

New Round of PPP Funds Available

January 8, 2021

On December 27, 2020, the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (Economic Aid Act) became law. This act reinstated the Paycheck Protection Program (PPP) by (1) making a new round of PPP funds available to first time borrowers and (2) creating a second draw of PPP funds for certain eligible borrowers. On January 6, 2021, the Small Business Administration (SBA) issued two Interim Final Rules (first rule and second rule) detailing regulations for this round of PPP funding. The authorized \$806,450,000 in funds for these new PPP loans are available only through March 31, 2021, and again are first-come, first-serve.

New First Time PPP Borrowers

Borrowers who did not previously receive PPP loans may apply for PPP loans from SBA-approved lenders under the same conditions and requirements as were in place for the initial round. Significantly, two types of organizations that were not previously eligible can now obtain a PPP loan: (i) News and Broadcast Organizations and (ii) Section 501(c)(6) Organizations.

Newsgathering Organizations/Broadcasters

The Economic Aid Act expanded eligibility of PPP loans to newsgathering and broadcast organizations who previously were ineligible due to their aggregate employee counts. For example, a broadcasting group that has more than 500 employees among all of their stations was not eligible under the prior law. Now, with respect to newsgathering and broadcast organizations:

- Individual stations may apply for a PPP loan, even if they are part of a large group, so long as there are not more than 500 employees per physical location.

Authors

Thomas W. Antonucci
Partner
202.719.7558
tantonucci@wiley.law
Jessica N. Rosenthal
Partner
202.719.7478
jrosenthal@wiley.law

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- This includes noncommercial stations owned by nonprofits or public entities (such as states or universities).
- News organizations and broadcasters will need to certify in their application that the PPP loan proceeds will be used to support expenses for the production or distribution of locally focused or emergency information.

Section 501(c)(6) Organizations

Under the CARES Act, 501(c)(3) charitable organizations were eligible for PPP loans, however other types of nonprofit organizations were not. The Economic Aid Act now allows Section 501(c)(6) organizations (e.g., business leagues, industry trade associations, chambers of commerce, etc.) to apply for PPP loans, provided that certain conditions are met:

- The organization must have 300 or fewer employees; and
- Not be engaged in significant lobbying activity:
 - Lobbying revenues may not be more than 15% of the organization's overall revenues;
 - Lobbying activities may not be more than 15% of the organization's overall activities; and
 - The organization's lobbying expenses for its most recent tax year (ending prior to February 15, 2020) could not have exceeded \$1 million.
- The statute and the interim rules did not specify how "activities" would be measured for the second requirement (presumably by the organization's expenses), nor did it define the applicable period for measuring revenues and activities for the first and second requirements (presumably by using the same period as for the third requirement – i.e., most recent tax year).

Rules Generally for First Time Borrowers

The regulations applicable to this new round of PPP loans generally are the same as those issued by the SBA last year, with a few refinements. As a refresher, significant PPP loan terms include the following:

- *Maximum Loan Amount* – The maximum loan amount is equal to the lesser of (i) \$10 million or (ii) 2.5 times average monthly payroll costs. To calculate clause (ii), Borrowers should (1) take their aggregate payroll costs for either 2019 or 2020 (borrower's choice) for US employees, then (2) subtract compensation paid to each employee in excess of \$100,000, then (3) divide step 2 by 12 to obtain the average monthly payroll cost, and (4) multiply step 3 by 2.5.
- *Limit on Overall Loans in a Corporate Group* – New in the Economic Aid Act is the limitation that a business that is part of a single corporate group (majority owned, directly or indirectly, by a common parent) cannot receive more than \$20 million in PPP loans in the aggregate across the group. The SBA makes clear that it is the applicant's responsibility to notify the lender if this limit is exceeded, and failure to do so will result be deemed an unauthorized use of PPP funds and the loan will not be forgiven.

- *Payroll Costs:*
 - Payroll costs include: (i) wages, salary, commissions or similar compensation, (ii) payments for vacation, parental, family, medical or sick leave, (iii) separation or dismissal payments, (iv) payments for group health, life, vision and dental insurance, and (v) payment of state and local taxes assessed on employee compensation.
 - Payroll costs do not include: (i) compensation to employees whose principal residence is outside the U.S., (ii) compensation in excess of \$100,000, (iii) federal employee taxes imposed or withheld (such as FICA), and (iv) payments to independent contractors (since they can apply for their own PPP loan).
- *Use of PPP Loan Proceeds:* PPP loan proceeds may be used only to pay the following expenses (some of these categories are new):
 - Payroll costs (as defined above) – it is important to keep in mind that at least 60% of proceeds must be used for payroll costs
 - Continuation of group health, life, vision and dental insurance during leave
 - Mortgage interest payments (but not prepayments or principal payments)
 - Rent and utilities payments
 - Interest payments on other debt incurred before 2/15/2020
 - Refinancing an EIDL loan made between 1/31/2020 and 4/3/2020
 - New permitted expenditures:
 - Operations expenditures for business software or cloud computing services that facilitate business operations, products or service delivery, processing or payment of payroll, human resources, sales or billing functions, or tracking inventory/expenses/records
 - Worker/customer safety protection costs to comply with CDC, OSHA, HHS or state requirements with respect to COVID-19 (such as drive-through windows, air filtration systems, physical barriers like sneezeguards, and expanded business space)
 - Supplier costs – payments made to suppliers for the supply of goods that are essential to the entity’s operations at that time
 - Property damage related to 2020 public disturbances that was not covered by insurance or other compensation

PPP funds may not be used for lobbying activities.

