



January 13, 2021

Round Two: Paycheck Protection Program for Nonprofits and Small Businesses

Following the enactment of the Consolidated Appropriations Act of 2021 (the Act), on January 6, 2021, the U.S. Small Business Administration (SBA) and Department of Treasury issued guidance for nonprofits and small businesses on how to access the newly allocated Paycheck Protection Program funds. This guidance includes two interim final rules, "*Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act*" and "*Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans*", which consolidate the rules for PPP loans made to first-time borrowers and detail how borrowers may access a second PPP loan (also called a "second draw"). Under the interim final rules, many of the restrictions and potentially negative tax and other consequences for borrowers of first draw PPP loans have been modified or eliminated. The SBA also issued specific guidance for minority, underserved, veteran and women-owned businesses to facilitate their access to PPP funds.

Reopening of First Draw Loans:

The SBA's portal opened to community financial institutions for first-draw PPP loans on January 11th and for second-draw PPP loans on January 13th. The PPP portal will open for all eligible borrowers to apply for first or second draw loans soon and will close for all borrowers on March 31, 2021. Sample applications for [first](#) and [second](#) draw loans can be found on the SBA's website. Borrowers should apply through participating SBA lenders and the SBA is providing [Lender Match](#), a free online tool, to connect borrowers with participating lenders.

- **First Draw Eligibility:** Eligible small businesses and nonprofits that were not able to obtain a PPP loan before the first draw closed in August 2020 may apply for a PPP loan from the newly-allocated funds.
 - o Eligible borrowers include:
 - Businesses with 500 or fewer employees that are eligible for other SBA 7(a) loans.
 - Sole proprietors, independent contractors, and eligible self-employed individuals.
 - Charities (including but not limited to churches and other religious organizations), veterans organizations and certain 501(c)(6) organizations.
 - Borrowers in the accommodations and food service industries with more than 500 employees but no more than 500 per physical location are also eligible.





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- The new law makes the following companies ineligible to receive PPP funds:
 - Publicly traded companies
 - Businesses owned or 20% controlled, either 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).
 - Businesses that have permanently closed, although businesses that are temporarily closed or that have temporarily suspended operations may be eligible.
- Businesses that are part of a single corporate group may not receive more than \$20 million first draw PPP funds in the aggregate.
- **Maximum Amount of First Draw Loan:** Qualifying borrowers may borrow up to a maximum of 2.5 times the average monthly payroll costs over the 12 months prior to the loan (or calendar year 2020), with a cap of \$100,000 per employee annualized for a total amount of up to \$10 million. Applicants must provide a Form 941, Employer's Quarterly Federal Tax Return, (or other forms with similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in the year used to calculate the loan amount, or equivalent payroll processor records, along with evidence of any retirement and health insurance contributions.

Second Draw Loans:

In recognition of the ongoing impact of Covid-19, Congress made a second round of funding available to small businesses and nonprofits.

- **Second Draw Eligibility Criteria:** This second round is generally intended for (i) smaller organizations (not more than 300 employees), (ii) that can demonstrate at least a 25% reduction in gross receipts in any quarter of 2020, compared to the same quarter in 2019 (separate criteria apply to borrowers that did not exist for some or all of 2019 to determine eligibility under the revenue loss criteria), (iii) that have used or will use the full amount of their first PPP loan prior to the disbursement of the second PPP loan to the borrower, and (iv) that used all of the first draw of PPP funds on eligible expenses.
 - Gross receipts of for-profit businesses are defined by the interim final rules to include all revenue in whatever form received or accrued (in accordance with the entity's accounting method) from whatever source, including from the acquisition of any businesses undertaken by the borrower during 2020 (and the receipts from the entire measurement period, not just from the time the business was acquired), the sales of products or services, interest,





dividends, rents, royalties, fees, or commissions, reduced by returns and allowances.¹

- For tax-exempt organizations, gross receipts are broadly defined by reference to Internal Revenue Code section 6033 to include the gross amount received from all sources, without reduction for any costs or expenses. The term includes gross amounts received from the sale of assets and in the form of investment income (such as interest, dividends, rents and royalties), in addition to other sources of revenue such as contributions, gifts, grants and earned income.
- **Additional Second Draw Eligibility Criteria:** The following criteria apply to second draw applicants:
 - Borrowers in the accommodations and food service industries with more than 300 employees but no more than 300 per physical location are also eligible.
 - Borrowers that have not yet requested loan forgiveness for a loan received from the first draw and that are eligible for a greater amount under the new rules may request an increase in the loan amounts received (provided that they have used or will have used the full amount of their first PPP loan prior to the disbursement of the second PPP loan to the borrower).
 - Borrowers that returned all or part of a loan received as part of the first draw or that did not accept the full amount they were eligible for in the first draw may reapply or request a modification of an existing loan to receive the difference between the amount they already received and the maximum allocation for which they are eligible.
 - Otherwise eligible borrowers that receive a grant under the Shuttered Venue Operator Grants (as more particularly described in our previous [alert](#)) are not eligible to receive a PPP second draw.
 - Borrowers created in or organized under the laws of China or Hong Kong, or having significant operations in China or Hong Kong (or businesses with one or more Board members who are resident in China) are ineligible. Nonprofits with significant operations in China or Hong Kong should consult with legal counsel to determine whether they might be eligible.
 - In addition to 501(c)(3) organizations and veterans organizations, certain 501(c)(6) organizations are eligible.

¹ Gross receipts do not include: forgiven first-draw PPP loans, taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees); proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts.



