

Paycheck Protection Program 2.0: What Small Businesses Need to Know

New York Law Journal / Coronavirus Legal Advisory

01.12.2021

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The Consolidated Appropriations Act, comprised of more than 5,500 pages and including a \$900 billion stimulus package, became law on December 27, 2020. As part of this law, the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (the “**Economic Aid Act**”), provides, among other things (a) \$284.5 billion to restart the Paycheck Protection Program (“**PPP 2.0**”), (b) \$15 billion of grants for shuttered live venues, theatres, museums and zoos (“**Shuttered Venue Operator Grant Program**”), and (c) \$20 billion for Economic Injury Disaster Loans.

This alert addresses the key features of PPP 2.0 for small businesses, incorporating the Interim Final Rule on the Paycheck Protection Program (“**PPP**”) as Amended by the Economic Aid Act (Docket No. SBA-2021-0001) (“**IFR # 1**”) and the Interim Final Rule on PPP Second Draw Loans (Docket No. SBA-2021-0001) (“**IFR # 2**”) issued by the Small Business Administration (“**SBA**”) on January 6, 2021. Future alerts will address PPP 2.0 from the lenders’ point of view, the Shuttered Venue Operator Grant Program, and other important provisions of the Economic Aid Act affecting businesses.

PPP 2.0 provides for up to \$284.5 million of additional PPP loans through March 31, 2021, for (a) certain small businesses that spent their first PPP loan (a “**2020 PPP Loan**”) to borrow a second PPP loan, (b) qualified small businesses that did not receive a 2020 PPP Loan to obtain a PPP loan (“**First Draw PPP Loans**”), and (c) certain 2020 PPP Loan recipients to request an increase in the amount of their 2020 PPP loans (“**Increased Draw of 2020 PPP Loans**”), and expands some of the key features of PPP, including (a) additional types of expenses that are eligible for loan forgiveness and (b) the kinds of businesses that may qualify for a PPP loan.

A. Second Draw PPP Loans

To qualify for a second PPP loan (“**Second Draw PPP Loan**”), an “eligible entity” must have (a) 300 or fewer employees and (b) have experienced a revenue reduction of 25% or more for one quarter in 2020 from the same quarter in 2019. Any eligible entity may receive only one Second Draw PPP Loan.

Eligible Entities. In addition to the types of entities that were eligible recipients of 2020 PPP Loans, an “eligible entity” has been expanded to include housing cooperatives (cooperative housing

corporation as defined in the Internal Revenue Code), certain nonprofit 501(c)(6) business organizations, certain news organizations and public broadcasting stations ("**News Organizations**"), and "destination marketing organizations," which include quasi-governmental state or local organizations promoting tourism or business in the relevant area.

Specifically excluded from Second Draw PPP Loans are publicly traded entities and their affiliates (except in the case of News Organizations); businesses primarily engaged in political or lobbying activities; any company that is organized in China, has significant operations in China or has a director who is a resident of China ("**Chinese Entities**"); any participant in the Shuttered Venue Operator Grant Program; and any business that was not in operation on February 15, 2020 (other than seasonal employers).

Number of Employees. For purposes of calculating the number of employees, Second Draw PPP Loans, as with 2020 PPP Loans, have special rules for any business (a) operating one or more hotels, restaurants, bars, and other hospitality businesses identified in North American Industry Classification System (NAICS) code 72 ("**NAICS 72**"); (b) operating as a franchise assigned an identifier code by the SBA ("**Franchises**"); or (c) which has issued debt or equity to an SBA-registered small business investment company ("**SBIC Portfolio Company**"), pursuant to which the "affiliation rules" are waived and the business may have up to 300 employees at each physical location. These favorable rules have now been extended to News Organizations.

25% 2020 Quarter Revenue Reduction. Gross receipts includes all receipts in whatever form received or accrued in accordance with the entity's accounting method, from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. However, gross receipts excludes net capital gains and losses as reported on income tax returns, taxes collected to be remitted to a taxing authority, and intercompany and affiliate transactions. For nonprofit organizations, gross receipts is subject to Section 6033 of the Internal Revenue Code. A business must include the gross receipts of any business acquired during 2020 for the entire measurement period, unless the acquisition is of a segregable division, in which case gross receipts do not include receipts prior to the consummation of the acquisition.

In the event that a business did not operate for one or more quarters in 2019, the receipts reduction may be demonstrated by a 25% receipts decrease in any 2020 quarter from the receipts of any 2019 quarter in which the business operated. If the business did not operate at all in 2019, the receipts reduction may be demonstrated by a 25% receipts reduction in the 2020 second, third, or fourth quarter from the 2020 first quarter.

Maximum Loan Amount. The maximum amount of a Second Draw PPP Loan is the lesser of (a) \$2 million or (b) 250% of the average monthly payroll costs incurred or paid for either calendar 2019 or the one-year period before the date on which the Second Draw PPP Loan is made, as selected by the eligible entity ("**Reference Period**"). For hotels, restaurants, bars and other hospitality businesses identified in NAICS 72, the percentage of average monthly payroll costs for the Reference Period is increased to 350, subject to the \$2 million cap.