PPP funds that are not used for permitted purposes will not be forgiven. Further, if a company knowingly uses PPP funds for unauthorized purposes, the company may be subject to additional liability, including charges for fraud.

- *Covered Period:* The “covered period” for expenses paid with PPP funds begins on the date the lender disburses funds and ends on a date between 8 and 24 weeks after disbursement (borrower’s choice).

This flexibility for borrowers to choose their own covered period can be important in the forgiveness calculation.

- *Certifications:*
 - As many recall from the publicity surrounding PPP loans last year, there are a number of certifications that an applicant must make in the loan application. The certification that received the most attention (and will still be required for all new PPP loans) is that the “current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.” The SBA’s “safe harbor” still applies such that borrowers with loans of less than \$2 million will be deemed to have made the economic uncertainty certification in good faith, while borrowers with loans of \$2 million or more will be audited by the SBA, which includes – at a minimum – completing a loan necessity questionnaire as part of the forgiveness process.
 - Other certifications that borrowers must make in the application include: (i) the applicant was in operation on 2/15/2020, (ii) the applicant has not received another PPP loan, and (iii) funds will be used to retain workers and maintain payroll or for other permitted purposes (and acknowledging that the government can hold the applicant liable for fraud if the funds are misused).
- *Other Key Terms:*
 - A first-time borrower may apply for only one PPP loan (prior borrowers may be able to take a second draw loan, as described below).
 - The loan funds will be disbursed within 10 days after approval (which is when the loan is assigned an SBA loan number).
 - Loan is 100% guaranteed by the SBA.
 - No collateral, no personal guaranty, and no fees.
 - Interest rate on amounts not forgiven – 1%, calculated on a non-compounding basis.
 - Maturity date for amounts not forgiven – 5 years.
- *Re-Applying for PPP Returned Funds:* If a prior PPP borrower returned all of their PPP funds without using them, they may now reapply. Further, if a prior PPP borrower returned part of their PPP funds without using them, they may now reapply for the difference between the amount retained and the amount previously approved. If a prior PPP borrower did not previously accept their full loan, they can request an increase up to the amount previously approved. There is also a March 31, 2021 deadline for these applications, subject to availability. The SBA is expected to issue further guidance on this re-application process.

Second Draw PPP Loans

The Economic Aid Act provides for a second PPP loan to certain eligible borrowers. These loans will be made primarily on the same terms as the first loans, however two important differences between first and second draw loans are (1) the maximum loan amount and (2) borrower eligibility criteria.

1. *Maximum Second Draw PPP Loan Amounts.* The maximum loan amount for second draw PPP loans is equal to the lesser of (i) \$2 million (not \$10 million) or (ii) 2.5 times average monthly payroll costs. In calculating average monthly payroll costs, the borrower may use either calendar year 2019 or the 12 months prior to the loan date.
2. *Eligibility for Second Draw PPP Loans.* A narrower set of borrowers is eligible for second draw loans. A second draw borrower must satisfy all of the following criteria:
 - Borrower received an initial PPP loan and used or will have used the full amount of the loan for authorized purposes on eligible expenses on or before the date of disbursement of the second loan;
 - Borrower has 300 or few employees (not 500 employees); the SBA affiliation rules will continue to apply; and
 - Borrower has experienced at least a 25% revenue loss in any quarter of 2020 as compared to the same quarter of 2019

A business that is part of a single corporate group (majority owned, directly or indirectly, by a common parent) may not receive more than \$4 million of second draw PPP loans in the aggregate across the group.

Businesses that are not eligible for a second PPP loan include: those whose primary purpose is political activity or lobbying, publicly traded companies, certain organizations with ties to foreign countries (e.g., China, FARA registrants, etc.), and entities in which certain federal officers and legislators (or their spouses) own or control at least 20% of the company.

Changes Applicable to All PPP Borrowers

The following changes in Economic Aid Act apply to all PPP borrowers – both those who received loans in 2020 and those who will apply in 2021:

- *Tax Deductions* – Significantly, the Economic Aid Act clarified that all business expenses paid with PPP loans are tax deductible. Further IRS guidance on this is expected.
- *Simplified Forgiveness Process for Smaller Loans* – Borrowers with PPP loans of \$150,000 or less will only be required to submit a one-page certification (the SBA is to create a new form) to receive automatic forgiveness. They will have to certify the number of employees they were able to retain because of the loan, the estimated amount spent on payroll costs and the total loan value. The act also reduced the record retention requirements for these loans to 4 years for employee records and 3 years for compliance records.

As in the past, we expect the SBA to revise its FAQs to conform to the Economic Aid Act and to continue to publish guidance. In addition, the SBA will need to issue application forms for new first time PPP loans and for second draw PPP loans. We are closely monitoring developments and will provide further updates as

appropriate. Please don't hesitate to reach out to us or your regular Wiley attorney for questions about first time PPP loans or second draw loans.

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