

## Paycheck Protection Program - What Has Changed?

Alert

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Previously we reported on the various types of loan relief available under the Coronavirus Aid, Relief, and Economic Security (CARES) Act signed into law on March 27, 2020. The [Paycheck Protection Program \(PPP\)](#), implemented by the Small Business Administration (SBA), with support from the Department of the Treasury, is a key program to provide funding to help eligible small and nonprofit businesses maintain their payroll, hire back employees who may have been laid off and cover applicable overhead.

The Coronavirus Response and Relief Supplemental Appropriations Act of 2021 (CRRSAA), which was signed into law on December 27, 2020, at Section N, "Additional Coronavirus Response and Relief," provides new funding to the PPP, makes a number of retroactive changes to the provisions applicable to the program (including eligibility requirements for new loans), and for a narrower class of borrowers that have already received and fully used an initial PPP loan, which we refer to as a "First Draw Loan," introduces the concept of an additional PPP loan under the CRRSAA relief package, called a "Second Draw Loan."

In this alert we will provide you with an overview of some key changes to the PPP as a result of the CRRSAA.

### FIRST DRAW PPP LOANS

#### Eligibility for First Draw Loans

Pursuant to the CRRSAA and the SBA's subsequent guidance, a borrower who has not already received a First Draw Loan in 2020 under the CARES Act may still apply for a First Draw Loan until the sooner of March 31, 2021, or the date funds are exhausted. Under provisions discussed further below, certain borrowers who received less than the full benefit of a First Draw Loan in 2020 may also reapply for or request an increase in the loan amount of a First Draw Loan. A borrower who received the full available

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benefit of a First Draw Loan in 2020 under the CARES Act may only be eligible for a Second Draw Loan.

The SBA has also expanded the eligibility criteria for a First Draw Loan, so the following borrowers, including some that may not have been eligible in 2020 under the CARES Act, that were in operation on February 15, 2020, may now be eligible for a First Draw Loan. Those that would be eligible include:

- Small business concerns under the applicable revenue-based size standard under 13 C.F.R. § 121.201 or the alternative size standard, which considers tangible net worth and average net income
- Independent contractors, self-employed individuals or sole proprietors
- Business concerns, 501(c)(3) nonprofits, 501(c)(19) veteran organizations, or tribal business concerns described in section 31(b)(2)(C) of the Small Business Act that employ no more than the greater of 500 employees or the applicable employee-based size standard under 13 C.F.R. § 121.201
- Housing cooperatives, 501(c)(6) organizations, or destination marketing organizations that employ no more than 300 employees
- News organizations that employ no more than the greater of 500 employees or the applicable employee-based size standard under 13 C.F.R. § 121.201 per location, where the news organization is majority-owned or controlled by a business or nonprofit public broadcasting entity with a NAICS code 51110 [newspaper publishers] or 5151 [radio and television broadcasting] or the particular trade or business falls under one of these NAICS codes
- Certain other types of entities specifically provided for in the PPP rules

While the SBA's affiliation rules generally continue to apply in determining the size of an eligible business, the affiliation rules are waived for the following categories of entities:

- Businesses with 500 or fewer employees that, as of the loan disbursement date, are assigned a NAICS code beginning with 72 [accommodation and food services]
- Businesses operating as a franchise that are assigned a franchise identifier code by the SBA
- Businesses that receive financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958
- Businesses (including any stations that broadcast pursuant to a license granted by the FCC under title III of the Communications Act of 1934) that employ 500 or fewer employees, or meet the size standard for the NAICS code applicable to the business, per physical location, and are majority owned or controlled by a business that is assigned a NAICS code beginning with 51110 or 5151
- Nonprofit organizations that are assigned a NAICS code beginning with 5151
- Certain other categories of entities for which SBA waives affiliation pursuant to 13 C.F.R. § 121.103(b)

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Certain categories of entities, however, have been deemed ineligible for First Draw Loans, including:

