Independent Restaurant Coalition

Paycheck Protection Program: Updates in the 2020 Omnibus Bill and FAQs for Applicants

Executive summary

On Monday, December 21, 2020, Congress passed a nearly 5,600-page, $1.3 trillion omnibus bill that includes an additional $900 billion in COVID-19 relief and stimulus funding — including new funding and updated requirements for the landmark Paycheck Protection Program (PPP). After months of discussion, reflection, and debate on the efficacy of the PPP, Congress has reauthorized the program with $325 billion in new funding and amended several key elements to the program. For example, the changes made by Congress expand program eligibility to certain nonprofits, expand expenses allowable for forgiveness, streamline the forgiveness process, and clarify loan terms and tax treatment.

This memo provides an overview of the changes made to the program through the omnibus bill, as well as answering a series of frequently asked questions (FAQs) for both first-time applicants and returning PPP borrowers.

What changes to PPP were included in the December 2020 omnibus?

Garnering significant bipartisan support in the past few months of COVID-19 relief negotiations, the legislation authorizes $325 billion for first and second Paycheck Protection Program (PPP) forgivable loans. In effect through March 31, 2021, this program provides eligible small businesses with government-backed interruption loans, which could then be forgiven.

Direct Appropriations

- $284.45 billion for PPP, including the following set-asides:

  Lenders:
  - $15 billion for PPP loans (initial and second draw) issued by community financial institutions, including community development financial institutions (CDFIs) and minority depository intuitions (MDIs);
  - $15 billion for PPP loans (initial and second draw) issued by certain small depository institutions.

  Borrowers:
  - $35 billion for first-time borrowers, $15 billion of which for smaller, first-time borrowers with 10 or fewer employees, or loans less than $250,000 in low-income areas;

    - $25 billion for second draw PPP loans for smaller borrowers with 10 or fewer employees, or loans less than $250,000 in low-income areas.

  After 25 days, the SBA Administrator may adjust the set-asides as necessary.

- $25 million for the Minority Business Development Centers program under the Minority Business Development Agency (MBDA);
- $50 million for PPP auditing and fraud mitigation purposes;
- $20 billion for the Targeted EIDL Advance program, of which $20 million for the Inspector General;
- $57 million for the Microloan program as described in section 29;
- $1.9 billion to carry out sections 26, 27, and 28;
- $3.5 billion for the Debt Relief program as described in section 25;
- $15 billion for grants for live venues as described in section 24.

Second Draw Loans

The omnibus creates a second loan from the Paycheck Protection Program, called a “PPP second draw” loan for smaller and harder-hit businesses, with a maximum amount of $2 million.

In order to receive a Paycheck Protection Program loan under this section, eligible entities must:

- Employ not more than 300 employees;
- Have used or will use the full amount of their first PPP; and
- Demonstrate at least a 25 percent reduction in gross receipts in the first, second, or third quarter of 2020 relative to the same 2019 quarter. Provides applicable timelines for businesses that were not in operation in Q1, Q2, and Q3, and Q4 of 2019. Applications submitted on or after January 1, 2021 are eligible to utilize the gross receipts from the fourth quarter of 2020.

Eligibility Requirements

- Clarifies that a business or organization that was not in operation on February 15, 2020 shall not be eligible for an initial PPP loan and a second draw PPP loan.
- Prohibits eligible entities that receive a grant under the Shuttered Venue Operator Grants from obtaining a PPP loan.
- Extends PPP eligibility to housing cooperatives defined in section 216(b) of the Internal Revenue Code of 1986 and which employ no more than 300 employees.
- Extends PPP eligibility to 501(c)(6) organizations if:
    - The organization does not receive more than 15 percent of receipts from lobbying;
    - The lobbying activities do not comprise more than 15 percent of activities;
    - The cost of lobbying activities of the organization did not exceed $1,000,000 during the most recent tax year that ended prior to February 15, 2020; and
    - The organization has 300 or fewer employees.

