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## What's New this Week with PPP Loans?

Deadline for Eligible Borrowers is March 31, 2021

**January 25, 2021**

by Nancy A. D. Hancock

The Consolidated Appropriations Act, 2021 (H.R. 133-116) added \$900 billion in stimulus relief to the spending packages dedicated to fighting the economic woes wrought by the COVID-19 pandemic. Title III of Division M of the Appropriations Act, the “Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act” (Pub. L. 116-260) (the Economic Aid Act), became law on December 27, 2020, adding \$284.45 billion in forgivable loans to the Paycheck Protection Program (the PPP), a loan program that is a temporary addition to the Section 7(a) loan program offered by the U.S. Small Business Administration (SBA).

The PPP loan program was enacted by Sections 1102 and 1106 of the Coronavirus Aid, Relief and Economic Security Act (Pub. L. 116-136)(the CARES Act), which became law on March 27, 2020, and was amended on April 24, 2020, June 5, 2020, and July 4, 2020. The PPP loan program ceased making loans in 2020. But, the bulk of those loans remain outstanding, as many borrowers are awaiting clearer (or different) guidance for achieving forgiveness. The Economic Aid Act is intended to provide such guidance, among many other things.

The Economic Aid Act also extends SBA’s authority to make PPP loans, commencing the week of January 11, 2021 and continuing through March 31, 2021, but on revised terms. SBA reopened the PPP for loans to first-time eligible borrowers (each, a First Draw PPP Loan) on these revised criteria and also opened the door for a smaller group of harder-hit eligible borrowers to obtain a second PPP loan (each, a Second Draw PPP Loan) on the same general terms. As of January 24, 2021, SBA has promulgated two new interim final rules governing PPP loans.

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The first interim final rule (Docket No. SBA-2021-0001), posted on January 7, 2021, consolidates the 24 previously issued interim final rules and additional guidance from SBA and the U.S. Department of the Treasury. The first interim rule expressly states that it is not intended to substantively alter or affect PPP rules that were not amended by the Economic Aid Act. The second interim final rule (Docket No. SBA-2021-0002), also posted on January 7, 2021, implements Section 311 of the Economic Aid Act, which authorizes SBA to guarantee additional loans under the PPP.

In addition, effective January 19, 2021, SBA released a revised "PPP Loan Forgiveness Application Form 3508S" for use by PPP borrowers who borrowed \$150,000 or less (Revised Form 3508S).

Although SBA has stated that additional rules related to PPP Second Draw Loans will be coming, and SBA has also promised a consolidated rule governing all aspects of PPP loan forgiveness, this summary outline is limited to the impact on the PPP Program by the Economic Aid Act, as implemented by the two interim final rules and the Revised Form 3508S. The PPP is subject to changes and reinterpretation very frequently (and sometimes retroactively), so this material is current as of January 24, 2021.

### **Economic Aid to Hard- Hit Small Businesses, Nonprofits, and Venues Act**

#### **Impact on PPP Loans**

##### **GENERAL**

- Maximum amount available for PPP Second Draw Loans: \$284.45 billion
- Final date for borrowing under PPP loan program: March 31, 2021

##### **FIRST INTERIM RULE**

- First interim rule applies to loan applications, requests for increases under a First Draw PPP Loan and applications for loan forgiveness where SBA has not yet remitted forgiveness payments

##### **AMENDMENTS MADE TO EXISTING PPP LOAN PROVISIONS**

- New borrowers may use 2019 or 2020 payroll costs as base period for determining their maximum available loan amount
- Allowable and forgivable nonpayroll costs incurred or paid are expanded:
  - Covered operations expenditures

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- Include payments for any business software or cloud computing service that facilitates 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 and vandalism costs incurred in 2020 that were not covered by insurance or other compensation
- Covered supplier costs for certain essential goods under contracts in effect before the covered period, or for perishable goods contracted for before or during the covered period
- Covered worker protection expenditures (include both capital and operating expenditures made for permissible worker safety expenses)
- Borrower may select loan forgiveness covered period for any period between 8 and 24 weeks (inclusive) from date loan disbursed to borrower
- Certain group insurance payments may be included as payroll costs (group life, disability, vision, dental insurance)
- New Revised Form 3508S adopted January 19, 2021--simplified one-page forgiveness application (with four pages of fine-print, detailed instructions) for loans of \$150,000 or less
- A business or organization that was not in operation on February 15, 2020 is not an eligible borrower for a loan
- A business that receives a shuttered venues grant is not eligible for a loan
- Proceeds of a covered loan may not be used for lobbying
- A borrower under the First Draw PPP Program who returned all or part of its previous PPP loan may reapply for the maximum amount applicable; and a borrower under the First Draw PPP Program who did not accept the full amount of a covered loan may request a modification to increase the amount of a loan to the maximum amount

### **HOLD HARMLESS FOR LENDERS**

- Safe harbor from enforcement actions for PPP lenders who originated a First Draw PPP Loan or a Second Draw PPP Loan in good faith, complied with all regulations, and relied in good faith on a borrower's certification and documentation

