

SBA ISSUES GUIDANCE ON HOW TO APPLY FOR MORE PPP FUNDS

The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act or Act), signed into law on December 27, 2020 as a part of the [Consolidated Appropriations Act, 2021](#), makes additional funds available under the Paycheck Protection Program (PPP) and expands eligibility for PPP loans.

On January 6, 2021, the federal Small Business Administration (SBA) released interpretations of the new provisions:

- Interim Final Rule (IFR), [“Business Loan Program Temporary Changes; Paycheck Protection Program as Amended,”](#) which consolidates the rules for original PPP loans, including the modifications made by the Act;
- IFR [“Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans,”](#) which contains guidance for businesses that previously received a PPP loan and are seeking a second loan; and
- [Guidance on Accessing Capital for Minority, Underserved, Veteran and Women-Owned Business Concerns](#), which sets out the commitment to reserve at least the first two days of the PPP application window exclusively for applications from community financial institutions that serve minority- and women-owned businesses.

On January 8, 2021, the SBA released [applications for the new loans, as well as overviews of the loans and two procedural notices](#):

- SBA Form 2483 – First Draw Borrower Application
- SBA Form 2484 – First Draw Lender Guaranty Application
- SBA Form 2483-SD – Second Draw Borrower Application
- SBA Form 2484-SD – Second Draw Lender Guaranty Application
- Overview of First Draw PPP Loans
- Overview of Second Draw PPP Loans
- 5000-20074, Modifications to SBA Forms 3506, 3507 and 750 CA (for purposes of PPP only) (effective January 6, 2021)

- 5000-20075, Repeal of EIDL Advance Deduction Requirement for SBA Loan Forgiveness Remittances to PPP Lenders (effective January 8, 2021).

In a [joint statement](#) with the U.S. Department of Treasury, the SBA also announced on January 8 that the PPP reopens on January 11, 2021. However, to promote loan access for smaller lenders and their customers, the SBA will initially only accept loan applications from community financial institutions, with the main program opening to all participating lenders shortly thereafter.

This alert summarizes some key points of the Act and updated SBA guidance (i.e., guidance issued through January 10, 2021), and is accompanied by an easy-to-read table that outlines the salient features of the guidance.

Overview

The PPP—which was originally created as part of [the Coronavirus Aid, Relief, and Economic Security Act \(CARES Act\)](#) enacted on March 27, 2020—is designed to help small businesses that have suffered from the disruptions and shutdowns related to the coronavirus pandemic and keep them operational by granting federally guaranteed loans to be used to retain staff at pre-COVID levels. A particularly beneficial aspect of the PPP is that the loan may be forgiven in whole or in part provided certain requirements are met.

The Economic Aid Act earmarks an additional \$284 billion for PPP loans, with specific set asides for eligible borrowers with no more than 10 employees or for loans of \$250,000 or less to eligible borrowers in low- or moderate-income neighborhoods. The program ends the earlier of March 31, 2021 or the exhaustion of the funds.

First draw loans are available to entities that were in operation on February 15, 2020, including certain nonprofits, veterans organizations, tribal concerns, self-employed individuals, sole proprietorships and independent

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contractors that make the required certification regarding economic necessity and:

- Did not receive a prior PPP loan and meet the definition of a small business by:
 - Employing, together with their affiliates (unless special rules apply that allow employees to be counted by location, which applies to NAICS codes 72- restaurants and hospitality and 511110 or 5151-news organizations), fewer than 500 employees (the 500 employee count is reduced to 300 in the case of housing cooperatives, eligible Internal Revenue Code Section 501(c)(6) organizations or eligible destination marketing organizations)
 - Meeting the SBA's size standards for industries that it allows to exceed 500 employees
 - Qualifying under the SBA's alternative size standard, if as of March 27, 2020, it (1) had a maximum tangible net worth of not more than \$15 million, and (2) an average net income after US federal income taxes of not more than \$5 million for the last two fiscal years before the date of the application
- Received a 2020 loan that was not forgiven by December 27, 2020 and qualifies for a larger draw on account of:
 - Having returned all or part of the PPP loan,
 - Having not drawn the entire loan amount that was approved by the lender,
 - Failing to include any compensation for its partners in the original application, or
 - Being a seasonal employer that now qualifies for an increased loan amount under the new provisions.