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- The new Act confirms that churches and other religious organizations are eligible borrowers.
- Organizations primarily engaged in political or lobbying activities are ineligible. This includes organizations focused on research or advocacy in such areas as public policy or political strategy or that describe themselves as think tanks.
- **Maximum Amount of Second Draw Loan:** Qualifying borrowers may borrow up to a maximum of 2.5 times the average monthly payroll costs over the 12 months prior to the loan (or calendar year 2020), with a cap per employee of \$100,000 annualized for a total amount of up to \$2 million. Borrowers assigned a NAICS code beginning with 72 (generally, accommodations and restaurants) may borrow up to 3.5 times the average monthly payroll costs, with a cap of \$2 million. Businesses that are part of a single corporate group may not receive more than \$4 million second draw PPP funds in the aggregate.

Simplified Application and Forgiveness Procedures:

For loans of \$150,000 or less, the new law calls for simplified application and forgiveness procedures:

- Application Process:
 - Borrowers of \$150,000 or less can initially certify to their eligibility without providing documentation, but will be required to substantiate the eligible revenue loss on or before submitting a forgiveness application.
 - Applicants required to submit documentation to establish eligibility and to demonstrate their qualifying payroll amount may include, as applicable, payroll records; payroll tax filings; Form 1099-MISC, Miscellaneous Income; Form 1040, Schedule C, Profit or Loss From Business, or Schedule F, Profit or Loss From Farming; income and expenses from a sole proprietorship; or bank records.
- Forgiveness: Loans up to \$150,000 will be forgiven in full if the borrower:
 - Signs and submits a one-page certification attesting to compliance with the program requirements and including the number of employees retained due to PPP loan, the estimated amount of loan spent on payroll expenses, and the total loan value, and
 - Agrees to retain relevant records for a period of four years (employment records) or three years (all other records).
- Loans over \$150,000 remain subject to the SBA's current loan forgiveness procedures and to SBA audit.





Use of Loan Proceeds:

- **Eligible Expenses:** Borrowers may use the loan proceeds for a wider array of expenses than was the case with the original PPP loans. In addition to the prior categories (primarily payroll, rent, mortgage interest, and utility payments), PPP loans may now be used for the following additional expenses:

Operations expenditures	Payment for any software, cloud computing, and other human resources and accounting needs.
Property damage costs	Costs related to property damage due to public disturbances during 2020 not covered by insurance.
Supplier costs	Expenditures pursuant to a contract for goods in effect prior to the PPP loan covered period that are essential to the current operations of the borrower when made.
Worker protection expenditures	Expenditures for personal protective and other equipment needed for the borrower to comply with Covid-19-related federal health and safety guidelines from the period between March 1, 2020 and the date on which Covid-19 no longer qualifies for federal emergency status.

- **Payroll Cost Requirement:** With respect to forgiveness, at least 60% of all PPP loans must be used for payroll costs. Covered forgivable payroll costs now include employer-provided group insurance benefits, such as group life, dental, vision or disability, in addition to employer-paid healthcare benefits.
- **Covered Period:** Borrowers may now select any end date for the covered period of their loan between 8 and 24 weeks after their loan origination date (rather than having to choose either 8 or 24 weeks exactly).

Tax Deductibility:

Under the new Act (which effectively overturns previous IRS guidance in this regard), business expenses paid for with PPP loans from either the first or second draw are tax-



deductible if the expenses would otherwise be deductible, regardless of the fact that forgiven PPP loans are not treated as taxable income.

Coordination with Economic Injury Disaster Loans:

Under prior law, the \$10,000 Economic Injury Disaster Loan advance provided by the SBA had to be deducted from the PPP loan forgiveness amount. The new Act changes this rule – deduction of such advances is no longer required.

Enhanced Access for Minority, Underserved, Veteran and Women-Owned Business Concerns:

- **Allocated Funds:** The relief package includes \$284 billion for the second draw of forgivable PPP loans. The following funds are specifically targeted toward minority-owned businesses:

\$15 billion	for initial and second draw PPP loans issued by community financial institutions, such as community development banks and funds and minority depository institutions.
\$15 billion	for initial and second draw PPP loans issued by certain small depository institutions.
\$35 billion	for first-time borrowers, \$15 billion of which is for first-time borrowers with 10 or fewer employees or loans less than \$250,000 in low-income areas. 25% of the set-aside will go to each of (1) borrowers with a maximum of 10 employees and (2) loans of less than \$250,000 to borrowers in low- or moderate-income neighborhoods.
\$25 billion	for second draw PPP loans for borrowers with 10 or fewer employees or loans less than \$250,000 in low income areas, 25% of which will go to each of (1) borrowers with a maximum of 10 employees and (2) loans of less than \$250,000 to borrowers in low- or moderate-income neighborhoods.
\$25 billion	has also been set aside for the Minority Business Development Centers program under the Minority Business Development Agency.





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- **Applicant Support Programs:** The SBA has taken steps to support minority, underserved, veteran, and women-owned businesses applying for PPP funds, starting with opening the application portal only to community financial institutions for at least the first two days of the application period. The SBA's guidance details several efforts to ensure these businesses successfully apply for PPP loans, including lender match programs between borrowers and small lenders, Certified Development Companies, Farm Credit System lenders, microloan intermediaries and traditional smaller asset size lenders and designating dedicated hours to processing and assisting the smallest PPP lenders with their PPP loans.

Additional Resources

Please visit our [COVID-19 Resource Page](#) for additional resources.

Contact Us

If you have questions or want to discuss your plan, please contact a member of Hemenway & Barnes LLP's [Business Law Group](#) or [Nonprofit Group](#), or the authors of this alert:

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