

# Debt Financing The Tech Group White Collar Criminal Defense

January 12, 2021

## Key Updates to First Draw PPP Loans

By **Lowell A. Citron**, **Kathleen A. McGee**, **Kimberly E. Lomot**, **Matthew J. Moisan** and **Jesse S. O'Connell**

*Certain provisions of the coronavirus/COVID-19 economic stimulus legislation are subject to the issuance of government regulations and other government action; thus, certain details regarding the legislation may be clarified or added.*

### Introduction

- The **First Draw Consolidated IFR** also applies to loan forgiveness applications submitted under the Paycheck Protection Program before enactment of the Economic Aid Act where SBA has not remitted the forgiveness payment.
- This rule should be interpreted consistently with the sets of Frequently Asked Questions (FAQs) regarding the PPP that are posted on SBA's and Treasury's websites.<sup>1</sup>

### Calculating Loan Amount

- Borrowers of First Draw PPP loans can use 2019 or 2020 to calculate their maximum loan amount.
  - Section 1102 of the CARES Act states that borrowers are to calculate their maximum loan amount by using "payroll costs incurred during the 1-year period before the date on which the loan is made..." For PPP loans made in 2020, most borrowers used 2019. The Economic Aid Act did not change this language for borrowers that are not farmers and ranchers and would require most new PPP borrowers who obtain a loan in 2021 to use 2020 as their base period. Using authority granted by section 1109 of the CARES Act, this rulemaking allows new borrowers to choose 2019 or 2020 as the base period, thereby ensuring that they are able to obtain funding on terms commensurate with existing PPP borrowers.

### Partner/Partnership

- If you are a partner in a partnership, you may not submit a separate PPP loan application for yourself as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to \$100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred on a PPP loan application filed by or on behalf of the partnership.
  - Limiting a partnership and its partners (and an LLC filing taxes as a partnership) to one PPP loan is necessary to help ensure that as many eligible borrowers as possible obtain PPP loans before the statutory deadline of March 31, 2021.
- If a partnership received a PPP loan that did not include any compensation for its partners, can the loan amount be increased to include partner compensation?
  - Yes. If a partnership received a PPP loan that only included amounts necessary for payroll costs of the partnership's employees and other eligible operating expenses, but did not include any amount for partner compensation, the lender may electronically submit a request through SBA's E-Tran Servicing site to increase the PPP loan amount to include appropriate partner compensation, even if the loan has been fully disbursed and even if the lender's first SBA Form 1502 report to SBA on the PPP loan has already been submitted. In no event can the increased loan amount exceed the maximum loan amount allowed under the PPP Program, which is \$10 million for an individual borrower or \$20

<sup>1</sup> For clarity, these are to be updated as soon as feasible.

million for a corporate group. Additionally, the borrower must provide the lender with required documentation to support the calculation of the increase. Any request for an increase must be submitted electronically in E-Tran on or before March 31, 2021, and is subject to the availability of funds.

### **Seasonal Business/Employees**

- In evaluating eligibility, 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 February 15, 2019 and February 15, 2020.
  - This approach aligns the eligibility criteria for seasonal businesses being in operation with the time period for calculation of a seasonal employer's maximum loan amount from section 336 of the Economic Aid Act and makes PPP loans available to seasonal businesses that operate outside of the original, more limited time frame.
- How does a seasonal employer calculate the maximum PPP loan amount?
  - As defined by section 315 of the Economic Aid Act, a borrower is a seasonal employer if it does not operate for more than seven months in any calendar year or, during the preceding calendar year, it had gross receipts for any six months of that year that were not more than 33.33 percent of the gross receipts for the other six months of that year. Under section 336 of the Economic Aid Act, a seasonal employer must determine its maximum loan amount for purposes of the PPP by using the employer's average total monthly payments for payroll for any 12-week period selected by the seasonal employer beginning February 15, 2019, and ending February 15, 2020.

### **Economic Injury Disaster Loan (EIDL)**

- Under paragraph 7(a)(36)(Q) of the Small Business Act, as amended by section 341 of the Economic Aid Act, an EIDL loan used for purposes other than paying payroll costs and other eligible PPP expenditures is not considered a duplication of the assistance available under the PPP.
- The Economic Aid Act repealed the CARES Act provision requiring SBA to deduct EIDL Advance Amounts received by borrowers from the forgiveness payment amounts remitted by

SBA to the lender. The EIDL Advance Amount received by the borrower will not reduce the amount of forgiveness to which the borrower is entitled and will not be deducted from the forgiveness payment amount that SBA remits to the lender. Any EIDL Advance Amounts previously deducted from a borrower's forgiveness amount will be remitted to the lender, together with interest to the remittance date.

