

## PPP 2.0: Expanded Lending For New and Existing Borrowers

Update

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After months of stalled negotiations, Congress has passed sweeping new COVID-19 relief legislation that, among other things, revitalizes and revises the Paycheck Protection Program. The new legislation reopens the program to first time borrowers, provides greater flexibility for how borrowers may use PPP funds and also adds a mechanism by which businesses that already received a PPP loan will be able to take advantage of a new round of “second draw” funding. Notably, the new legislation reiterates and clarifies the safe harbor provision for lenders. Highlights of the legislation are as follows:

### Timing

The updated lending program is expected to be in place soon, as the legislation requires that the SBA issue effectuating regulations within 10 days of enactment. Under the new law, the PPP program will be open until March 31, 2021.

### Loan Flexibility

As for spending flexibility, the bill allows borrowers to now use PPP funds not only for payroll expenses, but also for payments to vendors for essential supplies, payments for worker protections like air filters and PPE, certain software and cloud computing expenses, as well as costs related to property damage resulting from public disturbances that occurred during 2020 and which are not covered by insurance.

New borrowers, as well as existing borrowers who have not yet had their loans forgiven, will be permitted to take advantage of these expansions as forgivable

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expenses. However, the new bill still requires that, in order to obtain complete loan forgiveness, at least 60 percent of loan proceeds be used for payroll expenses.<sup>1</sup>

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## Second Draw Loans

Many smaller borrowers who have already taken a PPP loan will have an opportunity to obtain additional funding. A PPP Second Draw loan up to \$2 million, calculated based on 2.5 times average monthly payroll for the prior year, or 3.5 times for NAICS code 72 entities, including restaurants, will be available to eligible borrowers that:

- Employ no more than 300 employees;
- Have used the full amount of the first PPP loan; and
- Had gross receipts during the first, second, third or fourth quarter of 2020 that were at least 25% less than the same quarter in 2019.

While the Second Draw program specifically *includes* nonprofit and religious organizations, the legislation *excludes* entities engaged in political or lobbying activities, think tanks, as well as businesses owned or controlled by entities in China or Hong Kong, or where a member of the borrower's board of directors resides in China. Entities that receive a grant under the Economic Aid to Hard-Hit Small Business, Non-profits, and Venues Act are also not eligible for a PPP Second Draw loan.

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## Deductibility of PPP Expenses

The legislation also addresses the controversial issue of the deductibility of expenses paid for with PPP loan proceeds. Under IRS and Treasury guidance issued only last month, borrowers were not permitted to deduct PPP expenses where the loan had been forgiven or if forgiveness was expected. The new legislation makes it clear that such amounts are deductible, eliminating what many borrowers viewed as an adverse tax consequence of the PPP.

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## Election of Covered Period

While the original PPP utilized a "covered period" during which PPP funds were to be spent in eight weeks, which was later extended to 24 weeks by the Paycheck Protection Flexibility Act, borrowers may now select a covered period of between eight and 24 weeks.

### Related Practices

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## **Ability to Request Loan Size Increase Due to Updated Regulations**

Borrowers who have not yet received forgiveness for existing PPP loans and who returned amounts disbursed, or did not accept the full amount for which the borrower was approved, may reapply for a covered loan for an amount equal to the difference between the amount retained and the maximum amount available. Likewise, borrowers whose loan calculations have increased based on revised guidance will now have the ability to work with their lenders to increase their loan value.

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## **Simplified Forgiveness Application**

In a change that should significantly simplify the forgiveness process, borrowers who receive a covered loan of not more than \$150,000 will be permitted to apply for forgiveness by submitting an application of no more than one page in length that includes a description of the number of employees the borrower was able to retain because of the PPP loan, the estimated amount of the loan spent on payroll costs, and the total loan amount. Borrowers must also attest that the borrower accurately provided the requested certification and complied with the PPP loan requirements.

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## **Hold Harmless Provisions for Lenders**

The new legislation provides a significant safe harbor for lenders making PPP loans, providing that no enforcement action will be taken against a lender if it relies on certifications or documentation submitted by borrowers, acts in good faith relating to loan origination or forgiveness, and follows all other relevant federal, state and local laws.

These revisions to the Paycheck Protection Program reflect only a portion of this round of stimulus legislation, which provides other types of relief to small businesses, direct relief for individuals, relief for the healthcare and transportation industries, as well as schools, and also contains significant tax-related measures, including the extension of the Employee Retention Tax Credit.

Bracewell's cross-disciplinary COVID-19 task force is actively helping numerous clients navigate the many and evolving issues they are facing, including potential access to stimulus programs. Your Bracewell point of contact can help you learn more.

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<sup>1</sup>The legislation makes clear that employer-provided group insurance benefits are included in the definition of payroll costs.