Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (SBNV)

Paycheck Protection Program (PPP) "Second Draw" Summary

MSC values your business and remains committed to supporting you during these difficult times. In March 2020, the United States government passed the CARES Act to direct stimulus money to help companies stay in business. We previously provided a summary of the various loan programs created under the CARES Act, to provide some insight as you determined if your company was eligible for stimulus funds. While some of those programs have expired, a few key programs are still available for certain borrowers, including the Paycheck Protection Program (PPP) and certain others.

Recently, the government passed Title III of Division N of the Consolidated Appropriations Act of 2021 (the "Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act," hereinafter, the "SBNV Act"), which provides a second round of stimulus for certain small businesses. Among other things, the SBNV Act replenishes PPP funds to be lent to (1) certain businesses that are deemed newly-eligible for PPP loans under the SBNV Act, (2) certain businesses that were already eligible for a PPP loan under the CARES Act but did not obtain a loan in the first round of PPP lending, and (3) certain businesses that have already received and fully-used their first round PPP funds, so that they may take a "second draw" from the PPP. The SBNV Act also makes modifications for all PPP loans generally, expanding the scope of allowable uses for PPP funds, adding flexibility in certain areas, and simplifying the loan forgiveness process for certain loans.

If you are seeking a "second draw" on PPP funds, we hope the below summary of will provide you some insight as you determine if your company is eligible for additional stimulus funds. If you are seeking your first PPP loan or another SBA loan previously established under the CARES Act, or if you have questions regarding your existing "first draw" PPP loan, you may consult the CARES Act summary (linked here https://www.mscdirect.com/corporate/cares-act) for further insights about your eligibility or loan obligations.

We will continue to post new or updated information as it becomes available. This information and all the information below are not intended to provide legal advice or to be a substitute for legal advice or counsel. In addition, the information provided here might be subject to additional guidance from lenders, the federal government and/or other institutions.

Paycheck Protection Program ("PPP") - "Second Draw" Loans

Borrower Qualifications

To be eligible to take a "second draw" from the PPP, a business must have met these requirements:

- previously received a PPP loan under the CARES Act;
- exhausted fully the amount of the first PPP loan, or is expected to exhaust fully the amount of the first PPP loan on or before the "second draw" loan's expected disbursement date;
- employs 300 or fewer employees (as opposed to 500 employees under the CARES Act); and
- suffered a 25% or more reduction in gross receipts in the first, second, or third quarter of 2020 as compared to the same quarter of 2019 (although applications submitted on or after January 1, 2021 may reference Q4 2020 and Q4 2019, and requirements differ for any businesses that were not in business for all of 2019).

Other eligible businesses include:

- Businesses in the accommodation and food services industries (NAICS Code 72) with more than one physical location but at each location no more than 500 employees for "first draw" loans or 300 employees for "second draw" loans;
- Nonprofit organizations;
- Eligible independent contractors and sole proprietors;
- Religious-based organizations.

Ineligible businesses include:

- Publicly-traded entities;
- Political or lobbying businesses;
- Businesses for which 20% is held by a business with significant connections to China or Hong Kong, or businesses with a board member that resides in China or Hong Kong;
- All other businesses previously identified as ineligible for PPP loans under the CARES Act (e.g., businesses described in 13 C.F.R. § 120.110 other than non-profits and religion-based businesses).

SBA affiliation rules are again waived for "second draw" loans where an eligible business: (1) has an NAICS code beginning with 72; (2) operates as a franchise with a franchise identifier code listed on the SBA Franchise Directory; or (3) receives financial assistance from an SBIC.

Note: Certain debtors in bankruptcy may also be eligible for "second draw" loans. The SBNV Act establishes a process for debtors in bankruptcy to obtain loans if court-approved. However, the applicable section of the Act is not yet effective. Debtors in bankruptcy should seek the advice of legal counsel before pursuing a PPP loan.

Maximum Loan Amount

The maximum loan amount is the lesser of:

(a) 2.5 times the average monthly payroll costs incurred over either the trailing 12 months or 2019 calendar year (or 3.5 times for NAICS code 72 businesses);

OR

(b) $2 million.*

Eligible entities may only receive one second draw loan.