The definition of payroll costs was expanded to include payments for group life, disability, vision and dental insurance benefits.

For an eligible entity that did not exist during the one-year period preceding February 15, 2020, the Reference Period is determined based on the period until the date the eligible entity applies for the Second Draw PPP Loan. Seasonal employers, defined as (a) a business that does not operate for more than seven months in any calendar year, or (b) during calendar 2020, had gross receipts for any six months that were not more than 33.33% of the gross receipts for the other six months, the Reference Period is determined based on any 12-week period between February 15, 2019, and February 15, 2020.

Use of Proceeds. In addition to the permitted uses of 2020 PPP Loans, a Second Draw PPP Loan can be used for the following additional purposes, and such costs and expenditures will qualify for loan forgiveness:

- **Covered Operations Expenditures.** Covered operations expenditures are any payments for any business software or cloud computing service that facilitates business operations; product or service delivery; the processing of payments 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.** Covered property damage costs are costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation.
- **Covered Supplier Costs.** Covered supplier costs are expenditures for the supply of goods that (a) are essential to the operations of the PPP borrower at the time at which the expenditure is made and (b) are made pursuant to a contract, order or purchase order (i) in effect at any time before the covered period with respect to the applicable covered loan or (ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan.
- **Covered Worker Protection Expenditure.** Covered worker protection expenditures are any operating or capital expenditures to facilitate the adaptation of the business activities of a PPP borrower to comply with federal, state or local requirements established or guidance issued during the period beginning on March 1, 2020, and ending the date on which the national emergency declared by the President expires, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19. These expenditures may include (a) the purchase, maintenance or renovation of assets that create or expand (i) a drive-through window facility, (ii) an indoor, outdoor, or combined air or air pressure ventilation or filtration system, (iii) a physical barrier such as a sneeze guard, (iv) an expansion of additional indoor, outdoor or combined business space, (v) an onsite or offsite health screening capability, or (vi) other assets as determined by the SBA in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and (b) the purchase of certain personal protective equipment (PPE), not including residential real property or intangible property.

Loan Forgiveness. A borrower is eligible for forgiveness of a Second Draw PPP Loan indebtedness in an amount equal to the sum of the following costs incurred and payments made during the “covered period,” the eight-week or 24-week period selected by the PPP borrower beginning upon the receipt of the loan proceeds: (a) payroll costs, (b) payments of interest on any covered mortgage obligation (but not any prepayment of or payment of principal on a covered mortgage obligation), (c) payments on any covered rent obligation, (d) covered utility payments, (e) covered operations expenditures, (f) covered property damage costs, (g) covered supplier costs, and (h) covered worker protection expenditures, subject to payroll costs comprising at least 60% of the forgiveness amount. The Economic Aid Act also reverses the prior guidance of the Internal Revenue Service by permitting a tax deduction for business expenses funded with the proceeds of a forgiven PPP Loan even though the amount of the loan forgiven is excluded from gross income.

How to Apply for a Second Draw PPP Loan. An eligible entity must submit to participating lenders a completed [SBA Form 2483-SD](#) issued by the SBA on January 8, 2021. Documents to be submitted with the application include proof of the average monthly payroll costs for the applicable Reference Period, such as IRS Form 941 (or other tax forms containing similar information), and state quarterly wage unemployment insurance tax reporting forms from the applicable periods, or equivalent payroll processor records, along with evidence of any retirement and employee group health, life, disability, vision and dental insurance contributions. Certain of the documents need not be provided if the selected Reference

Period is calendar 2019, the same reference period used in the 2020 PPP Loan, and the eligible entity is using the same lender as the 2020 PPP Loan.

To substantiate the revenue decrease, an eligible entity must submit relevant tax forms or quarterly income statements or bank statements, unless the Second Draw Loan is \$150,000 or less, in which case such proof, if not accompanying the application, will be required when seeking loan forgiveness or if otherwise requested by the SBA. The application requires the applicant to certify, in good faith, that (a) current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant; (b) the applicant has realized a reduction in gross receipts in excess of 25% relative to the relevant comparison period; (c) the applicant received a 2020 PPP Loan and will have used the full amount of such loan only for eligible expenses before the Second Draw PPP Loan is disbursed; (d) the applicant has not and will not receive another Second Draw PPP Loan or a Shuttered Venue Operator Grant from the SBA; (e) the applicant is not an issuer of securities which are registered on a national securities exchange; and (f) the applicant is not a Chinese Entity.

B. First Draw PPP Loans

An otherwise eligible recipient which did not receive a 2020 PPP Loan may apply for a First Draw PPP Loan. The rules of the PPP prior to the enactment of the Economic Aid Act continue to apply, along with most of the PPP enhancements contained in the Second Draw PPP Loans.

