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New and “Improved” Paycheck Protection Program (PPP) Reopens: Second Round Loans, Eligibility and Forgiveness Considerations

The much anticipated and heavily politicized Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act (the Act) became law on December 27, 2020, bringing more clarity and more opportunities to receive a Paycheck Protection Program (PPP) loan and use the loan proceeds. The Act reopens the PPP to eligible businesses who did not receive a PPP loan in 2020 and certain new businesses who previously were not eligible to receive a PPP loan (First Draw PPP Loans), while giving existing PPP borrowers the chance to borrow additional PPP funds (Second Draw PPP Loans).

The Small Business Administration (SBA) announced the PPP will reopen the week of January 11 for new borrowers and certain existing PPP borrowers. Initially only community financial institutions will be able to make First Draw PPP Loans on Monday, January 11 and Second Draw PPP Loans on Wednesday, January 13. The PPP will open to all participating lenders shortly thereafter. A revised application for the First Draw PPP Loans and a new application for the Second Draw PPP Loans have been released by the SBA and can be found [here](#). Prior to the reopening announcement, the SBA issued two Interim Final Rules: [Paycheck Protection Program as Amended by Economic Aid Act](#) and [Second Draw PPP Loans](#), outlining program changes under the Act and the SBA’s implementation of those program changes.

Borrowers should become familiar with the SBA’s changes to the terms of the First Draw PPP Loans and Second Draw PPP Loans quickly to take advantage of the reopening of the program. Eligible small businesses can apply for the PPP loans before the new deadline of March 31, 2021, to the extent funds remain available.

New for All PPP Borrowers (First Draw and Second Draw PPP Loans)

Tax Benefits

Just in time for tax season (and on the heels of the IRS doubling down to the contrary), the Act specifies that expenses paid with forgiven PPP loan proceeds may be deducted by the borrower. The Act also reiterates the original PPP element that neither the PPP loan itself nor the forgiveness of the PPP loan is to be included in the gross income of the borrower.

PPP borrowers can take advantage of the Employee Retention Tax Credit with respect to wages that were not paid with forgiven PPP loan proceeds. Payroll costs that are qualified wages taken into account in determining the Employer Retention Credit are not eligible for loan forgiveness for First Draw PPP Loans.

Loan Amount Calculations

Payroll costs are now defined to include group life, disability, dental and vision expenses in addition to expenses for salary, wages and commissions, vacation and certain leaves, separation allowances, group health care, retirement benefits, and state or local taxes assessed on the compensation of employees. While many borrowers already included dental and vision insurance costs in their calculations, the addition of group life and disability expenses are welcome.

Unless they are self-employed, sole proprietorships, or independent contractors, borrowers may choose to use average monthly payroll for (1) calendar year 2019, (2) calendar year 2020, or (3) the one-year period before the date the PPP loan is made, when calculating the loan amount. A borrower will not have to resubmit payroll documentation if it used 2019 figures to determine its First Draw PPP Loan amount, 2019 figures to determine its Second Draw PPP Loan amount, and the lender for the Second Draw PPP loan is the same as the lender who made the borrower's First Draw PPP Loan.

Self-employed individuals, sole proprietorships, and independent contractors cannot use the one-year period before the date the PPP loan is made since their calculations are based (at least in part) on their 2019 or 2020 IRS Form 1040 Schedule C to calculate payroll costs. Seasonal employers are to use average total monthly payroll for any 12-week period between February 15, 2019 and February 15, 2020, as selected by the employer.

Permitted Uses

The Act adds the following permitted (and forgivable) uses. While additional permitted and forgivable uses provide new opportunities for borrowers to use PPP funds, it is important to note that loan forgiveness remains subject to the requirement that 60% of the amount forgiven be used for payroll expenses.

- Covered Operation Expenses – includes payments for any business software or computing service that facilitates business operations. Under the Act, this is a broad category of computing software or services that include, in addition to “business operations,” facility product or service delivery, processing of payroll expenses, human resources, sales and billing, and accounting or tracing of supplies, inventory, records and expenses.
- Covered Property Damage – includes uninsured costs related to property damage, vandalism or looting in connection with public disturbances in 2020.[\[i\]](#)
- Covered Supplier Costs – includes costs of goods that are essential to the operations of the borrower and made pursuant to a contract in effect at the start of the borrower’s covered period or, in the case of perishable goods, in effect before or during the covered period.
- Covered Worker Protection – includes any operating or capital expenses relating to the adaption of business activities of any entity to comply with any requirements or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or OSHA beginning on March 1, 2020. These expenses can relate to extra sanitation, social distancing, or other worker or customer

safety measures. Examples provided in the Act include drive-through windows, ventilation or air filtration systems, physical barriers, additional space, health screening costs, and personal protective equipment.

Borrowers who received loan forgiveness already cannot go back and modify the application to include these eligible expenses. We think this likely also pertains to any loan forgiveness application that has been submitted to the SBA even if the borrower has not received a determination from the SBA. If the PPP lender has not submitted the application to the SBA, the borrower may have the opportunity to revise the application.