* Modifications to this calculation exist for businesses employing seasonal employees, and for new entities. Further guidance regarding how different business types (e.g., sole proprietors, partnerships, corporations, non-profits) should calculate loan amounts can be found here, although guidance is expected soon to update for consistency with the SBNV Act.

Application Process

- Available for small businesses, sole proprietorships, independent contractors, and self-employed individuals. The SBA website has a list of current SBA lenders. Other lenders will be available to make loans as soon as they are approved and enrolled in the program.
- To apply, borrowers must complete the application (SBA Form 2483, available here) as well as submit payroll documentation. Borrowers seeking loans for less than $50,000 may use a more simplified application (SBA Form 3508S, available here; instructions here).
- Applications must be submitted by March 31, 2021.

Good Faith Certification:

- An applicant must certify that: (a) the uncertainty of current economic conditions make the "second draw" loan necessary, and (b) the funds will be used to retain workers and maintain payroll or mortgage, lease, and utility payments.
- For loans of $150,000 or less, applicants may submit a simplified certification regarding the applicable revenue loss requirement. For loans of $2 million, the SBA may impose certain additional requirements on the application certification.
- Borrowers determined to have not made the certification in good faith will not receive forgiveness for the loan, but will not be referred for enforcement if they repay the loan in full.

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Documentation:

- At minimum, applicants will need to provide documentation to verify the number of employees currently on the payroll, and average monthly payroll costs for the prior year, such as:

        - Payroll processor records, Payroll tax filings, Form 1099-MISC, or income and expenses (for a sole proprietorship); or
        - Other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.
    - Applicants may also be asked to provide documentation verifying current payrates for employees, historical numbers and payrates of employees throughout 2020, and recent monthly mortgage interest, rent, and utilities statements.
    - Examples of documentation required:
        - IRS Form 940 and 941;
        - Payroll Summary Report for 2019 and YTD 2020 (including a list of compensation of an individual employee that is in excess of $100,000 annual salary), with corresponding bank statement;
        - Employee Pay Stubs as of February 15, 2020 (or another corresponding period) with corresponding bank statement;
        - Breakdowns of payroll benefits (vacation, allowance for dismissal, group healthcare benefits, retirement benefits, etc.);
        - Certifications that all employees live within the United States, or a detailed list with corresponding salaries of all employees outside the United States;
        - Trailing twelve-month profit and loss statement (as of the date of application) for all applicants;
        - Articles of Incorporation/Organization of each borrowing entity;
        - Bylaws/Operating Agreement of each borrowing entity;
        - Owners' Driver's Licenses;
        - Most recent Mortgage Statement or Rent Statement (Lease);
        - Most recent Utility Bills (Electric, Gas, Telephone, Internet, Water).
    - Applicants may also need to certify that the requested loan amount can be calculated from the tax documents provided, and that those documents are valid and identical to documents submitted to the IRS.

Terms

- SBA will guarantee 100% of the loan.
- Payments (including interest) deferred until the date on which the amount of loan forgiveness is remitted to the lender, including for PPP loans which are sold on the secondary market, or 10 months after the end of the borrower’s covered period if the borrower declines to apply for forgiveness.
- Interest will be at 1%, and will accrue during the deferment period.
- Loans automatically require a minimum term of 5 years.
- No requirement for personal guarantee or collateral.
- No requirement that the borrower demonstrate that it cannot obtain credit elsewhere.
- The SBA will not collect any yearly or guarantee fees for the loan.
- All prepayment penalties are waived.

Allowable Uses

Allowable uses include:

- Payroll costs, including:
    - Wage, salary, commission, or similar compensation to employees;
    - Payment of cash tip or equivalent;
    - Payments for vacation, parental, family, medical or sick leave;
    - Allowance for dismissal or separation;
    - Payments required for group health care benefits (including insurance premiums);
    - Payments of any retirement benefits;
    - Payments of state and local employment taxes;
- Rent;
- Utilities;
- Interest payments on mortgage or debt obligations incurred before February 15, 2020;
- Operations expenditures, including payments for business software or cloud computing services that facilitated business operations (e.g., delivery, processing, and payment for products and services; sales and billing; HR; accounting services);
- Property damage costs due to public disturbances occurring in 2020 that are not covered by insurance;
- Certain supplier costs (expenditures for goods under a contract or order in effect prior to taking out the loan that are essential to the company’s business operations);
- COVID 19-related worker protection expenditures, including:
    - Purchase of personal protective equipment (PPE), or
    - Adaptive investments to help the loan recipient comply with federal, State, or local health and safety guidelines or restrictions (e.g., expanded drive-through windows, ventilation or filtration systems, physical barriers, expansions of indoor and/or outdoor business space, onsite or offsite health screening capabilities).

