

COVID-19 NEWS OF INTEREST

# Congress Renews the Paycheck Protection Program and Provides Second Draw for Certain Eligible Businesses

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## AUTHORS

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On Monday, December 21, 2020, the House and Senate voted to pass a new \$900 billion stimulus package, the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (the “Act”), which is a part of the larger Consolidated Appropriations Act, 2021. The Act was then signed into law by the President on Sunday, December 27, 2020.

In addition to the other buckets of aid provided by the Act, Congress included \$284 billion for the Paycheck Protection Program (“PPP”) and the Paycheck Protection Program Second Draw (the “Second Draw”) to be administered by the Small Business Administration (“SBA”). The additional funds added to the PPP allow small businesses who missed out on the PPP’s initial run or now find themselves needing the relief provided by PPP funds to apply for a PPP loan. The Second Draw allows businesses that have continued to struggle during the pandemic despite receiving a PPP loan to receive an additional loan through a similar program with key differences, such as additional restrictions on eligibility and a significantly reduced maximum loan amount.

The Act requires the SBA to issue regulations within 10 days from the date of its enactment to reopen the PPP and implement the Second Draw. Under the Act, businesses have until March 31, 2021 to apply for the renewed PPP and the Second Draw.

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### Restarting the Paycheck Protection Program

Businesses seeking PPP loans for the first time will have to meet the eligibility requirements laid out in the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), subsequent SBA interim final rules and guidance documents, and the Paycheck Protection Program Flexibility Act. Specifically, in order to be eligible for an initial PPP loan, a business must either:

- Employ 500 employees or fewer;
- Meet the relevant SBA size standards for its industry based on the business’s NAICS Code; or
- Meet the Alternative Size Standard, meaning the business’ maximum tangible net worth is \$15 million or less and the business’ average net income after federal income taxes for the past full two fiscal years is \$5 million or less.

There have been certain changes to the PPP that will affect businesses taking advantage of the reopened program, including expanding eligibility to certain news organizations as well as 501(c)(6) and destination marketing organizations. The Act also allows certain small businesses that have filed for bankruptcy to apply for and receive loans under both the PPP and the Second Draw.

### Additional Limits on PPP Eligibility

Businesses that did not exist prior to February 15, 2020, or that apply for and receive a shuttered venue operator grant under the Act, will not be eligible to receive a PPP loan. Additionally, the Act clarifies that publicly traded companies are not eligible for PPP loans in addition to ineligible businesses listed by the SBA at [13 CFR §120.110](#).<sup>1</sup> Pursuant to SBA guidance, private equity firms and hedge funds are also ineligible to receive PPP loans.

### Expanding Eligible Costs Under the PPP

The eligible costs that recipients may use their PPP loan funds on have been expanded to include:

- **“Covered operations expenditures”** defined as payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses.

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<sup>1</sup> Non-profit businesses, 120.110(a), and religious institutions, 120.110(k), are eligible for PPP loans pursuant to specific carve-outs in the CARES Act and subsequent interim final rules.

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- “**Covered property damage**” defined as costs related to property damage, vandalism, or looting due to public disturbances in 2020 that were not covered by insurance or other compensations.
- “**Covered supplier costs**” defined as an expenditure made to a supplier for goods that were essential to the operations of the business at the time and any purchases made pursuant to a contract or purchase order in effect before the covered period of the loan or, with respect to perishable goods, any time during the covered period.
- “**Covered worker protection expenditures**” defined as expenditures made to facilitate compliance with the requirements or guidance of the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements or guidance issued by state or local governments between March 1, 2020 and the date on which the national emergency with respect to COVID-19 expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement. This does not include residential real property or intangible property.

The full list of eligible costs is now:

- Payroll costs, which the Act specifies as including group health care or group life, disability, vision, or dental insurance benefits, including insurance premiums;<sup>2</sup>
- Any payment of interest on any covered mortgage obligation (excluding prepayment of or payment of principal on a covered mortgage);
- Any covered operations expenditure;
- Any covered property damage cost;
- Any payment on any covered rent obligation;

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<sup>2</sup> Under the Act, payroll costs include:

- Salary, wage, commission, or similar compensation;
- Cash tips or equivalent payments;
- Payment for vacation, parental, family, medical, or sick leave;
- Allowance for dismissal or separation;
- Payments required for the provision of group health care or group life, disability, vision, or dental insurance benefits, including insurance premiums;
- Payment of any retirement benefits; or
- Payment of state or local taxes on the compensation of employees.

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- Any covered utility payment;
- Any covered supplier cost; and
- Any covered worker protection expenditure.

Potential borrowers should note that the Act specifically states that loan funds are not permitted to be used for:

- Lobbying activities;
- Lobbying expenditures related to state or local elections; or
- Expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order on the federal, state, or local level.