Loan Forgiveness

Borrowers can now select the length of the covered period in which to pay expenses eligible for forgiveness. While the covered period continues to begin on the date the loan funds are disbursed, the covered period can be anywhere between eight and 24 weeks.

A simplified loan forgiveness process consisting of a single page application and no longer requiring the delivery of supporting documentation will be available for any loan in the amount of \$150,000 or less. Supporting documentation must still be retained by the borrower, just not delivered unless requested by the SBA as part of its review process.

Economic Injury Disaster Loan (EIDL) advanced grant amounts will no longer be deducted from the forgiveness amounts paid by the SBA. The SBA has indicated that it will identify prior forgiveness payments that were reduced by an EIDL advance and automatically send a reconciliation payment to the PPP lender. The reconciliation payment will also include interest accrued through the date the reconciliation payment is made. Neither PPP borrowers nor PPP lenders are required to request the reconciliation payment as it will be automatically paid. There is no timeline yet for when these reconciliation payments will be issued by the SBA.

New for Existing PPP Borrowers Who Want a Second Draw PPP Loan

Businesses that received a PPP loan in the first round may be eligible to receive a second PPP loan if the applicant:

- Employs no more than 300 employees (compared to 500 employees under the original PPP and for new First Draw PPP Loans);
- Demonstrates at least a 25% reduction in gross receipts for any single quarter in 2020 when compared to the same quarter in 2019, with additional accommodations made for borrowers who were not in business for all four quarters of 2019, or demonstrates that a borrower in operation for all four quarters of 2019 experienced the required 25% or greater revenue reduction in annual receipts in 2020 compared to 2019, and the borrower submits copies of its annual tax forms reflecting the decline; and
- Has used or will use the full amount of a First Draw PPP loan for eligible expenses before the Second Draw PPP Loan is disbursed.

What are gross receipts for purposes of determining a reduction in revenue?

The SBA has chosen to use the definition of receipts in the SBA's size standards regulations (see [13 CFR 121.104](#)) The SBA generally defines gross receipts to include all revenue in whatever form received or accrued (in accordance with the entity's accounting method) from whatever source, including revenue from the sales of products or services plus interest, dividends, rents, royalties, fees or commissions, less returns and allowances. Gross receipts do not include the following:

- 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 and excluding taxes levied on the concern or its employees);
- 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.

In addition, any forgiveness amount of a First Draw PPP Loan received in calendar year 2020 is excluded from the gross receipts of a borrower.

Gross receipts of a borrower with affiliates will include gross receipts of the affiliates, excluding any former affiliates and gross receipts of any segregable division of another business acquired during 2020, but including any affiliate acquired during 2020 and gross receipts of any segregable division sold by a borrower in 2020. We recommend businesses work with their accountant or legal team to make sure they are calculating gross receipts correctly.

What are the rules and limitations for a Second Draw PPP Loan?

Generally, the same rules that apply to First Draw PPP Loans (as modified by the Act) will apply to Second Draw PPP Loans with some notable exceptions:

- The eligible loan amount for most businesses (excluding those in the accommodations or food service industry) will be the lesser of 2.5x average monthly payroll costs and \$2,000,000 (whereas First Draw PPP Loans have a maximum loan amount of \$10,000,000).
- Businesses in the accommodation and food services industry (having a NAICS code beginning with 72) may receive a loan equal to the lesser of 3.5x average monthly payroll costs and \$2,000,000. Please also note that these same businesses who were eligible for the waiver of the SBA's affiliation rules are now limited to no more than 300 employees per physical location.
- Businesses that are part of a single corporate group (majority owned, directly or indirectly by a common parent) may not receive more than \$4,000,000 of Second Draw PPP Loans in the aggregate. The SBA concluded that this limitation is appropriate because it is proportional to the \$20,000,000 maximum amount for corporate groups provided under the First Draw PPP Loan when the maximum amount for a single PPP loan is \$10,000,000. Businesses who receive a waiver of

the affiliation rules still have to apply the single corporate group \$4,000,000 cap.

Who is not eligible for a Second Draw PPP Loan?

The following businesses are added to the list of ineligible businesses for a Second-Draw PPP Loan:

- Any business primarily engaged in political or lobbying activities; and
- Any business owned 20% or more by an entity created under the laws of or with significant operations in the People's Republic of China or Special Administrative Region of Hong Kong, or that has a director who is a resident of the People's Republic of China.

Newly Eligible Businesses

The following business types are now eligible to receive PPP loans, provided certain definitional components and other conditions are satisfied:

- News organizations and individual television and radio stations that broadcast pursuant to certain FCC licenses may apply for PPP loans so long as they have 500 or fewer employees or meet the applicable SBA size standard based on their NAICS code per physical location, or are an Internal Revenue Code Section 511(a)(2)(B) non-profit organization that is a public broadcasting entity. These business concerns will be eligible if they are owned or controlled by entities assigned a NAICS code beginning with 511110 or 5151 and they make a good faith certification that the loan will support the portion of the business that produces or distributes locally focused or emergency information. Having an affiliate that is a publicly traded company will not affect the eligibility of these businesses.
- Destination marketing organizations that are tax-exempt entities under Section 501(c) of the Internal Revenue Code or that are states, political subdivisions or instrumentalities of a state or political subdivision that (1) market and promote

communities or facilities to travelers, or (2) engage in and obtain most of their operating income from providing live events. To be eligible, these organizations must not employ more than 300 employees and must not engage in significant lobbying activities.

