

TaxNewsFlash

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Updated FAQs on PPP loans; guidance on second draw PPP loans

The U.S. Treasury Department today posted an updated set of “frequently asked questions” (FAQs) concerning the Paycheck Protection Program (PPP) as administered by the Small Business Administration (SBA).

The PPP is a program providing financial support lending for small and large businesses pursuant to measures originally included in the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) (Pub. L. No. 116-136). Additional measures concerning the program were enacted under the *Consolidated Appropriations Act, 2021* (Pub. L. No. 116-260) (the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* is one of the titles of the legislation enacted December 27, 2020). That legislation effectively opened up the availability for a “second draw” for PPP loans.

The updated [**FAQs**](#) [PDF 382 KB] (March 3, 2021) include the following statement:

The FAQs have been updated to reflect changes made by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act enacted on December 27, 2020. The FAQs are in the process of being revised to reflect changes made by the Interim Final Rule on Revisions to Loan Amount Calculation and Eligibility posted on SBA's website on March 3, 2021.

Read the [**SBA interim final rule**](#).

The updated FAQs reflect changes or clarifications made to existing FAQs (that is, the FAQs that were initially issued April 6, 2020, or released on subsequent dates). The footnotes to FAQs 1 through 56 indicate when revisions have been made, with a notation “revised March 3, 2021.”

Today’s release also includes new FAQs 57 through 65 (read the text of these new FAQs below).

57. Question: When determining the eligibility of section 501(c)(6) organizations and destination marketing organizations for First Draw PPP Loans and Second Draw PPP Loans, how is “lobbying activities” defined?

Answer: For purposes of determining the eligibility of section 501(c)(6) organizations and destination marketing organizations for First Draw and Second Draw PPP Loans, "lobbying activities" is defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602).

58. Question: May First Draw PPP Loan or Second Draw PPP Loan proceeds be used for lobbying activities or expenditures?

Answer: No. None of the proceeds of a First Draw PPP Loan or Second Draw PPP Loan may be used for (1) lobbying activities, as defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602); (2) lobbying expenditures related to a State or local election; or (3) expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before Congress or any State government, State legislature, or local legislature or legislative body.

59. Question: If a borrower that was eligible for a First Draw PPP Loan files for bankruptcy protection after disbursement of the First Draw PPP Loan, is that borrower eligible for loan forgiveness of its First Draw PPP Loan?

Answer: Yes. If a borrower that was eligible for a First Draw PPP Loan files for bankruptcy protection after disbursement of the First Draw PPP Loan, that borrower is eligible for loan forgiveness, provided it meets all requirements for loan forgiveness set forth in the PPP Interim Final Rules, including but not limited to, loan proceeds are used only for eligible expenses and at least 60% of the loan proceeds is used for eligible payroll costs.

60. Question: If a borrower that was eligible for a First Draw PPP Loan files for bankruptcy protection after disbursement of the First Draw PPP Loan, is that borrower eligible to apply for a Second Draw PPP Loan?

Answer: No. Each applicant for a Second Draw PPP Loan must certify on the Second Draw Borrower Application Form (SBA Form 2483-SD) that the applicant and any owner of 20% or more of the applicant is not presently involved in a bankruptcy proceeding. Thus, a borrower that received a First Draw PPP Loan and files for bankruptcy protection after disbursement of the First Draw PPP Loan is not eligible to apply for a Second Draw PPP Loan.

61. Question: To be eligible for a Second Draw PPP Loan, a borrower must certify on SBA Form 2483-SD that, before the Second Draw PPP Loan is disbursed, the borrower will have used the full loan amount (including any increase) of its First Draw PPP Loan "only for eligible expenses." How does the separate requirement that the borrower must use at least 60% of the First Draw PPP Loan proceeds for payroll costs affect this certification?

Answer: The borrower may certify, for purposes of the Second Draw PPP Loan application, that it will have used all of its First Draw PPP Loan proceeds "only for eligible expenses" if the borrower has used or will use the First Draw PPP Loan proceeds for any or all of the eligible expenses outlined in subsection B.11.a.i.-xi of the consolidated interim final rule implementing updates to the PPP. Borrowers should be mindful that failure to use PPP loan proceeds for the required percentage of payroll costs will affect loan forgiveness.

62. Question: If a borrower received partial forgiveness of its First Draw PPP Loan, does this make the borrower ineligible for a Second Draw PPP Loan?

Answer: If a borrower received partial forgiveness of its First Draw PPP Loan, the borrower is eligible for a Second Draw PPP Loan as long as the borrower used the full amount of its First Draw PPP Loan only for eligible expenses outlined in subsection B.11.a.i.-xi of the consolidated interim final rule implementing updates to the PPP.

63. Question: May applicants use SBA's established size standards (either revenue-based or employee-based) or SBA's alternative size standard to qualify for a Second Draw PPP Loan?

Answer: No. Applicants may not use SBA's established size standards (either revenue-based or employee-based) or the alternative size standard to qualify for a Second Draw PPP Loan. In general, the size eligibility requirement for Second Draw PPP Loans are narrower than the size

eligibility requirement for First Draw PPP Loans. With some exceptions, an applicant is eligible for a Second Draw PPP Loan only if it, together with its affiliates (if applicable), employs no more than 300 employees. The only exceptions are if an Applicant:

- *Is assigned a NAICS code beginning with 72 and employs no more than 300 employees per physical location; or*
- *Is a news organization that is majority owned or controlled by a business concern that is assigned NAICS code 511110 or a NAICS code beginning with 5151, or is a nonprofit public broadcasting entity with a trade or business under NAICS code 511110 or 5151, and, in either case, employs no more than 300 employees per physical location.*

64. Question: If an owner of an applicant, or a sole proprietor, self-employed individual, or independent contractor has an Individual Taxpayer Identification Number (ITIN) instead of a Social Security Number (SSN), can they use the ITIN on the Borrower Application Form for a PPP loan and the forms to apply for loan forgiveness?

Answer: Yes. If an owner of an applicant, or a sole proprietor, self-employed individual, or independent contractor has an ITIN instead of an SSN, they may use the ITIN on the PPP Borrower Application Form (SBA Forms 2483 and 2483-SD, or lender's equivalent) and the PPP Loan Forgiveness Application Forms (SBA Forms 3508, 3508EZ, and 3508S, or lender's equivalent). An ITIN is a tax processing number only available to certain nonresident and resident aliens, their spouses, and dependents who cannot get an SSN. It is a 9-digit number, beginning with the number "9", formatted like an SSN (NNN-NN-NNNN). To be eligible for a PPP loan or to receive loan forgiveness, the applicant must meet all eligibility criteria and PPP requirements, which includes the requirement that the principal place of residence for a sole proprietor, self-employed individual, or independent contractor must be in the United States.

65. Question: As of December 27, 2020, is an employer that receives a First Draw PPP Loan or Second Draw PPP Loan also eligible for the Employee Retention Credit?

Answer: The Taxpayer Certainty and Disaster Tax Relief Act of 2020, which was enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, on December 27, 2020, permits an employer that received a First Draw PPP Loan or Second Draw PPP Loan to claim the Employee Retention Credit if the employer is otherwise an eligible employer satisfying the requirements for the credit. However, payroll costs that are qualified wages for the Employee Retention Credit are not eligible for loan forgiveness if the employer elects to claim the credit for those amounts. (Additional guidance from the IRS is available at <https://www.irs.gov/pub/irs-drop/n-21-20.pdf>.)

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