

PPP Redux: What's New for 2021 in the SBA Loan Program

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On December 27, 2020, the [Consolidated Appropriations Act, 2021](#) ("the Act"), was signed into law. The new law both funded the U.S. government for the remainder of FY 2021 and made available a wide range of COVID-19 relief support, including [The Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act](#) ("Economic Aid Act").

The Act reopens the Small Business Administration's ("SBA") Paycheck Protection Program (PPP), allowing businesses to apply for a loan for the first time or, in some cases, allowing existing PPP borrowers to apply for a second loan. In general, new first-time PPP borrowers will be subject to the PPP's original eligibility rules as amended by the Economic Aid Act, and second-time PPP borrowers will be subject to the requirements outlined below. The Act includes significant modifications and extensions of the Paycheck Protection Program ("PPP") including:

- extending the program until March 31, 2021;
- increasing the list of eligible borrowers and the permitted uses of PPP loans;
- creating a new "second draw" loan program aimed at providing additional assistance of up to \$2 million to PPP borrowers that have exhausted their original PPP loan for permissible purposes; and
- making significant changes to the interaction between the PPP loan programs and various tax incentives provided by the Cares Act.

The program began re-opening in phases on Monday, January 11.

Background

The Economic Aid Act was the fourth law enacted in 2020 that has created or amended elements of the PPP. In total, Congress has authorized more than \$806 billion for the PPP program to provide forgivable loans to U.S. businesses and workers via the Small Business Act's Section 7(a) loan guarantee program.

A PPP loan requires no collateral or personal guarantee, the interest rate is a non-compounding 1%, loan maturity is five years, and lenders are authorized to accept borrowers' representations of many program requirements, subject to federally-enforceable personal certifications and scaled (depending on loan size) levels of documentation requirements. Loans under the Economic Aid Act are available until March 31, 2021.

Overall, the Economic Aid Act made approximately \$284 billion in PPP loans available, with \$35

billion of that total available for additional first-draw PPP loans.

As required under the Economic Aid Act, on January 6, 2021, the SBA issued two interim final rules, one addressing amendments to the first-draw program and general PPP requirements (the “[PPP IFR](#)”), and the second specifically addressing the “second-draw” program and how it relates to the original program (“[the Second-Draw IFR](#)”).

If a borrower is looking for guidance on obtaining a first PPP loan, or is in the midst of seeking SBA loan forgiveness for a first or second draw PPP loan, the PPP IFR should, in general, be consulted. If a borrower wants to know the details about a second-draw PPP loan, the Second-Draw PPP IFR should be consulted.

In addition to issuing these IFRs, the SBA has issued [SBA Form 2483-SD](#) for second-draw loans, which differs significantly from the original Form 2483 for first-draw PPP loans. The latter form was also amended to reflect changes made by the Economic Aid Act (<https://www.sba.gov/document/sba-form-2483-paycheck-protection-program-borrower-application-form>)

Most modifications made by the Economic Aid Act and not specifically related to the second-draw loans are retroactive to the start of the program. As a result, the SBA’s PPP IFR re-issued PPP requirements holistically, as opposed to simply implementing specific Economic Aid Act amendments in the PPP IFR.

More specifically, the extensive PPP IFR represents SBA’s effort to consolidate general PPP programmatic requirements in one place. SBA has been on an emergency footing since the CARES Act was enacted in late March 2020, iteratively issuing over twenty final rules; dozens of frequently asked questions; loan application and forgiveness forms and instructions for borrowers and lenders large, small and in-between; and furnishing other guidance. While the PPP IFR was produced within ten days of the Economic Aid Act’s enactment, it apparently was longer in the making. The rule consolidates prior interim final rules and associated guidance, provides background on the various statutory and regulatory enactments, and then sets forth the requirements for PPP borrowers and lenders in an extensive question and answer format, annotated in footnotes to explain the genesis for and changes to the requirements.

Guidance for Obtaining a First PPP Loan or Seeking Forgiveness for a First or Second Draw PPP Loan – Highlights of the Changes

Before delving into the details of the IFRs, it is useful to identify certain PPP program thresholds as a matter of general orientation. The CARES Act set a new, specific size standard or limit of 500 employees, between the borrower and its affiliates (with SBA affiliation rules being subject to certain exceptions), for a first-draw PPP loan. The Economic Aid Act sets a limit of 300 employees, between the borrower and its affiliates (subject to certain exceptions) for a second-draw PPP loan. Internal Revenue Code Section 501(c)(6) trade organizations newly admitted to the PPP via the Economic Aid Act are subject to the 300 employee limit.

The Economic Aid Act provides for loans, as did the CARES Act, to a wide range of the U.S. economy, from independent contractors (including “gig” economy workers) and sole proprietors to a broad range of small to mid-sized businesses. Notably, as we state below, the PPP second-draw program does not extend to, among others, publicly-traded businesses, following considerable CARES Act-related controversy in the spring and summer of 2020 as to whether publicly-traded businesses and other entities with available sources of liquidity could certify that “current uncertainty makes this

loan request necessary to support the ongoing operations of the Applicant.” The PPP second-draw loan application also requires this certification, among many others, including that the business was in operation on February 20, 2020; has not permanently closed; and recognizes the “SBA encourages the purchase, to the extent feasible, of American-made equipment and products.”

