

Publications

A Second Round of the Paycheck Protection Program is Coming

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As part of the “CARES Act 2” economic relief bill signed into law on December 27, 2020, the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act renews and extends the Paycheck Protection Program created by the original CARES Act. Congress has allocated \$284.45 billion to a second round of PPP loans (“PPP2”) to further aid small businesses and other eligible entities adversely impacted by the ongoing COVID-19 public health emergency.

Who is Eligible?

The general eligibility standard from the original PPP—that the applicant certify that the PPP loan is necessary to support ongoing operations—is still a requirement for the PPP2 loans. Beyond that, the PPP2 both restricts and expands eligibility.

First, the restrictions. The PPP2 requires an applicant to have been in operation as of February 15, 2020 to be eligible. Entities receiving Shuttered Venue Operator Grants (another form of relief offered under CARES Act 2) are not eligible to receive a PPP2 loan. Applicants may not employ more than 300 individuals (down from 500 under the original PPP), and applicants who are owned 20% or more by, or who have significant operations in or a board member from, the People's Republic of China or the Special Administrative Region of Hong Kong are not eligible. Finally, an applicant must demonstrate at least a 25% reduction in gross receipts for any one quarter in 2020 as compared to the same quarter in 2019. Amounts received under the original CARES Act—such as first round PPP loans or EIDL funds—are excluded from this calculation. But the PPP2 statutory text does not specify an accounting method for determining gross receipts.

Second, PPP2 does broaden eligibility to specifically include news organizations and 501(c)(6) organizations, which were excluded from receiving an initial PPP loan. Not all 501(c)(6) organizations are eligible, however—professional sports leagues are not eligible, nor are organizations that are primarily engaged in political or lobbying activities. Otherwise, 501(c)(6) entities are eligible if they do not receive more than 15% of their receipts from lobbying activities, lobbying

activities do not comprise more than 15% of their total activities, and the cost of the organization's lobbying activity did not exceed \$1 million during the most recent tax year.

How Much is Available?

Similar to the initial PPP loans, loan amounts are calculated according to formulae based on a multiple of the applicant's average payroll amount. These calculations vary based on the type of applicant, i.e. seasonal employer vs. a year round employer. The maximum loan amount for any applicant, however, cannot exceed \$2 million—down from the initial PPP's maximum amount of \$10 million. Furthermore, borrowers who received an initial PPP loan cannot receive a PPP2 loan that would make the aggregate loan amount exceed \$10 million.

What Does the Loan Cover?

PPP2 loans cover all the same types of expenses as were covered by the initial PPP loans, such as payroll, benefits, rent, utilities, mortgage interest, and transportation costs. Additionally, PPP2 loans will cover more categories of expenses. Operations expenses, such as payments for business software or cloud computing services that facilitate business operations (such as payroll, HR, sales, and inventory tracking services) are considered covered expenses. PPP2 loans will cover costs related to property damage from vandalism or looting due to public disturbances that occurred in 2020 that was not covered by insurance or other compensation. Supplier costs, i.e. payments to a supplier for goods that are essential to the applicant's operations and were made pursuant to a contract or purchase order, will be covered. Furthermore "worker protection expenditures" for capital or operating expenditures made to comply with worker health and safety regulations promulgated by HHS, the CDC, OSHA, or an equivalent entity, will also be covered.

Moreover, this expanded definition of covered expenses is effective retroactive to the date of the original CARES Act, i.e. March 27, 2020, for all loans except those that have already been forgiven.

Applicants again have flexibility in defining the covered period. Applicants can choose either an 8 week or a 24 week period—beginning on the date the loan is funded—as the covered period for eligible expenses.

New Forgiveness Rules for Loans Under \$150,000

PPP2 creates a streamlined process for forgiving loans under \$150,000. If the recipient signs and submits to its lender a certification describing 1) the number of employees the recipient was able to retain because of the loan, 2) the estimated amount of the loan spent on payroll costs, 3) the total loan value, and 4) attesting that they have complied with program requirements and will retain employment records for four years and other records for three years, the loan will be forgiven. The PPP2 requires the SBA to develop this certification, which cannot exceed one page in length, within 24 days of passage, i.e. within 24 days of December 27, 2020.

The SBA will have audit authority to review and audit loans subject to these new streamlined procedures and to access the recipient's records. If the audit reveals fraud, ineligibility, or noncompliance, the SBA will have the power to modify the amount of the covered loan or the amount to be forgiven. There is also a hold harmless provision for lenders stating that lenders may rely in good faith on the certifications or

documentation submitted by applicants, and if they do so they will not be subject to enforcement action.

Additional Guidance is Expected

The PPP2, as noted above, leaves several issues open, such as the accounting method to be used for determining gross receipts. Furthermore several provisions in the PPP2 specifically require the SBA to develop and promulgate additional guidance on topics such as improving access to capital for minority, underserved, veteran, and women-owned businesses and on reapplications for returned or unused funds loaned under the initial PPP.

Vorys is actively monitoring these developments and will continue to analyze the situation and provide updates. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in all niche disciplines and areas of the law affected by federal, state and local coronavirus legislation. Learn more and see the latest updates from the task force at vorys.com/coronavirus. If you have questions regarding this news, please contact your Vorys attorney or a member of our Coronavirus Task Force. Wishing you a happy, healthy and safe New Year.