- 501(c)(6) tax-exempt organizations, such as business leagues, chambers of commerce, real estate boards and boards of trade, provided the organization does not employ more than 300 employees or significantly engage in lobbying activities. Professional sports leagues and political organizations are expressly not eligible.
- Housing cooperatives with no more than 300 employees.
- Debtors-in-possession or bankruptcy trustees if approved by a court order and the PPP loan is given super-priority.

Any borrowers who returned all or part of the PPP loan may reapply for a PPP loan or an increase to a PPP loan equal to the difference between the amount retained and the amount previously approved.

Ineligible Entities and Prohibited Uses of PPP Loans Under the New Act

Publicly traded businesses are specifically not eligible to participate in any new First Draw PPP Loans or Second Draw PPP Loans.

An entity that receives a grant for shuttered venue operators described below are not eligible for a First Draw PPP Loan made in 2021 or a Second Draw PPP Loan.

A business that has permanently closed. The new PPP loan application forms require that borrowers certify that they have not permanently closed. Businesses that have announced they have permanently closed, as opposed to temporarily closed, will not be able to make the required certification.

No PPP loan proceeds can be used for lobbying activities. Any borrower who uses PPP funds for unauthorized purposes will have to repay the amounts so used. These amounts will not simply remain a one percent loan for the remainder the PPP loan term.

Shuttered Venue Grants

Businesses meeting the applicable definitions under the Act are eligible to receive grants under this program if they were operational on February 29, 2020 and experienced a 25% reduction in revenues for any quarter in 2020 compared to the same quarter in 2019. Eligible businesses include live venues, theatres, performing arts organizations, museum operators, and certain talent representatives; however, there are several additional definitional components that should be carefully considered to determine if the business will actually be eligible for this grant.

For instance, the business must be operating or open, or intend to resume operating or reopen, at the time of the grant. The business must not, nor shall its majority owner, be a publicly traded company or have received more than 10% of its 2019 gross revenue from federal funding sources. Businesses that partake in this special grant program are not eligible to receive a First Draw PPP Loan or a Second Draw PPP Loan.

What to Do Now?

If you are ready to apply for forgiveness for a First Draw PPP Loan and the amount will be reduced due to a reduction in salaries or wages:

Consider whether the ability to select a covered period reduces any potential reduction in the forgiveness amount that may have been due to a reduction in salaries or wages greater than 25%, since the length of the covered period can be shortened and the salary reduction carry-through period reduced.

If your First Draw PPP loan amount is less than \$150,000 and you have not yet applied for forgiveness:

Consider waiting to apply for forgiveness until the simplified application becomes available.

If you are eligible for a PPP Second Draw Loan, have spent all of the PPP First Draw Loan proceeds, but have not yet applied for loan forgiveness:

Consider waiting to apply for forgiveness to reduce the chance that your First Draw PPP Loan is considered unresolved by the SBA. If a borrower's First Draw PPP Loan is under review by the SBA, or information in the SBA's possession indicates that the borrower may have been ineligible for the First Draw PPP Loan it received, the lender will receive notification from the SBA that the original loan is unresolved when the lender submits an application for a guaranty of a Second Draw PPP Loan. The lender will not receive an SBA loan number until the issue is resolved. The SBA has said it will set aside an appropriate amount to fund Second Draw PPP Loans applied for by such borrowers in the event issues are resolved.

If you are considering a First Draw PPP Loan or a Second Draw PPP Loan but have not reviewed whether the economic uncertainty makes the loan necessary:

Review and discuss the necessity certification and make sure it can be made in good faith. All borrowers still have to certify that current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant. Borrowers should make sure they are able to make the certification in good faith given the guidance issued by the SBA relating to the necessity certification since the opening of the First Draw PPP Loans in April 2020. Borrowers of First Draw PPP Loans who receive less than \$2 million will continue to be deemed to have made the certification in good faith.

If you are considering closing your business but think you may reopen in the next few months:

Be careful about how you describe your "closing" and be certain to describe it as a "temporary closing." If you have not "permanently closed" and are otherwise eligible, you may be able to obtain a PPP loan to assist in reopening (provided you only use the loan funds for the permitted uses). The Interim Final Rule for Second Draw PPP Loans specifically states that a borrower that has temporarily closed their business remains eligible for a Second Draw PPP Loan.

Our SBA Lending Team, as always, is standing by to answer any of your questions regarding loan opportunities, eligibility requirements, and documentation under the updated PPP. For more information, contact [Becky Moore](#) or [Shannon Kuhl](#).

[\[i\]](#) While self-employed individuals are generally permitted to use PPP loan proceeds only for expenses that are reflected on their 2019 or 2020 Form 1040 Schedule C, covered property damage expenses are not subject to this limitation.

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