Loan Terms

- In general, borrowers may receive a loan amount of up to 2.5X the average monthly payroll costs in the one year prior to the loan or the calendar year. No future loan can be greater than $2 million.
- Seasonal employers may calculate their maximum loan amount based on a 12-week period beginning February 15, 2019 through February 15, 2020.
- New entities may receive loans of up to 2.5X the sum of average monthly payroll costs.
- Entities in industries assigned to NAICS code 72 (Accommodation and Food Services) may receive loans of up to 3.5X average monthly payroll costs.
- Businesses with multiple locations that are eligible entities under the initial PPP requirements may employ not more than 300 employees per physical location.
- Waiver of affiliation rules that applied during initial PPP loans apply to a second loan.
- An eligible entity may only receive one PPP second draw loan.
- Fees are waived for both borrowers and lenders to encourage participation.
- For loans of not more than $150,000, the entity may submit a certification attesting that the entity meets the revenue loss requirements on or before the date the entity submits their loan forgiveness application and non-profit and veterans' organizations may utilize gross receipts to calculate their revenue loss standard.

Simplified Forgiveness Application for Loans Under $150,000

- The law creates a simplified application process for loans under $150,000 such that:
  - A borrower shall receive forgiveness if a borrower signs and submits to the lender a certification that is not more than one page in length, includes a description of the number of employees the borrower was able to retain because of the covered loan, the estimated total amount of the loan spent on payroll costs, and the total loan amount.
  - The borrower must also attest that borrower accurately provided the required certification and complied with Paycheck Protection Program loan requirements. SBA must establish this form within 24 days of enactment and may not require additional materials unless necessary to substantiate revenue loss requirements or satisfy relevant statutory or regulatory requirements. This applies to loans made before, on, or after the date of enactment, including the forgiveness of the loan.
- Borrowers of a PPP second draw loan would be eligible for loan forgiveness equal to the sum of their payroll costs, as well as covered mortgage, rent, and utility payments, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures incurred during the covered period. The 60/40 cost allocation between payroll and non-payroll costs in order to receive full forgiveness will continue to apply.

Tax Treatment of PPP Loans

- The omnibus legislation clarifies that gross income does not include any amount that would otherwise arise from the forgiveness of a PPP loan.
- This provision also clarifies that deductions are allowed for otherwise deductible expenses paid with the proceeds of a PPP loan that is forgiven, and that the tax basis and other attributes of the borrower's assets will not be reduced as a result of the loan forgiveness.
- The provision is effective as of the date of enactment of the CARES Act. The provision provides similar treatment for Second Draw PPP loans, effective for tax years ending after the date of enactment of the provision.

Additional Eligible Expenses

- The bill makes the following expenses allowable and forgivable uses for Paycheck Protection Program funds:
    - Covered operations expenditures. Payment for any software, cloud computing, and other human resources and accounting needs.
    - Covered property damage costs. Costs related to property damage due to public disturbances that occurred during 2020 that are not covered by insurance.
    - Covered supplier costs. Expenditures to a supplier pursuant to a contract, purchase order, or order for goods in effect prior to taking out the loan that are essential to the recipient's operations at the time at which the expenditure was made. Supplier costs of perishable goods can be made before or during the life of the loan.
    - Covered worker protection expenditure. Personal protective equipment and adaptive investments to help a loan recipient comply with federal health and safety guidelines or any equivalent State and local guidance related to COVID-19 during the period between March 1, 2020, and the end of the national emergency declaration.
- The bill also allows loans made under PPP before, on, or after the enactment of this act to be eligible to utilize the expanded forgivable expenses except for borrowers who have already had their loans forgiven.

Lender Hold Harmless

- Provides that a lender may rely on any certification or documentation submitted by a borrower for an initial or second draw PPP loan and that no enforcement action may be taken against the lender and the lender shall not be subject to any penalties relating to loan origination or forgiveness if:
    - the lender acts in good faith relating to loan origination or forgiveness; and
    - all relevant federal, state, local and other statutory and regulatory requirements are satisfied.

Selected Covered Period

- Borrowers are now able to choose the 8 to 24-week covered period during which the borrower is required to spend a sufficient amount on qualified expenses to receive forgiveness. This begins the day the borrower received the funds and ends on any day selected by the borrower, but no earlier than 8-weeks from the date the loan proceeds are received and no later than 24 weeks after such date of origination.