- Businesses engaged in illegal activity
- Household employers
- Businesses with a 20% owner who is currently incarcerated, is subject to formal criminal charges for a felony, or has been convicted of a felony involving fraud, bribery or false statement on a loan application
- Businesses that are delinquent or have defaulted, within the last seven years, on federal or federally-guaranteed loans
- Businesses not in operation on February 15, 2020
- Businesses that have received or will receive a grant under the Shuttered Venue Operator Grant program
- Businesses in which the U.S. 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 in the business
- Businesses that are issuers of securities that are listed on an exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934
- Businesses that are permanently closed
- Other businesses that were previously ineligible to obtain a PPP loan, including businesses listed under 13 C.F.R. § 120.110, except under paragraphs (a), (g) and (k), and, in circumstances discussed below, debtors in bankruptcy proceedings

## Reapplying for and Applying for Loan Increases to First Draw Loans

The CRRSAA and interpretive guidance permit a First Draw Loan borrower that did not receive loan forgiveness by December 27, 2020 to either reapply for or request an increase to a First Draw Loan, up to the maximum amount for which they were eligible, if the borrower did not initially receive the full amount for which they were eligible because the borrower (a) did not accept the full amount of the loan for which they were eligible or (b) returned some or all of their First Draw Loan funds. Existing borrowers should thus consider whether they left any 2020 PPP money on the table or returned money to the table that they may claim now. For example, a borrower that returned funds because the borrower thought it would not be able to use the funds within the covered period after suspending operations due to COVID-19 restrictions might be able to reclaim those funds.

## SECOND DRAW PPP LOANS

In addition to extending and amending the existing First Draw Loan program as described above, CRRSAA also provides a second bite at the PPP apple for certain borrowers that did receive a First Draw Loan, through a Second Draw Loan under new section 37 to Section 7(a) of the Small Business Act.

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## Second Draw Loan Terms

The terms of Second Draw Loans are the same as for First Draw Loans:

- 100% SBA guaranteed
- No collateral required
- No personal guarantees required
- 1% interest rate (calculated on a non-compounding, non-adjustable basis)
- Five-year maturity

All guidance issued in connection with First Draw Loans applies to Second Draw Loans, except as specified in the new guidance applicable to Second Draw Loans.

## SBA Guaranty

As with First Draw Loans, Second Draw Loans are subject to an SBA guaranty of 100% of Second Draw Loans. As a result, a lender who makes a Second Draw Loan will not bear the financial risk of non-payment, as long as the lender complies with its obligations under the program.

## Eligibility

Eligibility for Second Draw Loans is much more limited than for First Draw Loans. To be eligible an applicant must be a business concern, nonprofit organization, housing cooperative, veterans organization, tribal business concern, eligible self-employed individual, sole proprietor, independent contractor, or small agricultural cooperative that (i) employs not more than 300 employees, (ii) experienced a 25% or greater reduction in gross receipts for at least one quarter in 2020 as compared to the same quarter in 2019, (iii) received a First Draw Loan, and (iv) has used, or will use, all proceeds of its First Draw Loan for payment of eligible expenses before the Second Draw Loan is funded. While applicants must have used all proceeds of the First Draw Loan for payment of eligible expenses, the applicant need not have applied for loan forgiveness or received loan forgiveness with respect to its First Draw Loan. *See Section III regarding Bankruptcy Issues Impacting PPP Eligibility for more information.*

The application for a Second Draw Loan still includes a certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” The SBA has yet to offer any clear guidance on how it will analyze this test when it audits or reviews PPP Loans.

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## Counting Employees

It is important to note that the 300 employee test is the total number of employees (counting all full-time and part-time employees), not full-time equivalent employees. The total number of employees is determined in the same manner as for First Draw Loans, under the SBA affiliation rules applicable to the PPP (i.e., 13.C.F.R. 121.301(f)). Thus, the applicant and all affiliates must not have more than 300 employees on a combined basis.

## Revenue Reduction Test

In general, an applicant that was in business during calendar year 2019 can satisfy the revenue reduction test if its gross receipts during any calendar quarter in 2020 were 25% or more below its gross receipts during the same quarter in 2019. In addition, an applicant that was in business only during the last quarter or last two quarters of calendar year 2019 can satisfy the gross receipts test if its gross receipts during any quarter of 2020 were 25% or more below its gross receipts during any quarter of 2019 during which it was in business. Applicants who were not in business during 2019, but were in business on February 15, 2020, are to compare gross receipts for the second, third or fourth quarters of 2020 to gross receipts for the first quarter of 2020. As an alternative, applicants in business during all of 2019 may compare annual gross receipts in 2020 with annual gross receipts in 2019.

