



# PPP ROUND 2: CHANGES TO THE PROGRAM, EXPANDED COVERAGE, AND WHO IS COVERED

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## SUMMARY

- **The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act mostly acts to expand the PPP loan program.**
- **The act broadens the types of expenses that may qualify for forgiveness and the types of businesses that qualify for aid.**
  - **Additional operations expenditures, property damage costs, covered supplier costs and covered work protection are now covered.**
  - **Certain news organizations, 501(c)(6) organizations and housing cooperatives are now eligible for PPP assistance.**
- **The act makes the forgiveness process simpler and more flexible for most borrowers.**
  - **Loans of \$150,000 or less require only a one-page application.**
  - **Borrowers may now choose a forgiveness period ranging from eight to 24 weeks.**
- **The act allows eligible borrowers to apply for first-time “First Draw” PPP loans and for certain borrowers who have already received and used a PPP loan to apply for additional assistance through “Second Draw” PPP loans.**
  - **First Draw PPP loans are initial loans taken under the PPP. New borrowers may apply so long as they meet the requirements.**

- In certain circumstances, borrowers who have a First Draw PPP loan already may seek an increase in the loan if it is not already forgiven.
- Certain borrowers who already took and exhausted a First Draw PPP loan may be eligible for a Second Draw PPP loan.
- The act also makes grants for certain “shuttered venues” available for certain event and movie venues and related businesses.
- The Small Business Administration opened the application portal for lenders with \$1 billion or less in assets for First and Second-Draw PPP loans on Friday, January 15. It opened the portal to all other lenders on January 19. Applications can be found [here](#).

## INTRODUCTION

On Dec. 27, 2020, then-President Trump signed into law the [Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act](#) (the “Economic Aid Act”). The Economic Aid Act modifies the Paycheck Protection Program (PPP) established under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) enacted in 2020 and allocates an additional \$284 billion to fund new and “second draw” PPP loans through March 31. The Economic Aid Act applies to PPP loans made prior to Dec. 27, 2020, as well as to PPP loans made after that date. It authorizes businesses to seek “First Draw” PPP loans if they did not obtain loans under the CARES Act and “second draw” PPP loans if they did.

Critically, the Economic Aid Act's provisions apply to any PPP loan that was not forgiven *prior to* Dec. 27, 2020. (Economic Aid Act § 304(c).) This means that the Economic Aid Act will govern: (1) any PPP loans (whether First or Second Draw) made on or after Dec. 27, 2020; *and* (2) any PPP loans made prior to Dec. 27, 2020, unless the borrower received forgiveness prior to Dec. 27, 2020. **In other words, even if a business took a PPP loan prior to Dec. 27, 2020, the Economic Aid Act still may govern the loan's terms.**

Accordingly, we address the amendments and their impact on each type of loan below. Lenders and borrowers should move quickly to submit applications, in any event: The Small Business Administration (SBA) opened the application portal for lenders with \$1 billion or less in assets for First and Second-Draw PPP loans on January 15 and it opened the portal to all other lenders on January 19.

*I. First Draw PPP Loans received and forgiven prior to Dec. 27, 2020, continue to be governed by the CARES Act.*

The CARES Act continues to govern PPP loans received *and* forgiven prior to Dec. 27, 2020. (Economic Aid Act § 304(c).) Accordingly, borrowers who took a PPP loan in 2020 and received forgiveness under the terms of the CARES Act do not need to comply with the Economic Aid Act *with respect to such loans*.

*II. First Draw PPP Loans received before or after Dec. 27, 2020, but not forgiven prior to that date, as well as Second Draw PPP Loans, are governed by the Economic Aid Act.*

The Economic Aid Act governs PPP loans received but not forgiven prior to Dec. 27, 2020, as well as PPP loans received after Dec. 27, 2020, including First and Second Draw loans. The same rules govern PPP loans received prior to Dec. 27, 2020, as to First Draw PPP loans received after that date. Second Draw loans are subject to different rules. We consider each in turn.