The PPP IFR also sets documentation requirements for both forgiveness applications and second-draw loans. Borrowers of \$150,000 or less are able to use simplified second-draw applications and are required to maintain documentation for loans and forgiveness but are not required to submit the documentation in the same way, at the same time, and to the same degree as larger lenders. The CARES Act limit on first-draw PPP loans is \$10,000,000, while the Economic Aid Act’s limit for second-draw loans is \$2,000,000. The SBA has utilized the \$2,000,000 threshold for other purposes, as well. For instance, first-draw borrowers of over \$2,000,000 are required to complete a SBA loan questionnaire, review and audit procedures when they apply for forgiveness, while borrowers of less than \$2,000,000 are subject to audit and loan review on a case-by-case basis.

Payroll costs have generally been the “coin of the realm” for PPP loan amounts, with a borrower being able to borrow 2.5 times monthly average payroll cost (subject to a \$100,000 annual per employee cap). The Economic Aid Act, however, allows food or accommodation businesses (NAICS code 72) to borrow 3.5 times monthly average payroll cost for a second-draw loan. Further, sixty percent of a PPP loan must be used for payroll costs, in line with the program’s overarching goal to encourage employers to retain workers on payroll despite COVID-19 uncertainty. The Economic Aid Act both expands the fringe benefits that can be included in payroll costs as well as the permissible uses of PPP loans to include covered operation expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures.

The Economic Aid Act also introduces a new concept of “gross receipts,” by including this test into the second-draw requirements, such that a business must show a decline of 25% in gross receipts over the relevant measuring period, which the Economic Aid Act sets as quarterly (e.g., 25% decline in gross receipts from Q2 2020 as compared to Q2 2019). However, the SBA in the Second-Draw IFR allows the 25% decline to be calculated on an annual basis. Special rules are designed for cases such as seasonal businesses or businesses only in operation for part of the measuring period.

The Economic Aid Act also contains provisions to address criticism regarding disparities in the prior loan disbursement process for smaller firms and those that did not have existing relationships with eligible lenders. The Act set aside \$15 billion across first and second draw PPP loans for lending by community financial institutions, \$15 billion across first and second draw PPP loans for lending by Insured Depository Institutions, Credit Unions, and Farm Credit System Institutions with consolidated assets of less than \$10 billion; \$35 billion for new first draw PPP borrowers; and \$15 billion and \$25 billion for first draw and second draw PPP loans, for borrowers with a maximum of 10 employees or for loans less than \$250,000 to borrowers in low-or moderate-income neighborhoods. Along with the IFRs, the SBA issued guidance to support loans for new and smaller borrowers, for borrowers in low-and moderate-income communities, and for community and smaller lenders.

New SBA Loan Application Process

The U.S. Small Business Administration and Treasury released borrower loan application forms on January 8 for the rebooted Paycheck Protection Program (PPP), which [launched](#) Monday, January 11, 2021.

To promote access to capital, 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.

(Note that [SBA Guidance](#) states that it will only accept PPP loan applications from community financial institutions for at least the first two days when the PPP loan portal re-opens. The PPP will open to all participating lenders shortly thereafter.)

Borrowers can apply for a PPP Loan until March 31, 2021, through any existing SBA 7(a) lender or through any federally insured depository institution, federally insured credit union, eligible non-bank lender, or Farm Credit System institution that is participating in PPP. The SBA will also direct lender match inquiries from borrowers to small lenders who can aid traditionally underserved communities; attempt to match small businesses through Lender Match with Certified Development Companies (CDCs), Farm Credit System lenders, microloan intermediaries, and traditional smaller asset size lenders.

APPENDIX A: Summary of Significant Modifications to the Original PPP Program

Newly Eligible Businesses

In addition to businesses previously eligible to participate in the PPP, the following entities are now also eligible for PPP loans:

- Debtors in possession or trustees, if approved by court order. PPP loans must be given superiority in the bankruptcy process in order for the debtor in possession or trustee to be an eligible borrower.
- News organizations that either employ no more than 500 (300 for PPPSD loans) employees, or the applicable SBA size standard, per physical location or that are public college or university broadcasting stations under section 511 of the Internal Revenue Code, so long as these organizations certify that the loan will support locally focused or emergency content. Furthermore, affiliation rules are waived for (i) non-profit broadcasters and (ii) any business that is majority owned or controlled by a newspaper or broadcaster, as long as the business has no more than 500 (300 for PPPSD loans) employees, or the applicable SBA size standard, per physical location.
- Housing cooperatives with no more than 300 employees.
- 501(c)(6) organizations (other than professional sports leagues and organizations with the purpose of promoting or participating in political campaigns) and Destination Marketing Organizations registered as a 501(c) organization, quasi-governmental entities or political subdivisions of state or local government, in each case if:
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 - the organization derives no more than 15% of its receipts from lobbying activity;
 - lobbying activities comprise no more than 15% of the organization's total activities;
 - the cost of lobbying activities did not exceed \$1,000,000 during the most recent tax year
 - that ended prior to February 15, 2020; and
 - the organization has 300 or fewer employees.