Gross receipts are to be calculated on a cash basis for cash-basis taxpayers and on an accrual basis for accrual-basis taxpayers.

Although not entirely clear, it appears that gross receipts calculations must be made on a calendar year/quarter basis, not a fiscal year/fiscal quarter basis. However, entities that use a fiscal year to file taxes may document a reduction in gross receipts with income tax returns if the applicant's fiscal year contains all of the second, third and fourth quarters of the calendar year.

For a for-profit business, gross receipts are calculated in a manner consistent with the definition of "receipts" in the SBA regulation published at 13 C.F.R. 121.104. Gross receipts generally include all revenue, including receipts from the sales of products or services, interest, dividends, rents, royalties, fees or commissions (less returns and allowances). Gross receipts exclude net capital gains and losses. Gross receipts do not include:

- Taxes included in gross or total income, such as sales or other taxes collected from customers
- Proceeds from transactions between affiliates
- Amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker

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Gross receipts include other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income and employee-based costs such as payroll taxes.

For a nonprofit applicant, gross receipts are described in section 6033 of the Internal Revenue Code.

For all applicants, the affiliation rules apply to calculating gross receipts unless a waiver of the affiliation rules applies. Thus, in the absence of a waiver of the affiliation rules, an applicant's gross receipts calculation must include the gross receipts of all affiliates.

Gross receipts do not include forgiven First Draw Loan amounts or Economic Injury Disaster Loan (EIDL) advances, which are not subject to federal income tax.

## Submission of Evidence of Revenue Reduction

For loans of \$150,000 or less, an applicant is not required to submit documentation of its reduction in revenue at the time of loan application, but must submit such documentation before or with the filing of the loan forgiveness application. For all other loans, the required documentation must be submitted with the loan application.

## Ineligible Entities

The SBA list of ineligible entities continues to include those entities described in 13 C.F.R. 120.110, except that certain nonprofit entities and entities principally engaged in teaching religious beliefs continue to be eligible to the same extent as such entities are eligible for First Draw Loans. In addition, the following entities are not eligible:

- Any business not in existence on February 15, 2019
- Publicly-traded companies
- Any entity primarily engaged in political or lobbying activities, including those organized for research or public policy or political strategy advocacy and think tanks
- Certain entities in which a business organized in China or Hong Kong or that has significant operations in China or Hong Kong holds 20% or more of the economic interest
- Any entity with a director who is a Chinese resident
- Any person required to be registered under Section 2 of the Foreign Agents Registration Act of 1938
- Any person or entity that receives a Shuttered Venue Operator Grant under section 324 of CRRSAA
- Entities in which the U.S. president, the vice president, the head of an executive department, or a member of Congress, or the spouse of such person owns, controls or holds at least 20% of any class of

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equity

- Any person or entity that has previously received a Second Draw Loan (i.e., each borrower can receive only one Second Draw Loan)
- Any business that has permanently closed

The SBA will not process applications for Second Draw Loans for applicants who have unresolved issues with First Draw Loans, such as instances where the SBA is reviewing the loan amount or the applicant's eligibility for the First Draw Loan.

On the other hand, as discussed in Section III below, certain businesses that are in bankruptcy may now be eligible, reversing the SBA's original position.

## Maximum Loan Amount

As with First Draw Loans, the maximum loan amount is generally calculated as 2.5 times the applicant's average monthly payroll costs, but is capped at \$2 million. Applicants may compute average payroll costs for 2019 or 2020 (the one-year period before the loan is made). Thus, an applicant who used calendar year 2019 payroll cost information for its First Draw Loan may use the same information for a Second Draw Loan application, which may streamline the application process if the applicant uses the same lender. An applicant who used a 12-month period other than calendar year 2019 to calculate payroll costs for its First Draw Loan application may not use that calculation for a Second Draw Loan and must re-calculate average monthly payroll costs as required by the second draw guidance.