*A. First Draw PPP Loans governed by the Economic Aid Act*

The SBA's [Interim Final Rule 1](#) [1] clarifies the Economic Aid Act "applies to loan forgiveness applications submitted under the Paycheck Protection Program before enactment of the Economic Aid Act where SBA has not remitted the forgiveness payment" as well as to pending applications to increase the amount loaned under a First Draw PPP loan made prior to Dec. 27, 2020. By its terms, the Economic Aid Act also applies to any First Draw PPP loan made on or after Dec. 27, 2020. (Economic Aid Act §§ 304, 310.) [2]

The eligibility requirements, including the 500-employee limit on borrower size, and many of the loan terms for a PPP loan made prior to enactment of the Economic Aid Act generally remain the same as under the CARES Act. You can read more about those requirements and terms [here](#). The Economic Aid Act, however, made some notable changes affecting First Draw PPP loans:

- **The Economic Aid Act broadens the allowable uses for PPP loans** to include "covered operations expenditures," "property damage costs," "covered supplier costs" and "covered work protection expenditures." The Economic Aid Act defines these terms in detail; for brevity, they relate mainly to costs associated with shifting to or facilitating remote work, repairing property damaged by vandalism or looting, or incurred in attempting to comply with Centers for Disease Control and Occupational Health and Safety Administration employee-protection requirements and guidelines. (Economic Aid Act § 304.) If expenditures fall within any of these categories, the Economic Aid Act permits borrowers to use PPP funds to cover those expenditures (in addition to all those permitted under the CARES Act). **Note, however, that at least 60 percent of the PPP loan must still be used for payroll costs.** (15 U.S.C. § 9005(d)(8).) This modification gives borrowers more flexibility to use the other 40% of funds received.
- Further, **borrowers may seek money foregone or returned earlier.** Borrowers who returned all or part of a PPP loan received prior to Dec. 27, 2020, may now "reapply for a [PPP] loan for an amount equal to the difference between the amount retained and the maximum amount applicable" for the borrower. (Economic Aid Act § 312.) Likewise, borrowers who did not accept the full amount of a PPP loan made prior to Dec. 27, 2020, "may request a modification to increase the amount of the [PPP] loan to the maximum amount applicable" for the borrower. (Economic Aid Act § 312.) The SBA is referring to applications under this section as applications for "increases" to existing PPP loans. The SBA has made clear in its Jan. 13, 2021 Procedural Notice (Control No. 5000-20076) that a PPP loan already forgiven is not eligible for increase under the section.
- The Economic Aid Act also **simplified the forgiveness process for PPP loans of \$150,000 or less.** Borrowers seeking forgiveness of a loan of \$150,000 or less may now use a one-page forgiveness certification that will be developed by the SBA. A borrower will complete the certification, which shall indicate the

number of employees the borrower was able to retain because of the PPP loan, the estimated amount of loan funds used to cover payroll costs, and the total loan value. The borrower's certification also must attest that the certification is accurate and that the borrower will retain certain records for up to four years. The borrower need not submit this documentation as part of the certification, though lenders are permitted to require copies of the documentation. (Economic Aid Act § 307.)

- **Borrowers are encouraged to disclose demographic information** as part of their forgiveness applications as well. (Economic Aid Act § 307.) This is important for minority, underserved, veteran or women-owned borrowers in part because the SBA says it intends to prioritize funding these businesses in the second round of PPP loans.[3]
- The Economic Aid Act **specifically makes certain news organizations, 501(c)(6) organizations and housing cooperatives eligible for PPP loans** if they meet the requirements outlined in the law. (Economic Aid Act §§ 316; 317; 318.)
- **Certain movie theaters, live venue operators, museums and talent representatives**, among others, **are eligible for Shuttered Venue Grants**, but if they accept the grant, they become ineligible for PPP loans. (Economic Aid Act §§ 310, 324.) We expand on these grants below in ***Section II.C.***
- The SBA has taken the position **the same formulas should be used to calculate the amount of PPP loan a borrower is eligible to take** in its Interim Final Rules as were used under the CARES Act and prior SBA guidance. (Interim Final Rule 1 at 31-42.) **But note** that, **for purposes of calculating the forgiveness amount**, the Economic Aid Act eliminates the requirement under CARES Act § 1106(e)(6) that a borrower reduce its PPP forgiveness amount by the amount of any EIDL advance the borrower received. (Economic Aid Act § 333.) Additionally, the Economic Aid Act expressly permits borrowers with a First Draw loan to seek an increase in the loan amount based on the act's provisions. (Economic Aid Act § 312.)
- The Economic Aid Act **allows borrowers to choose a forgiveness period between eight and 24 weeks**. (Economic Aid Act § 306.)

## **B. Second Draw PPP Loans**

The Economic Aid Act creates a new group of PPP loans for certain businesses that already have received and either have or will fully exhaust a First Draw PPP loan. These new loans are called "Second Draw" PPP Loans. (Economic Aid Act § 311; [Interim Final Rule 2](#)[4].) The eligibility requirements and loan and forgiveness terms are discussed below.

- **Eligibility.** Only borrowers who have received and can attest they have exhausted (or will exhaust) a First Draw PPP loan are eligible for a Second Draw loan. Further, borrowers must have 300 or fewer employees and must show a 25% gross revenue decline in any quarter of 2020 compared to the same quarter in 2019. As with First Draw PPP loans, the borrower must have been in business by Feb. 15, 2020. (Note that seasonal employers receive different treatment.)