Reimbursement for Processing

- Provides for PPP lender reimbursement by SBA for new PPP loans.
- Establishes a tiered reimbursement rate for PPP loans: (1) Loans of less than $50,000 that is equal to the lesser of 50 percent of the loan principal or $2,500; (2) loans of more than $50,000 and not more than $350,000 equal to five percent of the loan principal; (3) loans of more than $350,000 and less than $2,00,000 equal to three percent of the loan principal; and (4) loans of more than $2,000,000 equal to one percent.
- Clarifies lender reimbursement by SBA may be made no later than 5 days post-disbursement.
- Clarifies PPP borrowers who knowingly retained a loan agent may not pay agent fees out of the PPP proceeds. This applies to PPP loan before, on, or after the date of enactment, including during forgiveness of such loan.

Fraud Mitigation Inclusions

- The bill appropriates $50 million to the Inspector General of the Small Business Administration to prevent waste, fraud, and abuse.
- The bill also permits the Administrator, "in the case of fraud or other material noncompliance with respect to a grant, to require repayment of misspent funds or pursue legal action to collect funds."
- Borrowers are required to retain relevant records related to employment for four years and other records for three years. The Administrator may review and audit these loans to ensure against fraud.
- The SBA must submit to the Senate and House Small Business Committees a report 45 days after enactment detailing their review and forgiveness audit plan to mitigate risk of fraud and provide monthly reviews and audit updates thereafter.

Additional Measures

- Clarifies that: (1) fee waivers; (2) personal guarantee waiver; and (3) deferral eligibility continues past the covered period and attaches for the life of the PPP loan.
- Clarifies the interest rate on PPP loans is non-compounding and non-adjustable for all new initial PPP loans and second draw loans.

FAQs for applicants

How do I determine if my business is eligible?

- A business now needs to employ only 300 workers or fewer, down from 500 in round one; the business gross receipts must have declined by at least 25 percent in any quarter in 2020 compared with that same quarter in 2019.
- Participation in the Paycheck Protection Program is open to businesses, 501(c)3 nonprofits, certain 501(c)(6) organizations, Destination Marketing Organizations (DMOs) and veterans' organizations that have fewer than 300 employees or meet one of SBA's industry-specific small business thresholds – found here. Sole proprietors, independent contractors, and some other self-employed individuals are also eligible.

How do I participate in the program?

- Financial institutions are directly delegated the authority to process loan and forgiveness applications. Applicants for the Paycheck Protection Program apply directly through an existing SBA lender or any other federally insured depository institution, credit union, or Farm Credit System institution. Additional lenders are expected to be added.
- Applicants should also expect to submit tax documentation of payroll numbers confirming their eligibility to participate in the program and allowing the calculation of their maximum loan amount. Additionally, the legislation explicitly requires contractors and sole proprietors to establish their eligibility with payroll tax filings, Form 1099-MISC, and documentation of income and expenses.

When will assistance be available?

- Eligible small businesses and sole proprietorships will be able apply for Paycheck Protection loans through existing SBA lenders effective immediately upon being signed into law.

What Expenses are Covered?

- The SBA will offer a 100 percent guarantee on a loan amounting to the recipient's average monthly payroll costs over the previous year, times 2.5. In other words, this loan amounts to two and a half months of payroll costs. The maximum loan amount is $2 million. Covered operational expenditures, worker protection expenses, supplier costs and property damage expenditures were extended in the omnibus bill.

How do I apply for forgiveness?

- To achieve forgiveness, a borrower must submit to their lender documents including: (1) state or federal payroll documents; (2) documentation of mortgage interest, rent, or payroll expenses; (3) certification that the information is true; and (4) any other documentation that SBA determines is appropriate. The lender will then have 60 days to determine the appropriate level of forgiveness, at which point SBA would purchase and forgive the relevant amount of the initial loan.

- For loans under $150,000, a streamlined, single page application has been implemented to simplify the process.
- Second Draw loans are forgivable but at least 60 percent must be spent on payroll costs.
- The new legislation provides that forgiven PPP loans will not be taxable to the small-business borrower. This applies to all existing PPP loans under the original CARES Act as well as the new second draw PPP loans.
- Once signed into law, the SBA and Treasury have been tasked with providing interpretive guidance and forms for the new forgiveness rule.

How does this program interact with SBA's Economic Injury Disaster Loans (EIDL)?

- Borrowers who have received a COVID-19-related EIDL loan are allowed to apply for a Paycheck Protection loan or refinance their EIDL into a Paycheck Protection loan, and EIDL loan advances are no longer subject to deduction from PPP loan forgiveness amounts.