An affiliated group of applicants may not receive, in the aggregate, more than \$4 million in Second Draw Loan funds. (Note the limits for First Draw Loans and Second Draw Loans are stated separately; a borrower that drew the maximum First Draw Loan for which it was eligible may also draw the maximum Second Draw Loan for which it is eligible.)

## BANKRUPTCY ISSUES IMPACTING PPP ELIGIBILITY

The SBA took the position that the debtors in bankruptcy were not eligible for First Draw Loans, although the CARES Act did not address that question at all. The CRRSAA provides a process for obtaining SBA consent to a Second Draw Loan, although the process for obtaining SBA consent is not yet clear.

## Eligibility for First Draw Loans

While the CARES Act was silent on whether debtors in bankruptcy proceedings would be eligible for First Draw Loans (assuming they met the other criteria), the SBA unequivocally took the position in a rule dated April 24, 2020—which it reiterated as recently as January 6, 2021—the "SBA Exclusion Rule" that debtors in bankruptcy were categorically excluded from eligibility for First Draw Loans on the basis that they were

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unacceptably high credit risks and would be more likely to use the First Draw Loans for unauthorized purposes. *See 13 CFR Parts 113, 120 and 121, Docket No. SBA-2021-0001) at p. 26.*

This position generated significant litigation in bankruptcy cases, with courts throughout the country issuing various rulings, ranging from the SBA Exclusion Rule is enforceable, to the SBA Exclusion Rule is unenforceable as discriminatory against debtors in bankruptcy (which is legally impermissible under the bankruptcy law). *See "This DIP Loan Brought To You By Someone Who CARES! (Or 'I'm From The Government And I'm Here To Help You")", ABI Headlines (April 1, 2020); Salerno & Simpson, "This DIP Loan Should Be Brought To You By Someone Who CARES! (Or 'You Can't Get There from Here"): A Plea for Rationality, Part Two 1/2", ABI Journal (June 2020).* That litigation continues to this day.

### Eligibility for Second Draw Loans

The new law authorizes certain types of debtors to be eligible for Second Draw Loans (assuming they meet the other eligibility criteria, including having received and fully used a First Draw Loan), provided the SBA specifically gives its consent for this portion of the new law to become effective (the "SBA Consent"). *See "The 'New and Improved' PPP Loan Package! Part 3", American Bankruptcy Institute Journal (February 2021).*

There are three limited categories of debtors that (should the SBA give its consent) would be eligible for Second Draw Loans: (a) "small business debtors" (debtors that owe, in the aggregate, less than \$7.5 million in total debts, and whose bankruptcy proceedings are handled under special sections of the bankruptcy law (called "Subchapter V Cases"); (b) family farmer debtors (dealt with in Chapter 12 of the bankruptcy law); and (c) individual wage earner debtors (dealt with in Chapter 13 of the bankruptcy law). All other debtors are excluded by omission.

### Uncertainty Regarding SBA Position on Debtor Eligibility for Second Draw Loans

The CRRSAA does not provide a timeline for the SBA to give the SBA Consent. The SBA's prior position (as set forth in the SBA Exclusion Rule) unequivocally holds that debtors in bankruptcy should not have access to First Draw Loans. For the SBA to give the SBA Consent will be a material change in position for the SBA.

That said, on January 20, 2021 the Biden administration took office, and with it comes a new Secretary of the Treasury, Janet Yellen, and Administrator of the SBA (with Isabel Guzman the nominee still currently subject to senate confirmation). While there can be no assurances, and with timing still unknown, there is the possibility that the SBA will give the SBA Consent thereby making Second Draw Loans available to a limited group of debtors in bankruptcy.



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This will not resolve the still ongoing litigation involving debtors and First Draw Loan eligibility issues unless the new Treasury and SBA heads opt to drop their opposition to debtors being eligible for First Draw Loans (which, again, was not an exclusion found in the statute itself). Moreover, it is likely that even if the SBA consents to Second Draw Loans, those debtors that have more than \$7.5 million in debt and otherwise fall outside the three categories of eligible debtors may bring litigation in their bankruptcy proceedings asserting that the exclusion of some debtors from Second Draw Loan eligibility constitutes impermissible discrimination against those debtors. As such, they likely will assert Second Draw Loans should be available to all debtors in bankruptcy. If the SBA decides to fight that litigation, it will likely take several years to work through the federal court system. For struggling businesses that had to avail themselves of bankruptcy relief, one is left to wonder if the litigation solution can be accomplished soon enough to make a material difference to those cash-strapped businesses.