Second draw loans are available to a more select group and only if the full amount of the first draw loan will be or has been used for authorized purposes. To qualify for a second draw loan, the employer must:

- Average no more than 300 employees, together with its affiliates (unless special rules apply that allow employees to be counted by location, which apply to NAICS codes 72-restaurants and hospitality, 511110 or 5151 news organizations and borrowers assigned a franchise identifier code by the SBA);
- Demonstrate at least a 25% reduction in gross receipts between comparable quarters in 2019 and 2020; and
- Make the required certification regarding economic necessity.

The Act clears up the controversy about the taxation of PPP loans that are forgiven and the expenses that support such forgiveness. Borrowers should deduct, capitalize or adjust basis for expenses attributable to forgiven PPP loans just as they do any other expenses in accordance with their accounting methods. The Act also confirms that the forgiven amount does not generate taxable income and that it is excluded from gross receipts in calculating the gross receipts test for the second draw. Additionally, the Act changes grants under the Economic Injury Disaster Loan (EIDL) program from taxable to nontaxable income.

Loan Eligibility

As explained above, the Act allows certain previously excluded entities to apply for first draw PPP loans. Additionally, the Act specifically provides—and the SBA guidance confirms—that certain businesses are not eligible for a PPP loan under the new round of funding, including the following:

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- Publicly traded businesses and entities;
- Debtors in a bankruptcy proceeding;
- Entities that have permanently closed (note, however, that businesses that have closed temporarily or that temporarily suspend operations remain eligible for a loan, provided other relevant requirements are met);
- Business concerns or entities primarily engaged in political or lobbying activities;
- Businesses and entities created or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong that hold directly or indirectly at least 20% of the economic interest of the business or entity, or that retain a China-resident person as a member of the entity's board of directors;
- *Persons required to submit a registration statement under Section 2 of the Foreign Agents Registration Act;*
- *Persons that receive a grant for shuttered venue operators under Section 324 of the Economic Aid Act;*
- Businesses that are controlled, directly or indirectly, by the president, vice president, head of executive departments and members of Congress (or their spouses as defined by applicable common law); and
- Entities that previously received a second draw PPP loan.

Maximum PPP Loan Amounts

First draw loans continue to use the original formulas under the CARES Act to determine the loan size, i.e., 2.5 times the average monthly payroll costs up to \$10 million per borrower with an overall limit of \$20 million when including loans to members of the same corporate group.

Second draw loans use the same 2.5 times average monthly payroll costs for most borrowers but restaurants, hotels and other establishments that provide lodging and/or food for immediate consumption (NAICS code 72 entities) are allowed a

factor of 3.5 times the average monthly payroll costs. All second draw PPP loans are capped at a maximum of \$2 million per borrower (per location for NAICS code 72, 511110 or 5151) up to an overall limit of \$4 million when including loans to members of the same corporate group.

The borrower can elect to use the average monthly payroll costs for calendar year 2019, calendar year 2020 or the one-year period before the loan application. Special rules apply to seasonal employers and those who were not in business during 2019. Note that the definition of payroll costs has been changed to include life and disability coverage paid by the employer.

Revenue Reduction Needed for Second Draws

To qualify for the second draw PPP loan, a borrower must demonstrate at least a 25% reduction in gross receipts between comparable quarters in 2019 and 2020. For administrative ease, the SBA's IFR allows an applicant that was in operation in all four quarters of 2019 and 2020 to substantiate its 25% gross receipt reduction based on the comparison of its 2019 and 2020 annual tax returns. A borrower that did not experience a 25% annual decline in revenues or that was not in operation in all four quarters of 2019 may still meet the revenue reduction requirement under one of the quarterly measurements.

The IFR defines gross receipts consistent with the SBA's size regulations that generally include all revenue (including investment income) received or accrued, in accordance with the entity's accounting method, i.e., "total income" ("gross income" in the case of a sole proprietorship, independent contractor or self-employed individual), plus the cost of goods sold, but excluding net capital

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gains or losses. Gross receipts do not include items collected by the borrower required to be remitted to another, such as sales taxes and amounts collected by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. Receipts from affiliates (also known as intercompany transfers) are also excluded. Receipts that are collected as reimbursements for subcontractor costs and purchases made at a customer's request may not be excluded from gross receipts.

