station.

<sup>ix</sup> The CARES Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount (including, per the PPP Rules, any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees). The PPP Rules further clarify that affiliation rules are waived *even if* the borrower received investment from other non-SBIC investors.

<sup>x</sup> In an Interim Final Rule published on May 18, 2020 (which codifies Question 44), the SBA, recognizing the ambiguity as to the inclusion or exclusion of foreign employees in its prior guidance, provided that it will not find any borrower that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the borrower’s exclusion of non-U.S. employees from its employee headcount if the borrower (together with its affiliates) had no more than 500 employees whose principal place of residence is in the United States. Such borrowers are not deemed to have made an inaccurate certification of eligibility solely on that basis. Under no circumstances may PPP funds be used to support non-U.S. workers or operations

<sup>xi</sup> The SBA’s determination concerning the certification regarding the necessity of the loan request will not affect SBA’s loan guarantee.

<sup>xii</sup> The lobbying activities prohibited are defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602). “‘Lobbying activities’ means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.”

<sup>xiii</sup> SBA guidance clarifies that this treatment follows the computation of self-employment tax from IRS Form 1040 Schedule SE Section A line 4 and removes the “employer” share of self-employment tax, consistent with how payroll costs for employees in the partnership are determined.

<sup>xiv</sup> With respect to loan forgiveness, this shall only apply prospectively from the date of enactment of the American Rescue Plan.

<sup>xv</sup> Calculations to be confirmed by the lender (via review of supporting materials provided with the Form 3508) include (i) the amount of Cash Compensation, Non-Cash Compensation, and Compensation to Owners (claimed on Lines 1, 4, 6, 7, 8, and 9 of PPP Schedule A), (ii) the amount of Business Mortgage Interest Payments, Business Rent or Lease Payments, and Business Utility Payments (claimed on Lines 2, 3, and 4 of the PPP loan Forgiveness Calculation Form), and (iii) the calculation of payroll costs divided by 0.75% (on Line 10 of the PPP loan Forgiveness Calculation Form).

<sup>xvi</sup> A lender must provide the SBA as part of its a forgiveness approval or denial determination: (1) the PPP loan Forgiveness Calculation Form; (2) PPP Schedule A; and (3) the (optional) PPP Borrower Demographic Information Form.

---

<sup>xvii</sup> The Notice specifies additional limitations where the change of ownership transaction is to be financed (in whole or in part) by a 7(A) loan, including that the proceeds of the loan cannot finance any escrow account required to be set up in connection with a change of ownership of a PPP borrower as described in the Notice.

<sup>xviii</sup> The PPP Lender is defined in the Notice as either the initial lender under the PPP loan or the lender that is then-servicing the PPP loan (i.e., if the loan has been transferred to another lender).

<sup>xix</sup> In the case of funds escrowed in connection with an asset sale, the Notice specifies that the PPP lender must notify the appropriate SBA Loan Servicing Center of the location and amount of funds in the escrow account within 5 business days of sale's closing. The SBA Loan Servicing Center can be found at: <https://www.sba.gov/CitrusHeightsLGPC>.

<sup>xx</sup> This new Interim Final Rule establishes a new subpart L for 13 C.F.R. § 134, which are the rules of procedure governing cases before the SBA Office of Hearings and Appeals. This new subpart L also specifies the provisions of subpart B (the OHA's general Rules of Practices) that are applicable to appeals of SBA Loan Review Decisions under subpart L.

<sup>xxi</sup> EIDL borrowers may also be subject to fraud charges (and resulting fines and imprisonment) under 18 USC § 1040, which addresses fraud in connection with major disaster or emergency benefits.

<sup>xxii</sup> Note that there is a misalignment with the PPP, as "new entities" are those that were not in business between February 15, 2019 and June 30, 2019. Currently, the PPP does not provide an express mechanism for calculating loan amounts for businesses that were not in operation between June 30, 2019 and February 15, 2020.

<sup>xxiii</sup> An independent third-party SBA contractor has developed a COVID Revenue Reduction Score based on a variety of inputs including industry, geography, and business size. The COVID Revenue Reduction Score was developed using current data on economic recovery and return of businesses to operational status. Each Second Draw PPP Loan of \$150,000 or less will be assigned a score based on those inputs which will be visible to lenders as an alternative to documentation showing revenue reduction.

<sup>xxiv</sup> The SBA has confirmed that, for purposes of the PPP, an applicant's participation in an employee stock ownership plan (ESOP) does not trigger application of the affiliation rules.

<sup>xxv</sup> While referred to here as PPP Lenders (as these are the institutions that ultimately lend to the end-recipients of PPP loans), the term sheet and FAQ refer to such institutions in the context of the PPPLF as PPPLF borrowers.

<sup>xxvi</sup> Non-recourse status of the PPPLF Loan may change if the PPP Lender breaches any of the representations, warranties, or covenants in the PPPLF documentation, or engages in fraud/misrepresentation in connection with participation in the PPPLF.

<sup>xxvii</sup> As described in [Interim Final Rule](#) published collectively by the Federal bank regulatory agencies (Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC)), for participating eligible financial institutions: (i) the PPPLF is considered to be zero percent risk for purposes of risk-based and leverage-based capital requirements because PPP loans are 100% guaranteed by the SBA; and (ii) loans extended by the PPPLF to participating eligible financial institutions will not increase the regulatory capital requirements for those institutions. The Interim Final Rules take effect immediately, but are subject to a 30-day public comment period.

<sup>xxviii</sup> However, the Federal Reserve has clarified that this certification may be based on economic conditions in the market or markets intended to be addressed by the PPPLF facility. The certifying PPP Lender may consider current economic or market conditions as compared to usual economic or market conditions, including the availability and price of credit for small businesses with diminished revenue streams. For purposes of certifying that it is unable to secure adequate credit accommodations elsewhere, such PPP Lender does not need to establish that credit is unavailable, rather that credit accommodations may be available, but at prices or on conditions that are inconsistent with a normal, well-functioning market.

<sup>xxix</sup> Certain additional documentation requirements apply for depository institutions that have not already established access to the Federal Reserve's lending programs for depository institutions ("discount window" programs).