## PPP LOAN FORGIVENESS

### Expanded Categories of Forgivable Expenses

The CRRSAA adds four new categories of expenses for which PPP loans may be used and which qualify for forgiveness, subject to the original rule that at least 60% of PPP proceeds must be spent on payroll costs. The new categories are:

- **Covered Operations Expenditures:** Broadly defined as expenditures relating to payment for “any business software or cloud computing services 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:** Defined as property damage costs relating to looting or public disturbances in 2020 that have not been covered by insurance or other compensation.
- **Covered Supplier Costs:** Defined as expenditures to suppliers for goods that are “essential to the operations of the entity at the time at which the expenditure is made” and purchased pursuant to a contract or order in effect prior to the beginning of the covered period for the loan (subject to an exception allowing for contracts or orders for perishable goods to be entered into at any time during the covered period).
- **Covered Worker Protection Expenditures:** Defined to include PPE and expenses relating to business adaptations to comply with federal, state or local COVID-19 guidance (examples include the installation of a drive-through window or sneeze guard, air pressure ventilation or filtration systems, and onsite or offsite health screening capabilities).

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The addition of these new categories of forgivable expenses is effective retroactive to the date of the CARES Act, but the new categories do not apply to loans that were forgiven before December 27, 2020.

## Covered Period Flexibility

While guidance for the CARES Act had indicated a borrower could elect to use either an eight-week or 24-week covered period, the CRRSAA provides that the covered period begins on the date of disbursement of a PPP loan and ends on any date selected by the borrower at least eight weeks and up to 24 weeks after the date of disbursement. The ability to select an end date to the covered period may help borrowers avoid reductions in the loan forgiveness amount resulting from reductions in wages, salaries or FTE after all PPP loan funds are spent.

## New Procedures for Loans of \$150,000 or Less

The CRRSAA establishes new forgiveness procedures with regard to PPP loans of \$150,000 or less. Congress directed the SBA to establish a new forgiveness application by January 20, 2021 for use with these loans. The legislation mandated that the new forgiveness application could not be more than one page in length and must only require the borrower to provide:

- A statement by the borrower of the number of employees the borrower was able to retain “because of the covered loan”
- The “estimated amount” of the covered loan spent on payroll costs
- The total amount of the loan
- An attestation that the forgiveness application was accurately provided
- An attestation that the borrower complied with the statutory requirements of the PPP
- An attestation that the borrower will retain records relevant to proving its compliance with such requirements for three years from the date of the forgiveness application (four years for employment records)

Further, the CRRSAA states that a borrower using this new procedure may not be required to submit “any application or documentation” in addition to the short-form forgiveness application and “information required to substantiate forgiveness” (a broad phrase that may undermine any intent to set limits on how much documentation the borrower needs to submit).

The new short-form forgiveness application was released on January 19, 2021 as SBA Form 3508S. Notably, Form 3508S does not require the borrower to attest to the number of employees the borrower was able to retain “because of the covered loan” and instead simply asks for disclosure of the total number of employees at the time of the loan application and the total number of employees at the time of the

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forgiveness application. In addition, although the CRRSAA indicates the borrower may only be required to provide an “estimated amount” of the loan spent on payroll costs, Form 3508S does not incorporate this estimation concept and appears to require an exact calculation.

Interestingly, the CRRSAA also includes language describing certain actions the SBA “may” take with regard to forgiveness applications for loans of \$150,000 or less. Specifically, the SBA may review and audit such loans, access records provided by the borrower, and “in the case of fraud, ineligibility, or other material noncompliance with applicable loan or loan forgiveness requirements” modify the amount of the loan or the amount of forgiveness. Perhaps Congress intended this permissive language to limit the scope of the SBA’s authority with regard to such loans. But in the absence of language prohibiting the SBA from exercising its general authority with regard to such loans, it is hard to imagine such language being effective as a limit on SBA action.