For loans that exceed \$150,000, the applicant must submit documentation that substantiates the 25% revenue reduction. For loans that do not exceed \$150,000, documentation is not required with the loan application, but must be submitted to receive forgiveness of the loan. If a borrower does not apply for forgiveness, the documentation must be provided if requested by the SBA.

Reduced Payroll Documentation

PPP loan applicants for first draw and/or second draw loans must submit documentation that demonstrates their eligibility for the loan and to evidence the qualifying payroll amount. This documentation may include payroll records, payroll tax filings, Form 1099-MISC, Schedule C or F, income and expenses from a sole proprietorship or bank records.

However, an applicant for a second draw loan will not have to document payroll costs when the same lender that processed the original loan is handling the second draw and the 2019 calendar payroll figures are used for both the original or first draw and the second draw. However, the borrower can elect to substantiate a different payroll cost for the second draw as allowed by the Act and additional documentation may be requested by the lender if helpful in conducting a good-faith review of the borrower's application.

Use of Loan Proceeds

The original list of expenses that could legally be paid with PPP loan funds (cash payroll, health care, retirement plans and interest on mortgages, rent to unrelated parties, and utilities for obligations in existence on February 15, 2020) has been expanded to include:

- Covered operations expenditure, i.e., payments for business software or cloud computing services needed to keep business operations running (for example, HR, accounting, payables, inventory, etc.);
- Covered property damage costs not covered by insurance attributable to looting and vandalism during public disturbances that took place during 2020;
- Covered supplier costs, i.e., expenditures for goods that are essential to operations pursuant to an obligation made prior to the covered period. Expenditures for perishable goods qualify even if the obligation arises during the covered period;
- Covered worker protection expenditure necessary to ensure that the business complies with guidance regarding COVID-19 sanitation, safety or social distancing standards; and
- Life and disability benefits (also increases payroll as for calculating the maximum loan amount).

Loan Forgiveness and Simplified Procedure for Loans that Do Not Exceed \$150,000

A PPP loan may be forgiven if employee headcount and wage levels are maintained, the borrower uses the proceeds for eligible expenses (e.g., payroll and other specified costs) within 24 weeks following the receipt of the funds and at least 60% of the loan funds are spent on payroll costs. The parameters for loan forgiveness were not changed by

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the Act, although the expenses eligible for forgiveness have been expanded as outlined above. Applicants for forgiveness can elect any period between eight and 24 weeks after the loan is disbursed. The end of the covered period will determine the date on which safe harbors must be satisfied.

Under the Act, EIDL grants do not reduce the PPP loan forgiveness amount. For loans already forgiven, the SBA will return the EIDL advance that was deducted to the lender, with interest. The PPP lender is responsible for notifying the borrower of the reconciliation payment due to it.

The Act requires any PPP loan that is not more than \$150,000 be forgiven based solely on an application that sets out the number of employees the borrower was able to retain because of the PPP loan, the estimated total amount of the loan spent on payroll costs and the total loan amount, along with an attestation that the eligible recipient accurately provided the required certification, complied with the requirements of the law pertaining to the loan and retains employment records for four years following submission and other records for three years following submission that prove compliance. These records remain subject to audit by the SBA.

The SBA will be releasing the simplified loan forgiveness application following which, lenders will need to modify their systems to make an electronic version available to eligible borrowers.

Insight

Entities that expect to apply for a PPP loan should begin to proactively prepare and gather all of the necessary financial information and related documentation so they can apply as soon as their lender reopens its application process. The application can be filed before the borrower receives or applies for forgiveness, as long as there is a plan to spend the original loan before the borrower receives the second draw PPP loan disbursement. If the loan request does not exceed \$150,000, the revenue reduction documentation is not required until the earlier of the application for forgiveness or upon SBA's request. A borrower can apply before filing the 2020 tax return that substantiates the 25% revenue reduction. If relevant tax forms are not available, quarterly financial statements or bank statements can be submitted.

The demand for these loans is expected to exceed the funding, so it is recommended that applications be filed as early as possible.

