

Summary of Rules for 1st Time PPP Borrowers

The President signed the \$900 billion COVID-19 relief bill into law on Dec. 27, 2020, known as the Consolidated Appropriations Act (the “Act”). The bill is over 5,500 pages; for comparison, the \$2 trillion CARES Act passed in March was 335 pages. Of the \$900 billion of the stimulus package \$284 billion is allocated for additional PPP loans, \$20 billion of EIDL loans to businesses in low income communities and \$15 billion for certain live venues, independent movie theaters and cultural institutions. The Act addresses First Draw PPP loans and Second Draw PPP loans. The term “First Draw PPP loan” relates to borrowers who have not previously borrowed from the PPP loan program. The program is available starting January 8, 2021 and ends for new applications on March 31, 2021.

Eligible First Time PPP Borrowers

First time PPP borrowers must meet the following rules:

- Businesses with 500 or fewer employees that are eligible for other SBA 7(a) loans.
- A small business concern as per revenue based or alternative size standards established by the SBA.¹
- Sole proprietors, independent contractors, and eligible self-employed individuals.
- Not-for-profits, including churches.
- Accommodation and food services operations (those with North American Industry Classification System (NAICS) codes starting with 72) with fewer than 500 employees per physical location.
- Sec. 501(c)(6) business leagues, such as chambers of commerce, visitors’ bureaus, etc., and “destination marketing organizations” that have 300 or fewer employees and do not receive more than 15% of receipts from lobbying. The lobbying activities must comprise no more than 15% of the organization’s total activities and have cost no more than \$1 million during the most recent tax year that ended prior to Feb. 15, 2020. Sports leagues are not eligible.
- A housing cooperative, an eligible section 501(c)(6) organization, or an eligible destination marketing organization⁶, that employs no more than 300 employees;
- News organizations that are majority-owned or controlled by an NAICS code 511110 or 5151 business or not-for-profit public broadcasting entities with a trade or business under NAICS code 511110 or 5151. The size limit for this category is no more than 500 employees per location.
- Must have been in operation on February 15, 2020.

¹ Alternatively, if a company has more than 500 employees it may apply for a PPP if it meets both tests in SBA’s “alternative size standard” as of March 27, 2020: (1) maximum tangible net worth of the business is not more than \$15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million.

- Seasonal businesses will be considered to have been open in operation at 2/15/20 if they were in operation for any 12 week period between 2/15/19 and 2/15/20.

Affiliation Rules

Generally the affiliation rules for the second round of PPP loans are the same as they were for the first round of PPP loan, but for the following:

- The affiliation waiver applies to businesses with a NAICS code beginning with 72 and may apply to eligible new organizations with a NAICS code beginning with 511110 or 5151 (or majority-owned or controlled by a business with those NAICS codes) or any nonprofit organization that is assigned a NAICS code beginning with 5151 if the entities employ 500 or fewer employees by location.
- For borrowers with foreign affiliations, employees of all domestic and foreign affiliates are included for meeting size standards.

Loan Amount

- PPP borrowers may receive a loan amount of up to 2.5 times their average monthly payroll costs in either the calendar year 2020 or 2019.
 - Borrowers who are not self-employed (including sole proprietorships and independent contractors) are also permitted to use the precise 1-year period before the date on which the loan is made to calculate payroll costs if they choose not to use calendar year 2019 or 2020 to calculate payroll costs.
 - Seasonal business have separate time period computation rules.
 - Individual employee compensation costs for these purposes are limited to \$100,000 per year,
 - For self-employed persons the calculation is based on the relevant year's Schedule C, also capped at \$100,000. Partnerships would use similar relevant forms such as K-1 schedules.
 - Payroll costs include employer contributions to group health, life, disability, vision and dental insurance, state and local taxes such as unemployment tax and employer paid retirement costs.
- The maximum loan amount remains at \$10 million for first time borrowers with a maximum \$20 million limit for affiliated corporate entities receiving separate PPP loans.
- PPP borrowers with NAICS codes starting with 72 (hotels and restaurants) can get up to 3.5 times their average monthly payroll costs subject to the \$10 million loan maximum.
- There are special rules for how farmers and ranchers calculate payroll costs and loan amount.

Restricted Borrower Categories

In general, the same businesses that were restricted from taking out an original PPP loan are still precluded from borrowing. In addition, the following businesses have also been restricted from taking out a PPP loan:

- Publicly traded companies
- Lobbying organizations
- An owner of 20% or more is presently incarcerated or under indictment for felony charges
- A business owned or controlled by an owner that is currently delinquent or has defaulted on the last seven years on a guaranteed SBA loan or a loan from any other Federal agency
- Companies organized in or with significant operations in China or Hong Kong, and companies with board members who are residents of China
- Any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938
- A person or entity that receives a grant for shuttered venue operators under section 324 of the Economic Aid Act
- Entities in which the President, the Vice President, the head of an Executive department, or a Member of Congress, or the spouse of such person owns, controls, or holds at least 20 percent of any class of equity
- Is not presently in bankruptcy
- Is not a hedge fund or private equity firm (note that for employee count purposes private equity affiliation rules based on common ownership are applied)

Loan Terms

These PPP loans are generally subject to the same terms, conditions and requirements as the first round of PPP Loans. These include, but are not limited to the following terms:

- The loan is forgivable if certain requirements are met.
- No collateral will be required.
- No personal guarantees will be required.
- The interest rate will be 100 basis points or one percent, calculated on a noncompounding, non-adjustable basis.
- The maturity is five years.
- Borrowers may pursue forgiveness up until 10 months following the end of the relevant covered period.
- Loans accrue interest with no cash payment requirements until 10 months after the end of the relevant covered period.

Additional Eligible Expenses

Eligible expenses for this round of PPP are the same as for the first round of PPP, including the requirement that at least 60% of PPP proceeds shall be used for payroll costs, with the following additional eligible expenses included:

- Covered worker protection and facility modification expenditures, including personal protective equipment, to comply with COVID-19 federal health and safety guidelines.
- Expenditures to suppliers that are essential at the time of purchase to the recipient's current operations.
- Covered operating costs such as software and cloud computing services and accounting needs.
- Covered property damage costs (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);
- The relief act also clarifies that borrowers can include group benefit insurance (dental, vision, life, disability) as payroll costs in their calculations. Importantly, these expanded expense categories are valid for both existing and new PPP loans.

Loan Application and Documentation Requirements

The applicant must submit Paycheck Protection Program Borrower Application Form (SBA Form 2483), or lender's equivalent form, and payroll documentation.

Loan Forgiveness

The same loan forgiveness rules apply to a second PPP loan. To be eligible for full loan forgiveness, PPP borrowers will have to spend no less than 60% of the funds on payroll over a covered period of either eight or 24 weeks, to be used at the borrower's option — the same parameters as the first PPP.

Borrowers that receive a PPP loan of \$150,000 or less shall receive forgiveness if the borrower signs and submits to the lender a certification that is not more than one page in length, includes a description of the number of employees the borrower was able to retain because of the loan, the estimated total amount of the loan spent on payroll costs, and the total loan amount. The SBA has yet to publish this loan forgiveness form.

While not directly referred to in the regulations, these first time loans will also require filing the loan necessity form 3509 and similar to the present rules. Borrowers with loans of less than \$2 million are deemed to have made the required certification and thus not required to submit form 3509 at the time of submitting for forgiveness.

Tax Implications

The amount of PPP loan forgiven is not taxable. The expenses paid with PPP loan funds are deductible for tax purposes.