Eligible Recipients. An eligible recipient for a First Draw PPP Loan is (a) any business concern, nonprofit organization, veterans organization **or** News Organization that has not more than 500 employees or such greater number of employees as permitted for its applicable NAICS code; (b) if a housing cooperative, a qualifying nonprofit 501(c)(6) business organization, or a destination marketing organization, that has not more than 300 employees; or (c) a for-profit business which together with its affiliates (i) qualifies as a “small business” under the applicable revenue-based size standards established by the SBA or (ii) has a maximum tangible net worth not more than \$15 million and an average net income after federal income taxes (excluding any carry-over losses) for the two full fiscal years before the date of the loan application of not more than \$5 million. In making these determinations, the affiliates of a proposed borrower must be aggregated.

Under the SBA rules, entities are “affiliates” when one controls or has the power to control the other, or a third party controls or has the power to control both, whether or not control is actually exercised. A person or entity that owns or has the power to control 50% or more of a concern's voting stock, or a block of voting stock of at least 20%, controls or may be deemed to have the power to control the concern. Furthermore, the SBA will deem a minority shareholder to be in control if that individual or entity has the ability, under the concern's charter, bylaws or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders. The affiliation rules are waived for (a) NAICS 72, (b) Franchises, (c) SBIC Portfolio Companies, and (d) New Organizations, and there may be up to 500 employees at each physical location.

All of the businesses excluded from the Second Draw PPP Loans are excluded from First Draw PPP Loans, other than Chinese Entities.

Maximum Loan Amount. The maximum amount of a First Draw PPP Loan is the lesser of (a) \$10 million or (b) 250% of the average monthly “**payroll costs**” for the Reference Period of (i) calendar 2019, (ii) calendar 2020, or (iii) the one-year period before the date on which the First Draw PPP Loan is made, as selected by the loan applicant.

Use of Proceeds and Loan Forgiveness. A First Draw PPP Loan can be used for the following purposes, and such costs and expenditures will qualify for loan forgiveness: (a) payroll costs; (b) payments of interest on any covered mortgage obligation (but not any

prepayment of or payment of principal on a covered mortgage obligation); (c) payments on any covered rent obligation; (d) covered utility payments; (e) Covered Operations Expenditures; (f) Covered Property Damage Costs; (g) Covered Supplier Costs; and (h) Covered Worker Protection Expenditures, subject to payroll costs comprising at least 60% of the forgiveness amount. In addition, a First Draw PPP Loan may be used for any purpose permitted by an SBA 7(a) loan, which includes plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment and working capital; however, these uses will not qualify for loan forgiveness.

A borrower is eligible for forgiveness of First Draw PPP Loan indebtedness in an amount equal to the sum of the above-referenced costs incurred and payments made during the covered period, the eight-week or 24-week period selected by the PPP borrower beginning upon the receipt of the First Draw PPP Loan proceeds. A borrower is permitted a tax deduction for business expenses funded with the proceeds of a forgiven First Draw PPP Loan even though the amount of the loan forgiven is excluded from gross income.

How to Apply for a First Draw PPP Loan. An eligible entity must submit to participating lenders a completed [SBA Form 2483](#) issued by the SBA on January 8, 2021. Documents to be submitted with the application include proof of the average monthly payroll costs for the applicable Reference Period, such as IRS Form 941 (or other tax forms containing similar information), and state quarterly wage unemployment insurance tax reporting forms from the applicable periods, or equivalent payroll processor records, along with evidence of any retirement and employee group health, life, disability, vision and dental insurance contributions.

The application requires the applicant to certify, in good faith, that (a) current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant; (b) the applicant is not an issuer of securities which are registered on a national securities exchange; and (c) the applicant has not and will not receive another Second Draw PPP Loan or a Shuttered Venue Operator Grant from the SBA.

C. Increased Draw of 2020 PPP Loan

Since many of the provisions of the Economic Aid Act pertaining to PPP Loans were given retroactive to March 27, 2020, the date on which the PPP was established by the CARES Act, 2020 PPP Loan recipients may be able to request an increase to their 2020 PPP Loan amount in certain circumstances if, and only if, the SBA did not issue a loan forgiveness determination on or before December 26, 2020. These circumstances include (a) partnerships and limited liability companies taxed as partnerships that did not include any amount for partner compensation, and (b) seasonal employers whose calculation of their maximum loan amount increased based on the changes made by the Economic Aid Act.

In addition, (a) a 2020 PPP Loan recipient that returned all of its 2020 PPP Loan may apply for a First Draw PPP Loan; (b) a 2020 PPP Loan recipient that returned part of its loan may reapply for a loan amount equal to the difference between the loan amount retained and the loan amount previously approved; and (c) a 2020 PPP Loan recipient that did not accept the full amount of the loan for which it was approved may request an increase in the 2020 PPP Loan amount up to the amount previously approved.

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