

Up to date as of 01/18/21

PAYCHECK PROTECTION PROGRAM FLEXIBILITY ACT

PPP Flexibility Act insight from BKD:

The SBA has released two new Interim Final Rules (IFRs) containing guidance on both first-time and second draw Paycheck Protection Program (PPP) loans. Here are several guidelines and highlights that borrowers should be aware of:

- **Eligibility-related clarifications for PPP2 loans**
 - For purposes of the new 25 percent or greater decline requirement, gross receipts for for-profit entities include all revenue in whatever form received or accrued using the borrower's method of accounting; however, capital gains/losses, receipts from affiliates, and items generally construed as deposits held for others are excluded along with income from a forgiven PPP1 in 2020. For this purpose, gross receipts are not reduced by cost of sales, but are reduced by returns and allowances. A few specifics for acquisitions and dispositions during 2020:
 - If a borrower acquired an affiliate in 2020, the gross receipts of the affiliate are included in the calculation for all periods (unless the acquisition was of a "segregable division" of another entity—which isn't defined in the IFR—in which case the gross receipts of the division are only included for the period subsequent to the purchase)
 - If a borrower disposed of an affiliate in 2020, no receipts of that affiliate are included for any time during the measurement period (unless the disposition was of a "segregable division," in which case the gross receipts of the division are included for all periods prior to the sale)
 - PPP2 borrowers must certify that they spent or will spend the full amount of a PPP1 loan on authorized uses before the PPP2 distribution date (this appears to include amounts spent outside of the 24-week covered period)
 - The 300-employee limit is based on the most recent calendar year, i.e., based on 2020 average head count for each 2020 payroll, both full and part time. The same carveouts/exceptions under PPP1 loans apply for PPP2 with the exception that the 500-employee limit per physical location under PPP1 is now a 300-employee limit under PPP2. For example, a company that operates multiple restaurants in separate legal entities and employs less than 300 at each location are eligible for a PPP2 loan for each legal entity (assuming other requirements are met)
 - Borrowers who were in business for all of 2020 and experienced a 25 percent or greater reduction in annual receipts in 2020 compared to 2019 are allowed to submit copies of income tax returns for both years to support the decline requirement (otherwise documentation supporting the quarter over quarter requirement provided in the legislative text must be provided)
 - Borrowers aren't eligible for a PPP2 loan if they:
 - Weren't eligible for PPP1 or received a PPP1 loan but were later determined to be not eligible to receive it
 - Already received a PPP2 loan (in other words, borrowers can only get one PPP2 loan)
 - Are permanently closed
 - Received a grant for shuttered venue operators under section 324 of the Economic Aid Act (note there's an exception for those who received a PPP1 loan prior to the enactment of the Act)
 - Are prohibited borrowers listed under section 7(a)(37) of the Small Business Act, *e.g.*, lobbying organizations, entities organized under the laws of the People's Republic of China, etc.

- **Amount of PPP2 loans**
 - Lesser of 2.5 times a borrower's average monthly payroll costs or \$2 million; unless the borrower is assigned an NAICS code beginning with 72 at the time of disbursement, *i.e.*, hotels and restaurants, in which case borrowers can use 3.5 times average monthly payroll. The IFR provides the following clarifications:
 - The same definition of payroll costs for PPP1 is used for PPP2, including the \$100,000 annual compensation limit
 - Borrowers can use average monthly payroll costs for 2019 or 2020 for PPP2
 - Same calculations under PPP1 loans are used for PPP2 for Schedule C filers and partnership filers
 - Farmers or ranchers with employees must reduce gross income on Schedule F by payroll costs to avoid double-counting
 - Corporate groups that had a \$20 million PPP1 limit have a \$4 million limit for PPP2
- **How to apply for PPP2 loans**
 - Borrowers will use Form 2843-SD to apply for PPP2
 - Will require the same certifications as PPP1, including certification of need
 - Not required to submit any payroll information with the application if using same lender as PPP1 and using 2019 payroll for both PPP1 and PPP2
 - Otherwise required to submit payroll documentation as was done with PPP1 (see page 33 of the IFR on second draw loans)
 - Loans under of \$150,000 and under at the time of the application: documentation to support a 25 percent or greater decline in gross receipts is not due until the forgiveness application is filed; however, borrower must certify the requirement is met at the time of the loan disbursement
 - Loans greater than \$150,000 at the time of the application: borrowers must submit documentation of a 25 percent or greater decline in gross receipts with the application
- **How to apply for forgiveness for PPP2 loans:** same terms and conditions as PPP1
- **Clarifications provided on PPP1 loans**
 - Eligible borrowers who already received a PPP1 loan are not eligible for another PPP1 loan. Any borrower who received a PPP loan in 2020 is considered to have received a PPP1 for this purpose
 - Any EIDL advance amount previously deducted from a borrower's PPP1 forgiveness amount will be remitted to the lender along with interest through the remittance date
 - SBA will issue additional guidance on the process to reapply or request a loan increase for borrowers who:
 - Returned all of a PPP1 loan but is now eligible to reapply under the current PPP rules
 - Returned part of a PPP1 loan but is now eligible to apply for an amount equal to the difference between the amount retained and the amount previously approved
 - Did not accept the full amount of a PPP1 loan for which they were approved but is now eligible to request an increase in the loan up to the amount previously approved
 - SBA will also issue additional guidance on the process for partnerships to request a loan increase to include partner compensation, which will be done by the lender submitting a request through the SBA's E-Tran Servicing site on or before March 31, 2021 even if the lender's first Form 1502 was previously submitted

Another item that you will want to consider is the applicability of the Employee Retention Credit. Previously the PPP and ERC programs were mutually exclusive – if an entity took advantage of one program, they could not take advantage of the other. This is no longer the case, and the Taxpayer Certainty and Disaster Tax Relief Act of 2020, passed on December 27, 2020 expanded and extended the ERC. Part of this expansion includes the retroactive application of the ERC to PPP borrowers for 2020. This can provide additional liquidity to borrowers that meet the qualifying criteria. I have attached a decision tree that can be used to evaluate the application of the ERC for 2020 and 2021.

For additional information or questions contact:

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