

Revised Paycheck Protection Program Reopens Today—New Second Draw PPP Loans to Follow

January 11, 2021

On December 27, 2020, the President signed the Consolidated Appropriations Act, 2021 following its passage with bipartisan support in the U.S. House of Representatives and the Senate. The Consolidated Appropriations Act includes the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the “Act”), which extends and revises the Paycheck Protection Program (“PPP”).

The Act reopens the PPP, which previously closed on August 8, 2020, until March 31, 2021, and revises the PPP, including by establishing second draw loans (the “Second Draw PPP Loans”) as an available source of funding for a subset of small businesses eligible to participate in the PPP, in an amount up to \$2.0 million. On January 6, 2021, the Small Business Administration (“SBA”) published two Interim Final Rules (“IFRs”) on the PPP as amended by the Act and the Second Draw PPP Loans.¹ One of the two IFRs helpfully consolidates the interim final rules and important guidance issued to date regarding the PPP.² The SBA reopened the PPP as of 9:00am today with the availability of Second Draw PPP Loans to follow. Below is a summary of select revisions to the PPP made by the Act.

Background on the PPP

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), which established the PPP as an expansion of the SBA’s existing 7(a) loan program for small businesses. Since the CARES Act was passed, the SBA and Treasury Department have provided ongoing guidance with respect to the PPP for lenders and borrowers. On April 24, 2020 and June 5, 2020, Congress enacted the Paycheck Protection Program and Health Care Enhancement Act and the

¹ Please refer to the two interim final rules for additional information, found [here](#) and [here](#).

² Please refer to the interim final rule entitled “Business Loan Program Temporary Changes; Paycheck Protection Program as Amended” (“Amended PPP IFR”), found [here](#).

Paycheck Protection Program Flexibility Act of 2020, respectively, which provided additional appropriations and revised the PPP.³

Second Draw PPP Loans

The Act allows certain borrowers that use the full amount of their first PPP loans (“First Draw PPP Loans”) to access forgivable Second Draw PPP Loans.

- **Eligibility.** Eligibility for Second Draw PPP Loans is narrowed to smaller borrowers that are able to demonstrate harm to their revenue. Specifically, borrowers generally must employ no more than 300 employees and demonstrate at least a 25% reduction in gross receipts in one quarter of 2020 relative to the same quarter in 2019. (In contrast, the PPP generally establishes a 500-employee cap and does not require borrowers to demonstrate a reduction in revenue.) For loans with a principal amount of \$150,000 or less, borrowers are not required to document that they meet the revenue loss requirements at the time of application as long as they certify that they meet the requirement and submit adequate documentation at the time they request loan forgiveness.
- Among other similarities, the Second Draw PPP Loan program includes the PPP’s limited exceptions to the SBA’s affiliations rules for hotels, restaurants, franchises and companies that receive investments from small business investment corporations. Also like First Draw PPP Loans, Second Draw PPP Loans are not available to most entities that the SBA determined are not eligible for SBA business loans generally, including hedge funds and private equity firms.⁴
- **Loan Amount Limits.** A borrower is limited to one Second Draw PPP Loan, and it may not be able to borrow as much as it did under the PPP. Although the calculation of the size of a Second Draw PPP Loan is generally the same as that for First Draw PPP Loans (i.e., 2.5 times average total monthly payroll costs),⁵ Second Draw PPP Loans are capped at \$2.0 million, as compared to a \$10.0 million cap under the PPP.
- **Forgiveness.** Like First Draw PPP Loans, Second Draw PPP Loans may be forgiven in whole or in part. The forgiveness requirements and process appear to be generally

³ Please refer to our previously published resource for additional information on the PPP, found [here](#).

⁴ See Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450, 23451 (Apr. 24, 2020), available [here](#).

⁵ There are some differences in how the monthly payroll cost is calculated. In addition, organizations with a North American Industry Classification System Sector 72 code, which includes the restaurant and lodging industry, may receive a Second Draw PPP Loan equal to 3.5 times their average total monthly payroll, subject to the \$2.0 million cap.

the same as those of the PPP, although there are minor differences in the forgiveness calculation for Second Draw PPP Loans.

- **Lender Eligibility.** All lenders that are approved to make First Draw PPP Loans are eligible to make Second Draw PPP Loans.
- **SBA Guidance.** Pursuant to its requirement under the Act, the SBA issued guidance addressing barriers to accessing capital for minority, underserved, veteran and women-owned business concerns for the purpose of ensuring an equitable access to Second Draw PPP Loans on January 6, 2021.⁶

Revisions to the PPP

The Act also makes significant changes to provisions of the PPP relating to loan forgiveness, a lender's reliance on borrower information, eligible expenses and borrower eligibility.

- **Loan Forgiveness.** The Act revises the procedures and parameters of loan forgiveness. The amount of a First Draw PPP Loan eligible for forgiveness is calculated based on certain expenditures during the "covered period." Prior to the Act's enactment, borrowers could choose their covered period to end eight or 24 weeks after loan disbursement, although the covered period could in no case end later than December 31, 2020. The Act updated the covered period for determining the amount of a loan that is eligible for forgiveness to start on the date the loan is originated and end at the borrower's option on any date that is between eight and 24 weeks after the loan's origination. The Act also updates the payroll costs that are eligible for loan forgiveness with respect to First Draw PPP Loans and Second Draw PPP Loans to include insurance benefits such as group life, disability, vision and dental.
- In addition, covered loans up to \$150,000 are generally eligible for a simplified loan forgiveness process, whereby such a loan will be forgiven as long as the borrower provides a signed certification to the lender. The SBA is required to establish a one-page certification form to be used as a simplified application for loan forgiveness of eligible loans by January 20, 2021 (i.e., 24 days following enactment of the Act). Although the SBA is prohibited from requiring more information at the time forgiveness is requested, the SBA may subsequently audit the borrower and reduce the amount of the loan or amount forgiven.