### **New Allowable Uses of PPP Loan Proceeds<sup>2</sup>**

- Covered operations expenditures (payments 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 that was not covered by insurance or other compensation);
- Covered supplier costs (expenditures made by a borrower to a supplier of goods for the supply of goods that—(A) are essential to the operations of the borrower at the time at which the expenditure is made; and (B) is 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); and
- Covered worker protection expenditures ((A) operating or a 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, during the period beginning on March 1, 2020, and ending the date on which the national emergency with respect to the COVID-19 expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19; (B) such expenditures may include—(i) the purchase, maintenance, or renovation of assets that create or expand—(I) a drive-through window facility; (II) an indoor, outdoor, or combined air or air pressure ventilation or

---

<sup>2</sup> For clarity, these new uses are in addition to: (i) payroll costs (as defined in the CARES Act, Economic Aid Act, and this interim final rule); (ii) 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; (iii) mortgage interest payments (but not mortgage prepayments or principal payments); (iv) rent payments; (v) utility payments; (vi) interest payments on any other debt obligations that were incurred before February 15, 2020; and (vii) refinancing an SBA EIDL loan made between January 31, 2020, and April 3, 2020.

filtration system; (III) a physical barrier such as a sneeze guard; (IV) an expansion of additional indoor, outdoor, or combined business space; (V) an onsite or offsite health screening capability; or (VI) other assets relating to the compliance with the requirements or guidance described in subparagraph (A), as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and (ii) the purchase of—(I) covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation; (II) particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or (III) other kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and (C) such expenditures do not include residential real property or intangible property).

- Which other PPP borrowers can reapply or request an increase in their PPP loan amount?
  - The following borrowers can reapply or request an increase in their PPP loan amount:
    - If a borrower returned all of a PPP loan, the borrower may reapply for a PPP loan in an amount the borrower is eligible for under current PPP rules.
    - If a borrower returned part of a PPP loan, the borrower may reapply for an amount equal to the difference between the amount retained and the amount previously approved.
    - If a borrower did not accept the full amount of a PPP loan for which it was approved, the borrower may request an increase in the amount of the PPP loan up to the amount previously approved.
  - If a PPP loan is increased, the lender may make a single additional disbursement of the increased loan proceeds
  - The interest rate on a PPP loan will be 100 basis points or one percent, calculated on a non-compounding, non-adjustable basis.<sup>4</sup>

***To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).***

### **Elimination of the “Alternate Covered Period”**

- Because the Economic Aid Act changed the loan forgiveness covered period from either an eight- or 24-week period to a covered period between eight and 24 weeks at the election of the borrower, SBA is eliminating the “alternative covered period” as defined in the interim final rule published at 85 Fed. Reg. 33004, 33006 (June 1, 2020), as amended.

### **Other Takeaways**

- The First Consolidated IFR reiterates the position that if the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. Further, if the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant’s obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.<sup>3</sup>

---

<sup>3</sup> This appears to conflict with Section 320 of the Economic Aid Act which amends Section 364 of title 11 of the United States Code by adding at the end the following: “(g)(1) The court, after notice and a hearing, may authorize a debtor in possession or a trustee that is authorized to operate the business of the debtor under section 1183, 1184, 1203, 1204, or of this title to obtain a loan under paragraph (36) or (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), and such loan shall be treated as a debt to the extent the loan is not forgiven in accordance with section 7A of the Small Business Act or subparagraph (J) of such paragraph (37), as applicable, with priority equal to a claim of the kind specified in subsection (c)(1) of this section. (2) The trustee may incur debt described in paragraph (1) notwithstanding any provision in a contract, prior order authorizing the trustee to incur debt under this section, prior order authorizing the trustee to use cash collateral under section 363, or applicable law that prohibits the debtor from incurring additional debt. (3) The court shall hold a hearing within 7 days after the filing and service of the motion to obtain a loan described in paragraph (1). Notwithstanding the Federal Rules of Bankruptcy Procedure, at such hearing, the court may grant relief on a final basis.” As such, we await further clarity from the SBA and U.S. Treasury on this point.

<sup>4</sup> Italicized text has been added by the Economic Aid Act.

# Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

## **LOWELL A. CITRON**

Partner  
Chair, Debt Financing  
**T: 646.414.6819**  
[lcitron@lowenstein.com](mailto:lcitron@lowenstein.com)

## **KATHLEEN A. MCGEE**

Partner  
**T: 646.414.6831**  
[kmcgee@lowenstein.com](mailto:kmcgee@lowenstein.com)

## **KIMBERLY E. LOMOT**

Senior Counsel  
**T: 973.597.2430**  
[klomot@lowenstein.com](mailto:klomot@lowenstein.com)

## **MATTHEW J. MOISAN**

Counsel  
**T: 646.414.6855**  
[mmois@lowenstein.com](mailto:mmois@lowenstein.com)

## **JESSE S. O'CONNELL**

Associate  
**T: 646.414.6910**  
[joconnell@lowenstein.com](mailto:joconnell@lowenstein.com)

---

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

This Alert has been prepared by Lowenstein Sandler LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. Lowenstein Sandler assumes no responsibility to update the Alert based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. You should consult with counsel to determine applicable legal requirements in a specific fact situation. Attorney Advertising.