

## SBA Issues Regulations on New Round of PPP Loans

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On January 6, 2021, the U.S. Small Business Administration and the Department of Treasury released interim final rules related to the [expansion and extension of the original Paycheck Protection Program \(PPP\)](#) and the authorization of a [second round of PPP loans](#) pursuant to the \$900 billion COVID-19 relief package ([the Consolidated Appropriations Act, 2021](#) (the “Act”)) enacted on December 27, 2020.

In an effort to promote access to capital, initially only community financial institutions will be able to make new first time PPP loans starting on Monday, January 11, and second draw PPP loans starting on Wednesday, January 13. Shortly thereafter all participating lenders will be able to make PPP loans. The PPP program for both new first time loans and second draw loans will remain open until March 31, 2021.

### New First Time Loans

Eligible small businesses that were not able to receive a PPP loan in the first round of funding before the program expired on August 8, 2020 will again have an opportunity to apply for a PPP loan. In addition, a borrower that returned all of its PPP loan proceeds may reapply for a new loan for an amount it is eligible for under current rules. If a borrower returned part of a PPP loan or did not accept the full amount of the loan proceeds it was previously approved for, the borrower may apply for an increase to its existing loan for the difference between the amount retained and the amounts previously approved.

PPP loans for new applicants will be subject to the same program rules and eligibility criteria that were in place in the two initial rounds of funding. In addition, the Act provides for eligibility for housing cooperatives, certain 501(c)(6) organizations (excluding professional sports leagues and organizations with the purpose of promoting or participating in a political campaign or other activity), certain eligible destination marketing organizations with no more than 300 employees, and certain news organizations with more than one physical location that employs not more than 500 employees per physical location, if it is majority owned or controlled by a business concern that is assigned a NAICS code beginning with 511110 or 5151. However, the Act also contains new restrictions on the eligibility of certain other small businesses including a business that was not in operation on February 15, 2020, any business that receives a grant for shuttered venue operators under the Act, any business in which certain members of the executive and legislative branches of the United States government, or their spouse, owns or controls 20% of the ownership of such business, publicly traded companies, or any business that has permanently closed (a business that has temporality closed or temporarily suspended operations may remain eligible).

Similar to first round loans, the maximum amount a small business may borrow for a first time PPP loan is the lesser of 2.5 *multiplied* by the borrower’s average monthly payroll costs or \$10 million. For the purposes of this calculation, a borrower may choose to use average monthly payroll from the 1-year period before the date on which the loan is made, calendar year 2019, or calendar year 2020. The regulations also provide that businesses that are part of a single corporate group may not receive more than \$20 million of first time PPP loans in the aggregate.

### Second Draw PPP Loans

Small businesses that previously received a PPP loan may be eligible for a second PPP loan if the business has used the full amount of its first round PPP funds on eligible expenses. Second draw PPP loans cannot exceed \$2 million and are limited to small businesses with 300 or fewer employees and that can demonstrate a loss of 25% of gross receipts in 2020 as compared to 2019 or in any quarter during 2020 when compared to the same quarter in 2019.

While the eligibility criteria for a small business requesting a second PPP loan remains substantially similar to the eligibility criteria for the first time loans, the Act revises the qualification based on having fewer than 500 employees to having fewer than 300 employees (and in the case of restaurant or hospitality businesses with NAICS code 72 and with more than one location, 300 employees per location). In addition, the affiliation rules and exemptions applicable to determining whether an entity meets the requirements of an eligible small business remain applicable to second draw loans but the exemption for businesses in the restaurant and hospitality industry based on having fewer than 500 employees is reduced to having fewer than 300 employees.

The Act also contains new restrictions on the eligibility of certain small business including a business primarily engaged in lobbying or political activities, business entities that are owned by entities organized in or have significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong or businesses with a board member who is a resident of the People's Republic of China, any person that is required to register as a foreign agent, any business that receives a grant for shuttered venue operators under the Act, any business in which certain members of the executive and legislative branches of the United States government, or their spouse, owns or controls 20% of the ownership of such business, publicly traded companies, or any business that has permanently closed (a business that has temporally closed or temporarily suspended operations may remain eligible).

For the purposes of calculating gross receipts in order to determine whether a small business suffered a 25% loss of gross receipts between 2019 and 2020, the borrower must include all revenue in whatever form received or accrued by the borrower and any affiliates from whatever source, including from the sales of products, interest, dividends, fees, commissions, etc. Proceeds received from the initial first PPP loan, however, are excluded from the calculation of gross receipts. The regulations also provide that a borrower must include the receipts from any businesses acquired during 2020 and must include the receipts from the entire measurement period, not just time period after it was purchased.

The maximum loan amount for a second draw PPP loan is equal to the lesser of 2.5 (or 3.5 for restaurant and hospitality businesses with NAISC code 72) multiplied by the borrower's average monthly payroll costs or \$2 million. For the purposes of this calculation, a borrower may use the average monthly payroll from either calendar year 2019 or 2020. The regulations also provide that businesses that are part of a single corporate group may not receive more than \$4 million of second draw PPP loans in the aggregate.

### Expansion of Eligible and Forgivable Expenses

In addition to payroll, rent, utilities and interest on mortgages that are permitted expenses under the CARES Act, the Act allows for small businesses to use PPP proceeds for additional expenses such as personal protective equipment for employees, costs associated with outdoor dining, supplier costs, costs associated with software, cloud computing and other human resources and accounting needs, and property damage costs due to public disturbances that occurred during 2020 that are not covered by insurance. The Act also adds group life, disability, vision and dental benefits to items that may be included in the calculation of monthly payroll costs for the purposes of determining the maximum loan amount.

Foley Hoag LLP will update this summary as needed in the coming days and weeks, including to address additional regulations, FAQs, and loan applications that are expected to be issued in the coming days by the U.S. Small Business Administration.

For more information on this topic, please contact [Jennifer Audeh](#).

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