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Issue	First Draw PPP Loan (Did Not Receive PPP Loan in 2020 or Qualifies for an Adjustment)	Second Draw PPP Loan (Received a PPP Loan in 2020 or First Draw PPP Loan in 2021)
Last Day to Apply	<ul style="list-style-type: none"> • Earlier of March 31, 2021 or exhaustion of funds 	<ul style="list-style-type: none"> • Earlier of March 31, 2021 or exhaustion of funds
Eligibility Requirements for 2021 PPP Loan	<ul style="list-style-type: none"> • In operation on February 15, 2020 • Did not receive a 2020 PPP loan or • Received a 2020 loan that was not forgiven by December 27, 2020 and qualifies for a larger draw on account of: <ul style="list-style-type: none"> ◦ Having returned all or part of the PPP loan, ◦ Having not drawn the entire loan amount that was approved by the lender, ◦ Failing to include any compensation for its partners in the original application, or ◦ Being a seasonal employer that now qualifies for an increased loan amount under the new provisions • Business concern, independent contractor, eligible self-employed individual, sole proprietor, nonprofit organization eligible for a 2020 PPP loan, veterans' organization, tribal business concern, housing cooperative, small agricultural cooperative, eligible 501(c)(6) organization not conducting substantial lobbying activities or destination marketing organization, or an eligible nonprofit news organization <ul style="list-style-type: none"> ◦ Meets the "small business" definition <ul style="list-style-type: none"> - Generally, 500 employees including affiliates or SBA Industry Standard based on size/revenue - 500 employees reduced to 300 for eligible Section 501(c)(6) organization, destination marketing organizations, housing cooperatives - A business can qualify under the alternative size standard, if as of March 27, 2020, it (1) had a maximum tangible net worth of not more than \$15 million, and (2) had an average net income after US federal income taxes of not more than \$5 million for the last two fiscal years before the date of the application 	

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Affiliation Rules	<ul style="list-style-type: none"> • Borrowers are considered together with their affiliated businesses for purposes of determining eligibility for a PPP loan. In ascertaining the number of employees, employee counts include those of the borrower and its affiliates, although the affiliation rules are waived for: <ul style="list-style-type: none"> ○ A business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a NAICS code beginning with 72; (i) any business concern (including any station that broadcasts pursuant to a license that employs not more than 300 employees, per physical location of such business concern and is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 or 5151; or (ii) any nonprofit organization that is assigned a NAICS code beginning with 5151; and ○ A business concern operating as a franchise that is assigned a franchise identifier code by the Administration. 	<ul style="list-style-type: none"> • Same as first draw except “300” is substituted each time “500” employees appear
Necessity for Certification	<ul style="list-style-type: none"> • The following are not eligible for a PPP loan: <ul style="list-style-type: none"> ○ Publicly traded company ○ Debtor in bankruptcy proceedings ○ Entity that has permanently closed ○ Business concern or entity primarily engaged in political or lobbying activities ○ Business concern or entity for which an entity created in or organized under the laws of the People’s Republic of China or the Special Administrative Region of Hong Kong holds directly or indirectly at least 20% of the economic interest of the business or entity or that retain a China-resident person as a member of the entity’s board of directors ○ Person required to submit a registration statement under Section 2 of the Foreign Agents Registration Act of 1938 ○ Person or entity that receives a grant for shuttered venue operators under Section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act ○ Entity in which the 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 entity, where any issuer, the securities of which are listed on an exchange registered as a national securities exchange ○ Entity that has previously received a second draw PPP loan 	



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Issue	First Draw PPP Loan (Did Not Receive PPP Loan in 2020 or Qualifies for an Adjustment)	Second Draw PPP Loan (Received a PPP Loan in 2020 or First Draw PPP Loan in 2021)
Maximum Loan Amount	<ul style="list-style-type: none"> • Original formulas continue to apply to determine the loan size, i.e., 2.5 times the average monthly payroll costs limited to \$10 million per borrower with an overall limit of \$20 million when including loans to members of the same corporate group. • The borrower can elect to use the average monthly payroll costs for calendar year 2019, calendar year 2020 or the one-year period before the loan application. Special rules apply to seasonal employers and those who were not in business during 2019. Note that the definition of payroll costs has been changed to include life and disability coverage paid by the employer. 	<ul style="list-style-type: none"> • Generally, the same 2.5 times average monthly payroll costs for most borrowers; but restaurants, hotels and other establishments that provide lodging and/or food for immediate consumption (NAICS code 72 entities) are allowed a factor of 3.5 times average monthly payroll costs. • All second draw PPP loans are capped at a maximum of \$2 million per borrower (per location for NAICS code 72, 511110 or 5151) and with an overall limit of \$4 million when including loans to members of the same corporate group. • Like first draw PPP loans, the borrower can elect to use the average monthly payroll costs for calendar year 2019, calendar year 2020 or the one-year period before the loan application. Special rules apply to seasonal employers and those who were not in business during 2019. Note that the definition of payroll costs has been changed to include life and disability coverage paid by the employer.