### Forgiveness Audit Plan

The CRRSAA requires the SBA to prepare and submit to Senate and House committees an audit plan detailing its policies and procedures for conducting reviews and audits of PPP loans and the metrics the SBA will use to determine which loans to audit. The audit plan is due to Congress by February 10, 2021. Thereafter, the SBA will be required to provide monthly reports to Congress on its forgiveness review and audit activities, including the number of reviews and audits that are active, as well as those that have been ongoing for more than 60 days, together with descriptions of any “substantial changes” made to the audit plan as first submitted to Congress.

### PPP DATA, AUDITS AND INVESTIGATIONS

Like many federal programs, the CARES Act mandated tracking of PPP data, auditing of loan issuers and recipients, and investigating for potential wrongdoing. As of January 31, 2021, the SBA’s reported data reveals that the SBA had approved more than 6.039 million loans, for a total of \$595.5 billion. The average loan size for both first and second draw loans was \$81,635 (average total first draw loan size, \$21,157 and average total second draw loan size, \$102,228). The program has been administered through 5,460 lenders and across all 50 states, all territories and the District of Columbia. Although the plan was for the participating entities to collect PPP loan demographics, the SBA reported in August 2020 that approximately 75% of the PPP loans did not include demographic information at the time of loan application. In its January report, SBA indicates that a vast majority of the loans still do not have demographic information associated with them (\$71.15 billion unknown gender; \$60.548 billion unknown ethnicity; \$71.4 billion unknown veteran status).

Exactly who has jurisdiction to audit PPP loans? The SBA is charged with the implementation of the PPP, but the CARES Act also established the Office of the Special Inspector General for Pandemic Recovery (SIGPR) to provide oversight of pandemic relief programs. We previously reported on the first quarterly

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report issued by the SIGPR, which identified the PPP as an area of jurisdictional ambiguity – the SIGPR identified the factors that weigh in favor of and against its jurisdiction over PPP audit and investigation, and asked Congress to clarify “lingering ambiguities.” In its Strategic Plan for Fiscal Years 2021-2023, the SIGPR provided a three-year roadmap for implementing SIGPR’s mission, vision and goals, but at that time it still did not have a definitive position on its legal jurisdiction over PPP. In its latest quarterly report, published on February 1, 2021, the SIGPR acknowledges that some programs, such as PPP, may not be directly within its jurisdiction. However, the report does make clear that the SIGPR does consider concerns about loan recipients engaging in “double-dipping,” e.g., receiving PPP funds for payroll costs that are also charged to current federal awards which would result in “the Federal Government paying for the same expenditures twice,” to be within its jurisdiction. It also is looking at “multiple dipping” situations, where an entity receives funding from two or more CARES Act programs, as it considers these situations to be at increased risk of fraud and abuse.

The Office of the SIGPR reports that it has engaged in proactive initiatives to develop and refer leads to other investigatory and enforcement entities as part of its audit and investigation activities to ferret out suspected fraud under the CARES Act programs. It does not separately identify its PPP efforts, but reports that it has referred 69 leads to law enforcement partners, including agency inspectors general; initiated five new preliminary investigations including three that are being worked in conjunction with U.S. Attorneys’ offices; and vetted 27 complaints that it received, including two that were referred to law enforcement partners. The SIGPR has entered into partnerships and agreements with various entities, including FinCEN, Department of Treasury entities, the Securities and Exchange Commission, and the Federal Trade Commission. It also has Memoranda of Understanding in place with 11 U.S. Attorneys’ Offices.

It is clear that Justice has no qualms [about investigating and prosecuting for fraud](#) under the PPP. Justice’s Criminal Division Fraud Section and law enforcement – the Federal Bureau of Investigation, SBA Office of Inspector General, the Internal Revenue Service (IRS), U.S. Postal Inspection Service, and Offices of Inspectors General from the Federal Deposit Insurance Corporation (FDIC) and Federal Housing Finance Agency (FHFA)—[are partnering](#) in their efforts to combat fraud in PPP.