Requirement: 60% of loan proceeds must be used for payroll costs.

The money cannot be used for:

- Compensation of individual employees, independent contractors, or sole proprietors, in excess of an annualized salary of $100,000;
- Compensation of employees with a principal place of residence outside the United States;
- Qualified sick leave wages and family leave wages for which a credit is already covered by the Families First Coronavirus Response Act; or
- Taxes imposed or withheld during Chapters 21, 22, or 24 of the IRC during the covered period (Feb. 15, 2020 – June 30, 2020).

Misusing loan proceeds may result in:

- Being forced to repay amounts used for unauthorized purposes;
- Being subject to additional liability such as charges for fraud;
- Being subject to other recourse against the shareholder, member, or partners of the business for unauthorized use.

Forgiveness?

Simplified Loan Forgiveness

For all PPP loans under $150,000 (including "first draw" PPP loans), the SBNV Act creates a simplified loan forgiveness process and calls on the SBA to establish a new simplified forgiveness application form by January 20, 2021.

Eligible borrowers must submit a one-page certification that:

- states the number of employees the borrower retained because of the loan,
- estimates the total amount spent on payroll costs; and
- states the total loan value.

The borrower must also attest that (1) the required certification was accurate, (2) it has complied with PPP loan requirements, and (3) it will retain relevant records that prove compliance with such requirements (4 years for employment records, 3 years for other records).

Borrowers may be required to provide documentation to substantiate revenue loss.

General Loan Forgiveness

For loans of $150,000 or more, Borrowers will fill out the existing SBA Loan Forgiveness Application (with Instructions here) or Loan Application Form 3508EZ (for sole proprietors, independent contractors, and self-employed individuals with no employees, although applicants should review the Instructions to Form 3508EZ here to confirm that they qualify) and submit it to their lender. The Application contains, among other things, instructions for calculating expenses to confirm loan forgiveness eligibility and, where eligible, to ascertain the amount that is forgivable.

Other Forgiveness Details

The SBA may promulgate additional rules for the loan forgiveness process for some or all "second draw" loans, but current other key loan forgiveness details include:

- Eligibility for loan forgiveness will be determined based upon SBA guidance available at the time of the forgiveness application. The onus is on the borrower to accurately file for forgiveness.
- Forgiveness amount can be up to the full principal amount and any accrued interest.
- The borrower may select the "covered period" during which forgiveness is available (for costs incurred and/or paid), but the period must be between eight to twenty-four weeks after the date of loan origination.
- Borrowers must apply for forgiveness within 10 months after the day of the end of the loan's covered period, otherwise the borrower must begin making payments on the loan. If the application is submitted within 10 months, the borrower will not need to make principal or interest payments before the date on which the SBA remits the loan forgiveness amount to the lender. The lender is responsible for notifying the borrower of

the remittance, or that the loan or a portion of the loan was not forgiven, and the date on which the borrower's first payment is due.

