

COVID-19 UPDATE: Second Draw Loans and Other PPP Updates in New Covid Relief Bill

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On December 21, after months of negotiations, Congress overwhelmingly passed the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (H.R. 133) (the "Act"). This stimulus package which was passed as part of a larger appropriations bill provides \$900 billion in COVID-19 relief to the American public. The following is a summary of the provisions with the Act relevant to the Paycheck Protection Program ONLY. The overall appropriations bill as well as the COVID relief provisions, include additional provisions that could be helpful to for-profit businesses, non-profit businesses and individuals that have been hardest hit by the global pandemic. These additional relief provisions include but are not limited to direct stimulus payments to individuals, increases to weekly unemployment benefits, and additional assistance for small businesses in the form of EIDL loans, subsidies for payments owed under existing SBA 7(a) and 504 loans, and industry specific relief for businesses that have been particularly hard hit by the pandemic.

The legislation also ensures tax deductibility for all SBA related relief funds received by small businesses in 2020 (including PPP loans, EIDL loans, and payment subsidies for borrowers with SBA 7(A) and 504 loans).

The key PPP loan provisions in the Act include:

1. The Act creates an opportunity for a PPP second draw loan in an amount not more than \$2M for smaller and harder hit business.
 - a) These loans are available until March 21, 2021. Additional appropriation for these loans is \$147.45B.
 - b) To be eligible for a PPP second draw loan, the applicant must:
 - i. employ not more than 300 employees (and entities with multiple locations may employ not more than 300 employees per physical location);
 - ii. have used or will use the full amount of their first PPP loan; and
 - iii. demonstrate at least a 25 percent reduction in gross receipts in the first, second or third quarter of 2020 relative to the same 2019 quarter.
 - *There will be adjustments for business that were not in operation for all of 2019.*
 - *For PPP second draw loan applications made in 2021, the borrower can use 2020 operations for comparison.*
 - iv. Be businesses, although certain non-profit organizations, housing cooperatives, veterans' organizations, tribal businesses, self-employed individuals, sole proprietors, independent contractors, and small agricultural co-operatives will also be eligible.
 - v. A number of entities are explicitly excluded, including entities listed in 13 C.F.R. 120.110 and entities involved in political and lobbying activities.

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- c) Loan terms.
- i. Loan amount up to 2.5x of the average monthly payroll costs in the one year period prior to the loan (presumably the 12-month period prior to the date of the PPP second draw loan application) or calendar year 2019.
 - *New entities may receive loans of up to 2.5x the sum of average monthly payroll costs.*
 - *Entities in industries assigned to NAICS code 72 (accommodation and food services) may receive PPP second draw loans of up to 3.5x their average monthly payroll costs.*
 - ii. Waiver of affiliation rules that applied during initial PPP loans apply to a second loan.
 - iii. An eligible entity may only receive one PPP second draw loan.
 - iv. Fees are waived for both borrowers and lenders to encourage participation.
 - v. For loans of not more than \$150,000, the entity may submit a certification attesting that the entity meets the revenue loss requirements on or before the date the entity submits their loan forgiveness application and non-profit and veterans' organizations may utilize gross receipts to calculate their revenue loss standard.
 - vi. Borrowers of a PPP second draw loan would be eligible for loan forgiveness equal to the sum of their payroll costs, as well as covered mortgage, rent, and utility payments, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures incurred during the covered period, subject to the 60/40 cost allocation between payroll and non-payroll costs in order to receive full forgiveness will continue to apply.
- d) The SBA is directed to issue guidance addressing barriers to access to capital for underserved communities no later than ten days after the Act becomes law.
2. Borrowers who returned PPP loan proceeds will be provided an opportunity to reapply for the maximum amount if they have not received forgiveness. In addition, borrowers whose loan calculations have increased due to changes in interim final rules to work with lenders to modify their loan value regardless of whether the loan has been fully disbursed, or if Form 1502 has already been submitted.
 3. A portion of the Act appropriations (\$15B) will be available for eligible live venue operators or promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theatre operators, or talent representatives who demonstrate a 25 percent reduction in revenues, with an additional set-aside for eligible entities that employ not more than 50 employees.
 4. Additional expenses that will qualify for PPP loan forgiveness (both second draw and original PPP loans for which no forgiveness has been submitted):
 - a) Payment for any software, cloud computing, and other human resources and accounting needs.
 - b) Costs related to property damage due to public disturbances that occurred during 2020 that are not covered by insurance.
 - c) Expenditures to a supplier pursuant to a contract, purchase order, or order for goods in effect prior to taking out the loan that are essential to the recipient's operations at the time at which the expenditure was made. Supplier costs of perishable goods can be made before or during the life of the loan.
 - d) Personal protective equipment and adaptive investments to help a loan recipient comply with federal health and safety guidelines or any equivalent State and local guidance related to COVID-19 during the period between March 1, 2020, and the end of the national emergency declaration.
 - e) Group life, disability, vision, and dental insurance are expressly listed as payroll costs.
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5. Except for borrowers who have already had their PPP loans forgiven, the expanded list of forgivable expenses may be utilized by borrowers for all PPP loans, whether issued before or after Act.
6. Flexibility on applicable “covered period” to spend PPP loan proceeds. Previously, for a borrower to obtain PPP loan forgiveness the borrower had to spend the PPP loan proceeds on the original list of approved expenses (“payroll” as defined, rent, utilities and interest on secured indebtedness) within eight weeks of origination of the PPP loan (subsequently expanded to 24 weeks).
 - a) Under the Act, the borrower can select a “covered period” beginning on the date of origination and ending between eight and 24 weeks after origination for purposes of determining the spend applicable for PPP loan forgiveness.
 - b) Not clear if the SBA/Treasury’s requirement to pro rate or project the full period if a shorter period is selected, but probably not.
7. The Act affords those eligible entities who did not previously apply for a PPP loan until March 31, 2021 to seek an initial PPP loan. The extended deadline had been August 8, 2020.
8. On the theory it would be double dipping to have a forgiven loan not be considered income, and permit expenses used to obtain forgiveness to be deductible, the IRS had announced that expenses paid with PPP loan funds that have been forgiven would not be permitted to be used as deductions for purposes of determining taxable income.
 - a) The Act makes all such expenses fully deductible.
9. The Act mandates a simplified forgiveness applicable form for PPP loans that are less than \$150,000, regardless of the date the PPP loan was made.
 - a) Limited to one page (but no limit on size of font or margins).
 - b) Basically an affidavit certifying the number of employees the borrower was able to retain because of the PPP loan, the estimated total amount of the PPP loan spent on payroll costs, and the total loan amount.
 - c) In addition, the borrower must also attest that borrower accurately provided the required certification and complied with the PPP loan requirements.
 - d) SBA is obligated to establish the form within 24 days of the Act becoming law.
 - e) Additionally, borrowers of these smaller loans are required to retain relevant records related to employment for four years and other records for three years.
 - f) No other information will be required, although a borrow may, in its discretion, provide demographic information of the owner of the borrower, including the sex, race, ethnicity, and veteran status.
 - g) The SBA will still have the right to review and audit these loans to ensure against fraud, ineligibility or other material non-compliance with the PPP loan program.
 - h) Section 1110(e)(6) of the CARES Act required the up to \$10,000 EIDL advance to reduce the amount of PPP loan forgiveness. The Act eliminates that requirement, making the EIDL advance fully a grant.