Currently, Justice’s Criminal Division [reports](#) that it has charged more than 50 defendants with fraud under PPP, including more than \$175 million in attempted loss and \$70 million in actual loss, and it has seized more than \$30 million in PPP funds to address potential fraud. As of January 28, 2021, the Justice PPP enforcement site [lists cases](#) that have been brought in Arizona, California, DC, Florida, Georgia, Hawaii, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, South Carolina, Texas, Washington and Wisconsin. In a [press release](#) issued on January 28, 2021, Justice announced that it has indicted six individuals with fraudulently obtaining approximately \$1.5 million in PPP loans on behalf of five Georgia and South Carolina businesses. Five of the six pled guilty with regard to the scheme to seek loans of \$300,000 for each business by submitting loan applications containing false and misleading statements about the businesses with the

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help of the sixth individual. Justice reports that these individuals were part of a larger group that fraudulently obtained approximately \$3 million in PPP loans. As of this date, Justice has recovered \$1.2 million of this stolen money.

The CARES Act created the Pandemic Response Accountability Committee (PRAC) comprised of the federal Offices of Inspectors General to promote oversight, transparency, and the prevention and detection of fraud, waste and abuse, and mismanagement. The PRAC has issued a report on the [Top Challenges Facing Federal Agencies Related to COVID-19 Emergency Relief and Response Efforts](#). Reducing improper payments and obtaining timely and accurate financial performance information are some key aspects of their auditing efforts.

The SBA also is looking at fraud in the PPP – the SBA Office of Inspector General (SBA OIG) is actively alerting the public about [fraud schemes](#) associated with the economic stimulus programs offered by SBA in response to the pandemic, including grant fraud, loan fraud, and phishing. If you are aware of fraud in these programs, you can contact the [SBA OIG hotline](#) by telephone or portal.

### CLARIFICATION OF PPP FUND TAX TREATMENT

The CARES Act and CRRSAA provide funds to pay business expenses, with the expectation that the loan will be forgiven if the funds are used properly, raising questions about whether borrowers could in fact deduct expenses paid with PPP loan proceeds, and whether the borrowers would have to recognize forgiven loans as income. The IRS, in Notice 2020-32 and Rev. Rul. 2020-27, previously took the position that business expenses paid with PPP proceeds that were forgiven or expected to be forgiven could not be taken as deductions by borrowers, as they would otherwise do in the normal course. Further complicating matters, due to the restrictions on the uses of funds for purposes of seeking loan forgiveness, some businesses would not be able to seek forgiveness of all of the loan, and could either return unused funds or retain the funds and pay the loan at the low PPP rates made available.

The CRRSAA clarifies the tax status of loan proceeds as used. On January 6, the IRS issued Revenue Ruling 2021-2, reversing its earlier position and allowing expenses paid with PPP loan proceeds to be deducted. Specifically, the IRS was implementing the recent amendment to the CARES Act, which provides, as amended, that no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income under the PPP loan program. This change is set to be effective retroactively to the date of the CARES Act, March 27, 2020. For further information on the implications of this IRS ruling, see our [Stinson IRS alert](#) issued earlier this month.

With respect to taxability of the forgiven loan, the CRRSAA specifically provides that the PPP loan is completely tax-exempt, and not taxable as income when forgiven.

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## CONCLUSION

The CRRSAA provides eligible borrowers who did not obtain a First Draw Loan, or drew or retained or obtained forgiveness of less than their eligible maximum First Draw Loan, a second chance to draw up to their eligible maximum, through the earlier of March 31, 2021 or the date funds are exhausted. CRRSAA also provides eligible borrowers who did obtain a First Draw Loan an opportunity to obtain a Second Draw Loan, subject to expanded eligibility criteria and substantially the same terms as the First Draw PPP Loan, including the maximum loan amount.

Under the CRRSAA, the eligibility criteria are expanded, including several new categories, including housing cooperatives, destination marketing organizations, news organizations, and others, all subject to specific limitations.

The CRRSAA also endeavors to clear up questions that arose under the CARES Act, including establishing eligibility criteria for bankruptcy debtors and addressing deductibility of expenses paid with PPP loan proceeds (they are) and taxability of forgiven PPP loans (they are not).

The CRRSAA seeks to simplify the process for obtaining forgiveness of loans of \$150,000 or less (time will tell).

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