### **Eligibility of Certain News Organizations Under the PPP**

Firstly, the Act expands the eligibility criteria for certain news organizations with more than one physical location.

Specifically, in order to qualify, the business must be either:

- Businesses, including any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act, that employs 500 or fewer employees or the applicable SBA size standard per physical location; or
- Nonprofit organizations with an NAICS code beginning with 5151 (establishments primarily engaged in operating broadcast studios and facilities for over-the-air or satellite delivery of radio and television programs).

Businesses matching the above descriptions will be eligible to receive a loan if:

- The business is majority-owned or controlled by a business that is assigned an NAICS Code beginning with 51110 (newspaper, periodical, book, and directory publishers (except Internet)) or 5151 (establishments primarily engaged in operating broadcast studios and facilities for over-the-air or satellite delivery of radio and television programs) or, with respect to a public broadcasting entity (as defined in section 397(11) of the Communications Act of 1934 (47 U.S.C. § 397(11))), has a trade or business that falls under such a code; and
- The business makes a good faith certification that its loan proceeds will be used to support expenses on the component of the business that produces or distributes locally focused or emergency information.

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Additionally, for the purposes of determining eligibility, the SBA will not consider whether a business that owns or controls such a news organization, made eligible by the expanded eligibility rules described above, is a publicly traded company.

### **Expanding the Waiver of Affiliation Rules to Include News Organizations**

The Act waives the SBA's affiliation rules for businesses described in the previous section. The SBA's affiliation rules require applicants to aggregate all employees across themselves and their affiliates when making a size determination for the purposes of loan eligibility. Determinations of affiliation are generally based on whether a business or third party has, or can exercise, control over another business. The SBA has released a [guidance document](#) listing four tests for affiliation which apply to participants in the PPP, essentially repeating the existing affiliation rules applicable to Section 7(a) loans. Also see a client alert published on April 4, 2020 titled [SBA Clarifies Rules for Paycheck Protection Program](#), which includes additional details on the SBA's affiliation rules.

The addition of the waiver of affiliation for certain news organizations expands the list of businesses benefiting from the SBA's affiliation waiver to:

- Accommodation and Food Services sector businesses ("NAICS 72 businesses") with 500 employees or fewer per physical location;
- Businesses operating as a franchise that is assigned a franchise identifier code;
- Businesses that receive financial assistance from a licensed small business investment company; and
- Businesses, including any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act, that employs 500 or fewer employees or the applicable SBA size standard per physical location; and
- Any nonprofit organization with an NAICS code beginning with 5151 (establishments primarily engaged in operating broadcast studios and facilities for over-the-air or satellite delivery of radio and television programs).

Notwithstanding these waivers of the SBA's affiliation rules, any business that is a publicly listed entity will not be eligible to receive a PPP loan unless it is an eligible news organization under the expanded eligibility rules described in the previous section.

### **Tax Deductions and EIDL Advances**

The Act permits a business that receives a PPP loan to deduct expenses incurred with cash from PPP loans from its taxable income as business expenses even if the business' PPP loan is forgiven.

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Furthermore, with the resumption of the SBA's Emergency Injury Disaster Loan ("EIDL") advance program, the Act repeals the CARES Act provision that requires PPP borrowers to deduct the amount of any EIDL advance from their total PPP forgiveness amount.

### **Second Draw Eligible Recipients**

The Second Draw is a program for businesses that have already received a PPP loan and have used or will use the full amount of the original PPP loan on or before the expected date that their Second Draw loan would be disbursed. The Second Draw is further limited to businesses that employ **300 employees or fewer** between the applicant and its affiliates and had gross receipts during the first, second, third, or fourth quarter in 2020 demonstrating at least a 25% reduction from the businesses' gross receipts in the same quarter of 2019.

If an entity was not in business during 2019, but was in operation on February 15, 2020, then the comparison will be made between the 2020 quarter of their choice and the first quarter of 2020 for the purposes of determining if there was at least a 25% reduction in gross receipts.

In contrast to the PPP, businesses having fewer employees or receipts than the relevant SBA size standards for their industry or that meet the Alternative Size Standard are not eligible for the Second Draw solely on that basis and must meet the aforementioned eligibility requirements. Furthermore, eligible businesses are limited to only one Second Draw loan.

### **Second Draw Waiver of Affiliation Rules for the Purposes of Calculating Size**

The Second Draw waives the SBA's affiliation rules for:

- NAICS 72 businesses with **300 employees or fewer** per physical location;
- Businesses operating as a franchise that is assigned a franchise identifier code;
- Businesses that receive financial assistance from a licensed small business investment company;
- Businesses, including any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act, that employs **300 or fewer employees** or the applicable SBA size standard per physical location; and
- Any nonprofit organization with an NAICS code beginning with 5151 (establishments primarily engaged in operating broadcast studios and facilities for over-the-air or satellite delivery of radio and television programs).