- Certain businesses are expressly excluded from eligibility, such as businesses engaged in political or lobbying activities, those organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or with other specific ties to China's or Hong Kong's government, recipients of a Shuttered Venue Grant, business in which certain federal government personnel have an interest and publicly traded companies.
- **Loan Amount.** The maximum loan amount is the lesser of an average of payroll multiplied by the applicable multiplier (either 2.5 or 3.5), or \$2 million.
- **Application Process.** The documentation necessary to apply for a Second Draw PPP loan generally is the same as for the First Draw PPP loan. Because of this, SBA will not require additional documentation to substantiate payroll costs if the borrower uses 2019 figures to determine its First Draw PPP loan amount, uses the same figures to determine its Second Draw loan amount and uses the same lender.
- **Forgiveness.** The forgiveness process for Second Draw loans generally is the same as for First Draw PPP loans, as modified by the Economic Aid Act. Second Draw borrowers with a principal amount of \$150,000 or less, however, must provide documentation of a revenue reduction if the documentation was not provided at the time the borrower applied for the Second Draw loan.

#### [C. Shuttered Venue Grants](#)

The Economic Aid Act also creates grants for live venue operators or promoters, theatrical producers, live performing arts organization operators, relevant museum operators, motion picture theatre operators and talent representatives (hereinafter "Venue") to apply for a "Shuttered Venue" grant if they meet certain requirements. (Economic Aid Act § 324; see § 324(a)(3)-(10 for descriptions of what businesses qualify as venues.)

Specifically, the grantee: (a) must have been operation on Feb. 29, 2020, as a venue; (b) must show 25% gross revenue decline in any quarter of 2020 compared to the same quarter in 2019; and (c) must affirm that, at the time of the grant application, it is operating or intending to commence venue operations in the future.

More specific requirements exist depending on the type of venue, and the act expressly excludes venues that present live performances "of a prurient sexual nature" or derive more than *de minimus* gross revenue from "presentation of any depictions or displays[] of a prurient sexual nature."

Initial grant amounts are capped at \$10 million and depend on whether the venue was in business on Jan. 1, 2019. If the Venue was in operation on Jan. 1, 2019, the initial grant amount will be the lesser of \$10 million or 45% of the gross earned revenue in 2019. If the venue came into operation after Jan. 1, 2019, the amount will be the lesser of \$10 million or the average monthly gross earned revenue for each month the venue was in operation in 2019 multiplied by six. Supplemental grants are available for venues showing that, as of April 1, 2021, the revenues of the venue for the most recent quarter are not more than 30% of the revenues for the same quarter in the year prior.

The grants may only be used for specific expenses similar to those permitted for PPP loans, and grantee Venues will be subject to increased oversight in the form of audits of employment and other records pertinent to any grant(s).

## CONCLUSION

The Economic Aid Act seeks to reach sectors of the economy that hindsight has revealed were impacted directly by the COVID-19 pandemic. It also seeks to make the application and forgiveness processes easier for lenders and borrowers. The SBA, IRS, and U.S. Treasury Department continue to issue guidance on this expansive act; and, the SBA has indicated applications for newly allocated funds will be posted soon. Staying proactive and keeping apprised the government's guidance will be critical to seeking and obtaining funds under these programs.

[1] *Interim Final Rule on Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act*, Small Bus. Admin. (Jan. 6, 2021) (to be codified at 13 C.F.R. Parts 113, 120 & 121) (referred to hereinafter as "Interim Final Rule 1").

[2] Although it is clear this means first-time borrowers (who never applied for PPP relief prior to December 27, 2020) are governed by the same rules as borrowers who sought and obtained PPP loans prior to December 27, 2020, it is unclear whether borrowers who sought and were denied PPP relief prior to December 27, 2020 are covered. Until the SBA clarifies this point, it is advisable to consult your lender to see if your eligibility has changed as a result of the Economic Aid Act or due to other circumstances.

[3] *Guidance on Accessing Capital for Minority, Underserved, Veteran and Women-Owned Business Concerns*, Small Bus. Admin. (Jan. 6, 2021), <https://www.sba.gov/sites/default/files/2021-01/Guidance%20on%20Accessing%20Capital%20for%20Underserved-508.pdf>.

[4] *Interim Final Rule on Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans*, Small Bus. Admin. (Jan. 6, 2021) (to be codified at 13 C.F.R. Parts 120 & 121) (referred to hereinafter as "Interim Final Rule 2")

## Related Practices

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Litigation

## Practice Area Contact

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Troy "T.J." Hales