

Summary of Rules for 2nd 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 “Second Draw PPP loan” relates to borrowers who have previously borrowed from the PPP loan program. Its available immediately (January 8, 2021) and is available for applications through March 31, 2021.

Previous PPP Recipients Eligibility

Previous PPP borrowers may apply for a second PPP loan, but must meet the following rules:

- Borrowers must have 300 or fewer employees.
 - a single business entity that is assigned a NAICS code beginning with 72 must have no more than 300 employees per physical location. While these entities are allowed to use a 3.5 average pay multiple for calculating the loan amount they still are limited to 300 employees.
- Borrowers must have used or will use all of their first PPP loan funds.
- Must be able to show at least a 25% decline in gross revenue for any 2020 quarter compared with the same quarter in 2019.

25% or Greater Gross Revenue Reduction

The borrower must have experienced a revenue reduction of 25% or greater in 2020 relative to 2019. A borrower must calculate this revenue reduction by comparing the borrower’s quarterly gross receipts for one quarter in 2020 with the borrower’s gross receipts for the corresponding quarter of 2019.

Example: a borrower with gross receipts of \$50,000 in the second quarter of 2019 and gross receipts of \$30,000 in the second quarter of 2020 has experienced a revenue reduction of 40 percent between the quarters, and is therefore eligible for a second PPP loan.

The SBA guidance provides that the definition of gross receipts for purposes of this Act is the definition set forth in 13 CFR §121.104. This definition is as follows:

Gross Receipts means all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered “total income” (or in the case of a sole proprietorship “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; 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. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. 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 receipts.

(1) The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

(2) When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

Gross receipts of affiliates are calculated as follows:

(1) Gross receipts of a borrower with affiliates is calculated by adding the gross receipts of the business concern with the gross receipts of each affiliate.

(2) If a borrower has acquired an affiliate or been acquired as an affiliate during 2020, gross receipts includes the receipts of the acquired or acquiring concern. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose. However, if a concern acquired a segregable division of another business concern during 2020, gross receipts do not include the receipts of the acquired division prior to the acquisition.

(3) The gross receipts of a former affiliate are not included. This exclusion of gross receipts of such former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a borrower sold a segregable division during 2020, the gross receipts will continue to include the receipts of the division that was sold.

(4) All terms in this subsection shall have the meaning attributed to them by the IRS.

For an eligible nonprofit organization, a veterans organization, an eligible nonprofit news organization, an eligible 501(c)(6) organization or eligible destination marketing organization, gross receipts means gross receipts within the meaning of section 6033 of the Internal Revenue Code of 1986.

Any forgiveness amount of a PPP Loan that a borrower received in calendar year 2020 is excluded from a borrower's gross receipts.

The term "quarter" isn't defined. So the question as to whether you are required to use a tax quarter, fiscal quarter, calendar quarter, or any 3 consecutive months has not been specifically answered.

However, since the gross receipts definition references the tax code it would be safe to say that comparing tax quarters for calendar year taxpayers would be sufficient. Further guidance is necessary to address other scenarios, because not all businesses have calendar tax and/or fiscal quarters.

SBA guidance has provided that, “borrower that was in operation in all four quarters of 2019 is deemed to have experienced the required revenue reduction if it experienced a reduction in annual receipts of 25 percent or greater in 2020 compared to 2019 and the borrower submits copies of its annual tax forms substantiating the revenue decline”. This operates as more of a safe harbor and by no means turns the quarter over quarter comparison into a required year over year comparison.

There are special rules for businesses who were not in business for all or part of 2019.

For an eligible nonprofit organization, a veterans organization, an eligible nonprofit news organization, eligible 501(c) organization, or eligible destination marketing organization, gross receipts has the meaning in section 6033 of the Internal Revenue Code of 1986.

Affiliation Rules

Generally the affiliation rules for a second PPP loan are the same as they were for the first 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 300 or fewer employees by location.

Loan Amount

- Second time 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.
- The maximum loan amount has been cut from \$10 million in the first round to a \$2 million maximum for the second PPP.
- A single corporate group may not receive more than \$4 million in the aggregate.
- PPP borrowers with NAICS codes starting with 72 (hotels and restaurants) can get up to 3.5 times their average monthly payroll costs, again subject to a \$2 million maximum.
- There are special rules for how farmers and ranchers calculate payroll costs and loan amount.

Restricted Borrower Categories

Entities that are restricted from receiving first time PPP loans are also restricted from receiving second time PPP loans. The following restricted businesses are new with the current act and are also highlighted as being excluded from taking out a second PPP loan:

- Publicly traded companies
- Lobbying organizations
- 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
- If a borrower is subject to any open review issues from its first PPP loan, particularly if it's indicated the borrower may not have been eligible for the first loan, it is an unresolved borrower and may not receive a second time PPP loan until the issue(s) in question are resolved.

Loan Terms

Second PPP loans are generally subject to the same terms, conditions and requirements as the first 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.

Additional Eligible Expenses

Eligible expenses for a second PPP are the same as for the first PPP 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.

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 — the same parameters as the first PPP.

Loan Application and Documentation Requirements

The applicant must submit to the lender SBA Form 2483-SD (Paycheck Protection Program Second Draw Borrower Application Form) or the lender's equivalent form including the required Certifications and the documentation. The documentation required to substantiate an applicant's payroll cost calculations is generally the same as documentation required for PPP Loans. However, no additional documentation to substantiate payroll costs will be required if the applicant (i) used calendar year 2019 figures to determine its first PPP Loan amount, (ii) used calendar year 2019 figures to determine its PPP2 Loan amount (instead of calendar year 2020), and (iii) the lender for the applicant's PPP2 Loan is the same as the lender that made the applicant's first PPP Loan. The lender may request additional documentation, however, if on further review the lender concludes that it would be useful in conducting the lender's good-faith review of the borrower's loan amount calculation.

For loans with a principal amount greater than \$150,000, the applicant must also submit documentation adequate to establish that the applicant experienced a revenue reduction of 25% or greater in 2020 relative to 2019. Such documentation may include relevant tax forms, including annual tax forms, or, if relevant tax forms are not available, quarterly financial statements or bank statements. For loans with a principal amount of \$150,000 or less, such documentation is not required at the time the borrower submits its application for a loan, but must be submitted on or before the date the borrower applies for loan forgiveness. Loans of \$2 million are still subject to the additional disclosure of the loan necessity form (form 3509) at the time of the application for forgiveness.

Loan Forgiveness

The same loan forgiveness rules apply to a second PPP loan. The borrower may choose between an 8 week or a 24 week covered period.

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.

Tax Implications

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