⁶ For information regarding the steps the SBA is taking to ensure increased access to PPP for minority, underserved, veteran and women-owned business concerns, refer to the SBA's guidance, found [here](#).

- The Act also requires the SBA to establish an audit plan by February 10, 2021 that details the policies and procedures for the SBA to conduct forgiveness reviews and audits of First Draw PPP Loans and the metrics that the SBA will use to determine which loans will be audited.
- **Lender Reliance.** A lender will not be subject to any enforcement action or penalties relating to First Draw PPP Loan origination or forgiveness (including Second Draw PPP Loans), as long as a lender (i) relies in “good faith” on certification from the applicant that such applicant has provided accurate documentation to the lender in accordance with relevant standards and (ii) fulfills all relevant federal, state and local requirements applicable to the lender.
- **Borrower Eligibility.** The Act updates key provisions regarding borrower eligibility. By January 13, 2021, the SBA is required to issue rules or guidance to ensure that an eligible PPP recipient that returns amounts disbursed under the loan—or did not accept the full amount of an included covered loan—may reapply for, or request a modification to increase, a loan to the maximum amount.
 - The Act also describes entities that are not eligible for the PPP. Notably, publicly-traded entities are not eligible for the PPP as of December 27, 2020. In addition, the Act provides that businesses or organizations that were not in operation on February 15, 2020 were never eligible for First Draw PPP Loans.
 - The Act also establishes grants for shuttered venue operators. However, entities that receive these grants are not eligible for First Draw PPP Loans or Second Draw PPP Loans.
- **Proceeds.** The Act provides additional parameters regarding the use of loan proceeds. Borrowers are provided additional flexibility by expanding the allowable (and forgivable) uses for the proceeds of the loans to include certain expenditures relating to property damage, supplier costs, and worker protection expenditures. This amendment applies retroactively to all First Draw PPP Loans except those that have been forgiven before the Act’s enactment.
 - The Act also clarified that no loan proceeds may be used for lobbying expenditures or expenditures designed to influence the enactment of legislation, appropriations, regulation or administrative actions.
- **Bankruptcy Implications.** The Act amends the Bankruptcy Code to provide that, to the extent that a First Draw PPP Loan or Second Draw PPP Loan is not forgiven, it will be given “superpriority” status in a bankruptcy case, meaning taxpayers and participating banks providing the loan have superior right to payment over general

unsecured creditors. The Bankruptcy Code amendments also provide that plans under Chapters 11 and 13 of the Bankruptcy Code may be confirmed despite repayment of the loan in the ordinary course and that a trustee may incur a First or Second Draw PPP Loan notwithstanding certain restrictions on the incurrence of additional debt.⁷ These bankruptcy provisions take effect following the SBA's submission of an applicability determination that is provided to the Executive Office for the United States Trustees and will expire on December 27, 2022.

- **Appropriations for Loan Distributions by Small Financial Institutions.** Under the revised PPP, a certain portion of the newly appropriated amount is set aside to be distributed by the smallest financial institutions, including \$15 billion in loans made by community financial institutions, and \$15 billion for either (1) insured depository institutions with consolidated assets of less than \$10 billion, (2) credit unions with consolidated assets of less than \$10 billion or (3) institutions of the Farm Credit System chartered under the Farm Credit Act of 1971 with consolidated assets of less than \$10 billion (not including the Federal Agricultural Mortgage Corporation).
- **Conflicts of Interest.** Lawmakers also seem to have responded to public criticism by establishing a conflicts of interest restriction that requires entities controlled (control representing not less than 20% equity ownership) by certain government officials, including the President, Vice President, head of the Executive Department, Member of Congress or any spouse of the foregoing, to disclose existing amounts they may have received under the PPP. Such disclosure must be made not later than January 26, 2021, if the borrower submitted an application for forgiveness before December 27, 2020, or not later than 30 days after submitting an application for forgiveness.

Further, any entity that would be required to provide a disclosure under this conflicts of interest provision is not eligible to receive a First Draw PPP Loan or Second Draw PPP Loan on a go-forward basis. The approach taken by the Act generally reflects the approach taken under Title IV of the CARES Act, which explicitly states that neither the President, Vice President, head of the Executive Department, Member of Congress nor immediate family member of these persons may hold a controlling interest in the borrower or recipient of the program, with the exception that the Act only covers spouses rather than other immediate family members.⁸

⁷ Note also that the SBA has stated that a PPP loan applicant is not eligible to receive a PPP loan if the applicant or its owner is a debtor in bankruptcy at the time of the PPP loan application or any time before the PPP loan is disbursed. Amended PPP IFR at 2.c.

⁸ See CARES Act § 4019(b). Under the CARES Act, a "Member of Congress" is defined to include a member of the Senate or House of Representatives, a Delegate to the House of Representatives and the Resident Commissioner of Puerto Rico.

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We will continue to monitor developments of the PPP and provide additional updates as warranted. Please do not hesitate to contact us with any questions.

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