Newly Ineligible Businesses

Publicly traded entities and entities receiving a grant under the Act's Shuttered Venue Operator Grants.

Permitted Uses of Loan Proceeds

In addition to currently permitted uses of PPP funds (e.g., payroll costs, mortgage interest payments, lease payments and utility payments), the Act provides for the following additional uses:

- Covered operations expenditures – payments for business software or cloud computing services that facilitate 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, vandalism or looting due to public disturbances during 2020 that were not covered by insurance or otherwise compensated.
- Covered supplier costs – expenditures for goods (i) essential to operations at the time the expenditure is made and (ii) made pursuant to a contract, order or purchase order (x) in effect before the date of the PPP loan's disbursement or (y) with respect to perishable goods, in effect during the borrower's forgiveness covered period
- Covered worker protection expenditures – certain operating or capital expenditures required to meet worker or customer safety requirements or guidance related to COVID-19 issued by the Department of Health and Human Services, the Centers for Disease Control, the Occupational Safety and Health Administration, or any equivalent state or local requirements implemented between March 1, 2020 and the date the COVID-19 national emergency is lifted, for example, the purchase or renovation of drive-through windows, ventilation or filtration systems, or the expansion of physical space.

Prohibited Uses of Loan Proceeds

PPP loans may not be used for lobbying activities, lobbying expenditures related to state or local campaigns or expenditures to influence the enactment of legislation, appropriations, regulation or administrative action.

Noteworthy Changes to Loan Forgiveness

- **Additional Forgivable Expenses:** Consistent with the new categories of permitted uses of loan proceeds, covered operations expenditures, covered property damage costs, covered supplier costs and covered worker protection expenditures are also eligible for forgiveness. This change is effective with respect to PPP loans made before or after the enactment of the Act, except for loans as to which the borrower received forgiveness before such enactment.
- **Simplified Forgiveness Application:** For loans of less than \$150,000, a borrower need only submit a one-page certification that includes a description of the number of employees the borrower retained because of the loan, the estimated total amount of the loan spent on payroll and the total loan amount. Further, the borrower must attest that the borrower accurately provided the required certification, complied with PPP requirements and retains records that prove such compliance. Such borrowers are no longer required to submit any supporting documentation evidencing their use of loan proceeds in the first instance. Furthermore, the Act

provides that this simplified forgiveness application process also applies to PPP loans that were made before the enactment of the Act.

Clarification of Tax Treatment

Clarification of tax treatment is explained [here](#).

APPENDIX B: Summary of Second Draw Loan Program

To provide relief to the businesses hardest hit by the pandemic, the Act creates a new program for second draw loans (PPPSD), which will be available to PPP borrowers that have exhausted their original PPP loans.

PPPSD loans generally operate on the same terms and conditions as PPP loans, subject to some exceptions. PPPSD loans will be available until March 31, 2021.

The key program requirements are summarized below.

Eligibility Requirements – PPPSD loans may only be made to PPP borrowers who:

- have used (prior to origination of the PPPSD loan) all proceeds of their PPP loan for permissible purposes and
- satisfy the following additional criteria:
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 - Employ no more than 300 employees. However, similar to the PPP, entities in industries assigned to NAICS code 72 (including hotels and restaurants) and with more than one physical location are subject to a limit of no more than 300 employees at each physical location.
 - Demonstrate at least a 25% reduction in gross receipts in the first, second or third quarter of 2020 relative to the same quarter in 2019. These timelines may vary if a business was not in operation during some of 2019 or if the business submits its PPPSD application after January 1, 2021.

Loan Amount Calculations – Like in the PPP, PPPSD borrowers may receive a loan of up to 2.5 times their average monthly payment for payroll costs, up to a maximum of \$2,000,000. However, entities in industries assigned to NAICS code 72 (including hotels and restaurants) may receive up to 3.5 times their average monthly payment for payroll costs, also up to a maximum of \$2,000,000.

Ineligible Entities – The following entities are ineligible to receive PPPSD loans:

- Entities that fall under the various ineligible business types described in 13 CFR 120.110 (or any successor regulation or guidance), except for non-profits and entities principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs.
- Entities primarily involved in political and lobbying activities, “which shall include any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public documents.”

- Any business (i) of which at least 20% of its economic interest is owned either directly or indirectly by an entity created or organized in China or Hong Kong or that has “significant operations” in China or Hong Kong or (ii) that retains a resident of China as a member of its board of directors.
- Registrants under the Foreign Agents Registration Act.
- Entities that receive a Shuttered Venue Operator Grant.