### **SECOND INTERIM FINAL RULE PROVIDES CRITERIA FOR SECOND DRAW PPP LOANS**

- Second Draw PPP Loans may be applied for through March 31, 2021

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- SBA authorized to guarantee loans through March 31, 2021
- Generally, the same terms and conditions apply to Second Draw PPP Loans as the modified terms applicable to First Draw PPP Loans under the First Interim Final Rule
- Key terms of Second Draw PPP Loans include:
  - 100% SBA guaranty
  - No collateral required
  - No personal guarantees required
  - Interest: 100 basis point (1%) non-compounding, non-adjustable
  - 5-year term to maturity
  - All loans made by participating lenders (not SBA), and lenders permitted to rely on borrower certifications to determine borrower eligibility and use of loan proceeds
- Different terms applicable to Second Draw PPP Loans that do not apply to First Draw PPP Loans include:
  - Eligibility Limitations
    - Eligibility limited to borrowers with not more than 300 employees
    - Borrower must have used or will use full amount of First Draw PPP Loan for authorized purposes on or before the expected disbursement date of the Second Draw PPP Loan
  - Gross receipts reduction eligibility requirement
    - Borrower must be able to show it experienced a gross receipts reduction of 25% or greater in 2020 relative to 2019, or in any 2020 quarter compared with the same quarter in 2019
    - A borrower in operation for all four quarters in 2019 is deemed to have experienced the required gross receipts reduction if its annual receipts declined 25% or greater in 2020 compared to 2019 and the borrower submits copies of its annual tax returns to substantiate its gross receipts reduction
    - For eligible nonprofits, veterans' organizations, etc., "gross receipts" has meaning defined in section 6033 of the Internal Revenue Code of 1986
    - Forgiveness amount of a First Draw PPP Loan is not includable in a borrower's gross receipts
  - Any single business entity assigned a NAICS code beginning with 72 (hotels, restaurants, etc.) and employs not more than 300 employees per physical location is eligible for a Second Draw PPP Loan (eligibility for a First Draw PPP Loan may have up to 500 employees per physical location)
  - With all outstanding PPP loans, maximum \$10,000,000
  - Entity must have been in business on February 15, 2020
  - PPP eligibility expanded to include 501(c)(6) business organizations (but not professional sports leagues or organizations with the purpose of promoting or participating in a political campaign) and destination marketing organizations with 300 or fewer employees and that do not receive more than 15% of receipts

## What's New this Week with PPP Loans?

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from lobbying

- PPP eligibility expanded to include local newspapers, TV and radio stations and housing cooperatives with 300 or fewer employees (with affiliation rules waived for certain eligible news organizations)
- Borrowers may receive only one Second Draw PPP Loan
- Payroll cost changes
  - Maximum loan amount for a Second Draw PPP Loan limited to the lesser of 2.5 times borrower's average monthly payroll costs and \$2 million
  - Borrower may use calendar year 2019 or calendar year 2020, as "the twelve-month period prior to when the loan is made" for calculating payroll costs
  - Tailored calculations for seasonal businesses
  - Special calculations for farmers and ranchers
  - Second Draw PPP Loan borrowers with NAICS codes starting with 72 may receive up to 3.5 times their average monthly payroll costs (rather than 2.5 times)
  - Businesses that are part of a single corporate group may receive no more than \$4 million in Second Draw PPP Loans in the aggregate
- Necessity certification required
- Full forgiveness if at least 60% of PPP loan spent on payroll costs over a selected time period of eight weeks to 24 weeks
- Costs eligible for loan forgiveness in a Second Draw PPP Loan same as those modified costs for a First Draw PPP Loan, as described above
  - payroll costs (amended definition)
  - covered rent obligations
  - covered mortgage obligations
  - covered utility payments
  - covered operations expenditures
  - covered property damage costs
  - covered supplier costs
  - covered worker protection expenditures
- Instructions to PPP Loan Forgiveness Application Form 3508S (revised January 19, 2021) provide a detailed descriptions of eligible payroll costs and nonpayroll costs

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### **EXPANDED LIST OF THOSE WHO ARE INELIGIBLE FOR SECOND DRAW PPP LOANS**

- Ineligible businesses include publicly-traded businesses; entities listed in 13 CFR 120.110 (except for entities otherwise ineligible under that regulation that have been made eligible by statute or SBA guidance); entities primarily engaged in political or lobbying activities; entities under the control of entities in the People's Republic of China or the Special Administrative Region of Hong Kong or with a board member who is a resident of the People's Republic of China; registrants under the Foreign Agents Registration Act of 1938; and entities that are receiving a grant under the live venues grant program
- Holders of listed federal Executive Branch and Legislative Branch titles and their spouses are required to disclose their status when receiving forgiveness on a PPP loan and these individuals are prohibited from obtaining a future PPP loan
- Ineligible borrowers for First Draw PPP Loans are ineligible for Second Draw PPP Loans

### **TAX CONSIDERATIONS**

- “no deduction denied, no tax attribute reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided” by Section 1106 of the CARES Act
- Borrower may deduct ordinary and necessary business expenses made with PPP loan proceeds

Eligible borrowers should act quickly, as **March 31, 2021** is just around the corner.

Pullman & Comley has experienced professionals working to assist their clients during these unprecedented times. For specific guidance or more information, please contact us.

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