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### Ineligible Businesses

The Second Draw places additional limits on eligibility, excluding:

- Businesses that are ineligible for SBA business loans listed in 13 CFR §120.110<sub>1</sub>, which SBA guidance has stated includes publicly listed companies, private equity firms, and hedge funds;<sup>3</sup>
- Businesses primarily engaged in political or lobbying activities, including think tanks;
- Businesses that are directly or indirectly owned 20% or more by an entity created or incorporated in China or Hong Kong or an entity that has significant operations in China or Hong Kong (the statute does not define “significant operations”);
- Businesses that retain a person who is a resident of China as a member of its board of directors;
- Businesses required to submit a registration under section 2 of the Foreign Agents Registration Act of 1938; and
- Businesses that receive a shuttered venue operator grant under the Act.

### Maximum Second Draw Loan Amounts

The maximum amount of a Second Draw PPP loan has been significantly reduced from the maximum amount that was available to eligible borrowers under the PPP. The maximum amount of Second Draw funds available to businesses is the lesser of:

- 2.5 times the average total monthly payment for payroll costs incurred or paid during the borrower’s choice of the one-year period before the date on which the loan is made, or calendar year 2019; or
- \$2 million.

However, for eligible businesses that did not exist in the one-year period preceding February 15, 2020, the maximum amount is the lesser of:

- 2.5 times the average monthly payroll costs for the life of the business; or
- \$2 million.

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<sup>3</sup> Non-profit businesses, 120.110(a), and religious institutions, 120.110(k), are eligible for Second Draw loans pursuant to specific carve-outs in the Act.

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### **Accommodation and Food Services**

The Second Draw also provides special rules for NAICS 72 businesses. The maximum amount available to an NAICS 72 business remains \$2 million, as it is for all other businesses applying for a Second Draw loan. However, the calculation used to determine that maximum is 3.5 times the average total monthly payment for payroll costs incurred or paid during the borrower's choice of the one-year period before the date on which the loan is made, or calendar year 2019.

Additionally, NAICS 72 businesses with more than one physical location are eligible for a Second Draw loan if the business employs no more 300 employees per physical location and meets the 25% gross receipts reduction described above.

### **Forgiveness of Second Draw Loans**

Under the Second Draw rules, the loan forgiveness rules remain largely unchanged in that a borrower will be eligible for forgiveness on a Second Draw loan in the same manner it would have been eligible for forgiveness under the PPP. As with PPP forgiveness, Second Draw borrowers may choose between an 8-week and 24-week covered period, during which any eligible costs, the same as those detailed in the update to the PPP, will be forgiven so long as 60% of the Second Draw proceeds are used for eligible payroll costs.

For the purposes of loan forgiveness, qualified wages taken into account when determining the employee retention tax credits in section 2301 of the CARES Act or section 303 of the Taxpayer Certainty and Disaster Relief Act of 2020 are excluded from the definition of payroll costs.

### **Requesting an Increase in a PPP Loan Amount**

Businesses that applied for and received a loan through the original run of the PPP may request an increase in their loan amount due to the updated regulations so long as the business has not received forgiveness for their PPP loan under section 1106 of the CARES Act. The Act states that the SBA shall issue rules or guidance within 17 days from its enactment that ensure an eligible borrower that returned amounts disbursed under its PPP loan or did not accept the full amount of the PPP loan for which it was approved may:

- If part of the borrower's PPP loan was returned, reapply for a PPP loan for an amount equal to the difference between the amount of funds retained and the maximum amount the borrower was eligible for; and
- If the borrower did not accept the full amount of PPP funds it was approved for, request a modification to its loan to increase it to the maximum amount it is eligible for under the PPP rules.



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### **Conclusion**

As with the initial launch of the PPP, we can expect the SBA to release FAQs, guidance documents, and interim final rules in the coming weeks on the Second Draw. However, it is possible that the rollout will proceed much more smoothly due to the substantial similarities in how the Second Draw and PPP operate. While many businesses that were eligible for the PPP will not be eligible to receive additional funds under the Second Draw due to the more restrictive eligibility requirements, the Second Draw can nevertheless provide relief to businesses that have continued to struggle during the COVID-19 pandemic.

Borrowers should keep in mind the scrutiny the SBA and other authorities will exercise over PPP and Second Draw applications. Numerous borrowers of PPP loans over \$2 million have already received questionnaires regarding their financial situation in order to examine the companies' certifications that the loan was necessary to maintain their operations. Borrowers under the expanded program should consider whether a review of their need for the loans would withstand such scrutiny.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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