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Issue	First Draw PPP Loan (Did Not Receive PPP Loan in 2020 or Qualifies for an Adjustment)	Second Draw PPP Loan (Received a PPP Loan in 2020 or First Draw PPP Loan in 2021)
Revenue Reduction Documentation	N/A	<ul style="list-style-type: none"> •For loans that exceed \$150,000, the applicant must submit documentation that substantiates the 25% or greater revenue reduction. •For loans that do not exceed \$150,000, documentation is not required with the loan application, but it must be submitted to receive forgiveness. If a borrower does not apply for forgiveness, the documentation must be provided if requested by the SBA.
Payroll Documentation	<ul style="list-style-type: none"> •Documents must be submitted with the loan application that demonstrates eligibility for the loan and to evidence the qualifying payroll amount. This documentation may include payroll records, payroll tax filings, Form 1099-MISC, Schedule C or F, income and expenses from a sole proprietorship, or bank records. 	<ul style="list-style-type: none"> •Documentation of payroll costs is not required when the same lender that processed the original loan is handling the second draw and the 2019 calendar payroll figures are used for both the original or first draw and the second draw. •If the borrower elects different payroll costs for the second draw, substantiation will be required. •Additional documentation may be requested by the lender if helpful in conducting the good-faith review of the borrower's application.



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Issue	First Draw PPP Loan (Did Not Receive PPP Loan in 2020 or Qualifies for an Adjustment)	Second Draw PPP Loan (Received a PPP Loan in 2020 or First Draw PPP Loan in 2021)
Use of Loan Proceeds	<ul style="list-style-type: none"> • Payroll costs <ul style="list-style-type: none"> ○ Cash payroll ○ Employer cost of health care ○ Employer retirement plan contribution ○ Employer state payroll tax ○ Life and disability benefits (new) • Non-payroll costs for obligations in existence on February 15, 2020 <ul style="list-style-type: none"> ○ Interest on mortgages ○ Rent to unrelated parties ○ Utilities • New non-payroll costs <ul style="list-style-type: none"> ○ Covered operations expenditure ○ Covered property damage costs ○ Covered supplier costs ○ Covered worker protection expenditure 	<ul style="list-style-type: none"> • Same as first draw PPP loan rules
Covered Period	<ul style="list-style-type: none"> • For all loan forgiveness applications filed after December 27, 2020, the covered period: <ul style="list-style-type: none"> ○ Starts on the disbursement date ○ Ends on any day that is at least eight but not more than 24 weeks later (or any time frame in between) than the start date • The end of the covered period will determine the date on which safe harbors must be satisfied. 	<ul style="list-style-type: none"> • Same as first draw PPP loan rules
Loan Forgiveness	<ul style="list-style-type: none"> • Loan forgiveness must be applied for within 10 months following the end of the selected covered period to avoid loan payments. • Loan may be forgiven to the extent the loan proceeds are spent on the expanded payroll costs and other eligible expenses, as described above, within the covered period. • In addition to the use on qualified expenses, full forgiveness requires <ul style="list-style-type: none"> ○ Full-time equivalent employee and compensation levels be maintained (full forgiveness may be achieved even with some reduction of full-time equivalent employees or wages/salaries) ○ At least 60% of the proceeds are spent on payroll costs 	<ul style="list-style-type: none"> • Same as first draw PPP loan rules
Maturity Date and Interest Rate	<ul style="list-style-type: none"> • 100 basis points (1%) • Five years 	<ul style="list-style-type: none"> • Same as first draw if received in 2021