

# CONGRESS AND THE PRESIDENT APPROVE \$284 BILLION SECOND ROUND OF PAYCHECK PROTECTION PROGRAM LOANS IN SUPPORT OF STRUGGLING SMALL BUSINESSES

*Hodgson Russ Corporate & Business Alert*  
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In the waning evening hours of December 21, 2020, Congress passed the “Consolidated Appropriations Act, 2021,” a new, comprehensive COVID-19 relief bill. The bill passed by a wide margin with bi-partisan support, with votes of 92-6 in the Senate, and 359-53 in the House. While President Trump initially expressed his displeasure with the bill, he ultimately signed it into law on December 27, albeit with demands for changes that are unlikely to be met.

Among the many different components of the law is a retooled version of the Paycheck Protection Program (PPP), with some modifications, effectuated through the “Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act” (PPP2). The law authorizes the U.S. Small Business Administration (SBA) to issue more than \$284 billion in a new round of forgivable PPP2 loan funds. Importantly, PPP2 makes some retroactive changes to the CARES Act that may impact prior PPP loans and their forgiveness. Below is a summary of key issues addressed in the legislation.

## **Who is Eligible for PPP2?**

An “eligible entity” may be “any business concern, nonprofit organization, housing cooperative, veterans organization, Tribal business concern, eligible self-employed individual, sole proprietor, independent contractor, or small agricultural cooperative.” Eligible entities must employ not more than 300 workers and meet certain gross revenue limitations. The borrower must also be able to demonstrate at least a 25 percent reduction in gross revenues for a particular period relative to a comparative period in 2019 or 2020.

## **What if the Eligible Entity Received a PPP loan?**

An eligible entity that received a prior PPP loan may still seek a supplemental PPP2 loan provided it has used, or will use, the full amount of the prior loan proceeds before disbursement of the PPP2 loan. An eligible entity may only receive one PPP2 loan. However, an eligible recipient that previously returned all or part of a PPP loan that had not been forgiven as of the date of the enactment of PPP2, or did not

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accept the full amount of such a loan, may reapply or request a modification to increase the borrowed amount to the maximum amount applicable to that borrower's circumstances. PPP2 also amends the definition of "covered period" applicable to original PPP loans to extend the outside date from December 31, 2020 to March 31, 2021 for new loans.

### **Does PPP2 Disqualify Any Businesses?**

The following businesses are expressly disqualified from PPP2:

- A business that was not operating on February 15, 2020;
- A person or entity (as defined in PPP2) that receives a grant under section 24 (Shuttered Venue Operator Grants);
- Businesses ordinarily ineligible for SBA Section 7(a) loans, with certain exceptions;
- Any business concern or entity primarily engaged in political or lobbying activities;
- Any business concern or entity owned, directly or indirectly, 20% or more by a Chinese or Hong Kong person or entity;
- Any business concern or entity that has as a board member a resident of China;
- Any person required to register under the Foreign Agents Registration Act of 1938; and
- Publicly traded companies.

### **How Much Can be Borrowed?**

For most borrowers, the maximum amount of the loan is the lesser of \$2 million, or 2.5 times the borrower's average monthly payroll costs for either calendar year 2019 or the 12 months before the date of the loan. Alternative calculation methods are available for seasonal employers, hospitality employers, and other special circumstances.

### **What are the Permitted and Forgivable Uses of the Loan Proceeds?**

As with the original PPP, borrowers may use PPP2 loan proceeds for payroll costs, mortgage interest, rent, utilities, and interest on other debt obligations incurred before the covered period. Payroll costs must account for at least 60% of the spend. But PPP2 adds and defines four new categories of non-payroll uses that are also eligible for forgiveness:

- (1) covered operations expenditures<sup>[1]</sup>
- (2) covered property damage costs<sup>[2]</sup>
- (3) covered supplier costs<sup>[3]</sup>
- (4) covered worker protection expenditures<sup>[4]</sup>

### **Is there any Change to the Definition of "Payroll Costs?"**

PPP2 broadens the PPP definition of payroll costs to include: "payment required for the provisions of group health care or group life, disability, vision, or dental insurance benefits, including insurance premiums."

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### **What Will be the “Covered Period” for the New PPP2 Loans?**

The covered period begins on the date of the origination of the PPP2 loan and ends on a date selected by the borrower during the 8- to 24-week period after the loan date.

### **How Will Forgiveness Work?**

For PPP2 loans of \$150,000 or less, SBA will provide a simplified one-page forgiveness application. The borrower will not be required to provide supporting documentation with the application, though we recommend borrowers keep detailed records of the loan and their use of loan proceeds in case of SBA review or audit. For PPP2 loans greater than \$150,000, the borrower must submit supporting documentation to the lender with its forgiveness application.

### **What if My Business Was Shuttered During the Pandemic?**

PPP2 includes a new form of grant relief for certain types of businesses that were forced to shutter operations during the pandemic. These grants are available only for live venue operators or promoters, theatre producers, live performing arts organizations, museums, movie theatres, or talent agents that meet associated eligibility requirements. The maximum grant available under this program is \$10 million.

### **Does PPP2 affect EIDL Grants?**

PPP2 repeals the requirement that the amount of PPP loan forgiveness must be reduced by funds advanced through the EIDL program.

### **What is the Effective Date of the Changes?**

PPP borrowers should be aware that many of the provisions have retroactive application to loans made before or on the date of enactment, including as relating to forgiveness of such a loan. Therefore, it is important to evaluate the effective dates of the various provisions for any benefits that may inure to borrowers with respect to prior PPP loans or forgiveness applications.

If you have questions about applying for a loan under PPP2, or how the new legislation affects your existing PPP loan, please contact [Jason Markel](mailto:jmarkel@hodgsonruss.com) (716.848.1395) or [Valerie Stevens](mailto:vstevens@hodgsonruss.com) (646.218.7614).

Please check our [Coronavirus Resource Center](#) and our [CARES Act](#) page to access information related to both of these rapidly evolving topics.

If you received this alert from a third party or from visiting our website, and would like to be added to any of our mailing lists, please visit us [HERE](#).

[1] Covered operations expenditure “means “a payment 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 and tracking of supplies, inventory, records and expenses.”

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[2] Covered property damage cost “means a cost related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation.”

[3] Covered supplier cost “means an expenditure made by an entity to a supplier of goods for the supply of goods that—(A) are essential to the operations of the entity at the time at which the expenditure is made; and (B) is made pursuant to a contract, order or purchase order—(i) in effect at any time before the covered period with respect to the applicable covered loan; or (ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan.”

[4] Covered worker protection expenditure “means an operating or capital expenditure to facilitate the adaptation of business activities to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the President...expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.” The definition goes on to provide numerous examples of equipment, workplace modifications, and personal protective equipment that may be included.