- Payroll Costs:
    - 60% of forgiveness amount must be for payroll costs.
    - Borrowers may calculate payroll costs eligible for loan forgiveness using an "Alternative Payroll Covered Period" which correlates to the borrowers' payroll cycles.
    - Payroll costs are generally incurred on the day the employee's pay is earned (i.e., the day the employee worked), and where employees are not performing work but on the payroll, payroll costs can be incurred based on the schedule established by the borrower (typically, each day the employee would have performed work).
    - Borrowers may include in payroll costs those costs which are incurred but not paid during the forgiveness period, if paid on or before the next regular payroll date, and non-payroll expenses that are paid or incurred but not paid during the forgiveness period, if paid on or before the next regular billing date.
    - Borrowers may also include in payroll costs those costs which were incurred prior to but paid during the covered period.
    - Payroll costs include all forms of cash compensation paid to employees, including tips, commissions, bonuses, and hazard pay.
    - Employer expenses for employee group health benefits paid or incurred by the borrower are payroll costs.
    - Employer contributions for employee retirement benefits are payroll costs
    - Additional wages paid to tipped workers are forgivable.
    - Wages paid to furloughed workers are forgivable.
    - Payroll costs are capped at $100,000 per employee.
    - For borrowers that received loans before June 5, 2020 and elect to use an 8-week covered period, owner-employees and self-employed individuals are limited to "payroll compensation" no greater than the lesser of 8/52 of 2019 compensation or $15,385 per individual (across all businesses in which the owner-employee has an ownership stake), and owner-employees are further capped by the amount of their 2019 employee cash compensation and employer retirement and health care contributions made on their behalf. Schedule C filers are capped by the amount of their owner compensation requirement, calculated based on 2019 net profit. And general partners are capped by the amount of their 2019 net earnings from self-employment, subject to certain reductions. Borrowers using the 24-week covered period are capped at $20,833. Owner-employees with less than a 5% ownership stake in a C- or S- Corporation are not subject to this rule.
- Nonpayroll costs:
    - Borrowers are not required to report payment for nonpayroll costs that they do not want to be included in the forgiveness amount.
    - Nonpayroll costs must be paid during the covered period 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. But, if a borrower's nonpayroll expenses straddle the covered and noncovered period and are paid after the covered period (e.g., a borrower's "covered period" ends on July 26 and its electricity expenses for July are not paid until August 10), the borrower may seek partial forgiveness

of the expenses incurred during the covered period but paid on the next regular billing date (e.g., electricity expenses for July 1-26 are forgivable).
    - Eligible business mortgage interest, rent, lease, and utility costs incurred prior to the covered period and paid during the covered period are eligible for forgiveness.
    - Mortgage interest and rent payments can include both real and personal property.
    - Advance payments on mortgage obligations are not eligible for loan forgiveness.
    - Payments on leases renewed after February 15, 2020, and on mortgages refinanced after February 15, 2020, are eligible for forgiveness.
    - Amounts attributable to the business operation of a tenant or sub-tenant of a PPP borrower are not forgivable (e.g., where a borrower rents out a portion of its space or shares its space with another, it cannot obtain forgiveness for the portion of rent or mortgage expenses attributable to the subtenant or sharing business).
    - Rent or lease payments, but not mortgage payments, to a related party are eligible for loan forgiveness, so long as (1) the amount of forgiveness requested is no greater than the amount of mortgage interest owed on the property during the Covered Period attributable to the space being rented by the business, and (2) the lease and mortgage were entered into prior to February 15, 2020. For purposes of this rule, the borrower and property owner are related parties where they have "any ownership in common."
    - Interest on unsecured credit is ineligible for forgiveness, although interest on unsecured credit incurred prior to February 15, 2020 is an allowable use.
    - Eligible operations expenditures, property damage costs, supplier costs and worker protection expenditures are also eligible for forgiveness.
- Loan Forgiveness Reductions:
    - The amount forgiven will be reduced if the employer laid off employees or reduced salaries for certain employees between February 15, 2020, and April 26, 2020.
    - Reductions for Headcount:
        - Loan forgiveness will be reduced in proportion to the reduction in headcount during the covered period as compared to the average number of Full-Time Equivalent (FTE) employees per month on the borrower's payroll between February 15, 2019 and June 30, 2019, or January 1, 2020 and February 29, 2020.
        - Full-time employees are employees who work 40 hours or more, on average, each week. Each such employee is considered an FTE with a weight of 1.0. To calculate FTE weights for other workers, borrowers may either add the hours of all part-time employees and divide by 40, or elect, "for administrative convenience . . . to use a full-time equivalency of 0.5 for each part-time employee," as long as the borrower applies the chosen method consistently.
        - Borrowers are not penalized for employees who (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours, but only if the position was not filled by a new employee.
    - Reduction for Salaries:

        - Loan forgiveness will be reduced in proportion to the reduction in salary during the covered period greater than a reduction of 25% for employees making less than an annualized rate of $100,000 in any 2019 pay period.
        - This calculation is performed on a per-employee basis and not in the aggregate.
        - The salary/wage reduction applies only to the decline in employee salary and wages not attributable to the FTE reduction.
    - A reduction in loan forgiveness may be remedied:
        - For reductions in headcount and salary occurring between February 15, 2020 and April 26, 2020, if employees are re-hired and salaries restored by December 31, 2020, as compared to the headcount and salaries existing as of February 15, 2020, the employer will not be penalized.**
        - If employers make a good faith written offer to rehire an employee and the employee rejects the offer, the reduction for that employee may be forgiven and the employee may forfeit eligibility for continued unemployment benefits. SBA guidance states that the borrower must inform the applicable state unemployment insurance office within 30 days of the employee's rejection of the offer.
        - If the employer can (1) document an inability to rehire individuals employed on February 15, 2020 and an inability to hire "similarly qualified" employees for unfilled position on or before December 31, 2020, or (2) document an inability to "return to the same level of business activity" that the business experienced before February 15, 2020 "due to compliance with the requirements established or guidance issued" by certain federal agencies from March 1, 2020 to December 31, 2020 "related to the standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19."**
    - Borrowers receiving loans less than $50,000 are exempt from reductions to loan forgiveness based on reductions to FTE headcount or salary and wages.

*Note: SBA regulations state that the loan forgiveness covered period begins on the date of disbursement.

**Note: The SBNV Act does not make clear whether the deadline to remedy a headcount or salary reduction will be extended through March 31, 2021. The SBA is, however, expected to issue new regulations shortly which may provide further insight.

Loan Forgiveness Documentation:

Borrowers, especially those with loans greater than $150,000, should expect requirements to submit certain documentation, including:

- Documents verifying eligible payroll expenses, including bank statements, tax forms, and third-party payroll reports and receipts of benefits payments.
- Documents evidencing FTE numbers for the applicable periods (i.e., payroll tax filings and wage reports).

- Documentation of nonpayroll expenses, such as:
    - Amortization schedules and receipts of eligible mortgage interest expenses;
    - Leasing agreements and receipts for eligible lease expenses;
    - Utility invoices and receipts for eligible utility expenses.
- For nonpayroll costs, documentation "verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period."
- Documents substantiating revenue loss.

*Note: The cap on compensation of employees in excess of $100,000 only applies to cash compensation (e.g., salary, wages, or tips). It does not apply to non-cash benefits, such as employer contributions to defined-benefit and defined-contribution retirement plans, payment for provision of employee benefits consisting of group health care coverage, including insurance premiums, and payment of state and local taxes assessed on compensation of employees.

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SBA Loan Review Process

- The SBA may review "any PPP loans," at any time in its discretion, and may consider in that review whether a borrower correctly calculated the loan amount, properly used the loan proceeds, and/or is entitled to the loan forgiveness amount sought. This may include loans smaller than $2 million.
- Borrowers must retain PPP documentation for at least 6 years after the date the loan is forgiven or paid in full, and the SBA and SBA Inspector General must be granted these files upon request. For borrowers applying for simplified loan forgiveness (i.e., for a loan under $150,000), they must retain records for 4 years for employment records, and 3 years for other records.
- If the SBA believes a borrower may be ineligible for the loan or some forgiveness amount, it will require that the lender make a written request for additional information, and it may also request information directly from the borrower. Failure to respond to the request may result in a determination that the borrower is ineligible for forgiveness or the loan itself.
- Per SBA guidance, shareholders, members, or partners of a borrower that is deemed ineligible to have received a PPP loan will not be protected by "the CARES Act's nonrecourse provision … which limits SBA's recourse against individual shareholders, members, or partners of a PPP borrower for nonpayment of a PPP loan only if the borrower is an eligible recipient of the loan."
- Borrowers will be given the opportunity to seek reconsideration and appeal of certain SBA loan review decisions, but may not appeal decisions by their lenders directly. Appeals are heard by the SBA's Office of Hearings and Appeals (OHA). Borrowers may appeal an SBA loan review decision that (1) a borrower was ineligible for a loan or loan amount, (2) a borrower used PPP funds for unauthorized purposes, (3) a borrower was ineligible for the forgiveness amount approved by the lender (whether the lender issued a

full or partial approval), or (4) a borrower was ineligible for any forgiveness amount (i.e., the SBA concurs with a lender's full denial decision).

- A borrower may also seek review of a final SBA decision (i.e., a decision on the borrower's appeal) in federal district court, but must first exhaust its administrative remedies, including by filing a request for review of the OHA's to the SBA Administrator. Borrowers should carefully review with their attorneys to ensure that they comply with the procedural rules regarding PPP appeals, found here.