

## Select Guidance on PPP1 & PPP2 from Interim Final Rule

The Interim Final Rule (IFRs) issued January 7, 2021 incorporates the Economic Aid Act amendments required to be implemented by regulation within 10 days of enactment. For ease of borrower and lender reference, the interim final rule also consolidates the interim final rules (and important guidance) issued to date governing borrower eligibility, lender eligibility, and PPP application and origination requirements for new PPP loans, as well as provides general rules relating to loan increases and loan forgiveness.

Select paragraphs specific to Outdoor Recreation Companies (ORCs) have been captured below with page reference to the full 87 page IFRs.

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*c. How does a seasonal employer calculate the maximum PPP loan amount?*

As defined by section 315 of the Economic Aid Act, a borrower is a seasonal employer if it does not operate for more than 7 months in any calendar year or, during the preceding calendar year, it had gross receipts for any 6 months of that year that were not more than 33.33 percent of the gross receipts for the other 6 months of that year. Under section 336 of the Economic Aid Act, a seasonal employer must determine its maximum loan amount for purposes of the PPP by using the employer's average total monthly payments for payroll for any 12-week period selected by the seasonal employer beginning February 15, 2019, and ending February 15, 2020.

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*g. What qualifies as "payroll costs?"*

Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care or group life, disability, vision, or dental insurance,<sup>62</sup> including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation.

<sup>62</sup> This provision has been modified to conform to section 308 of the Economic Aid Act. This revision is effective as if included in the CARES Act and applies to any loan made before, on, or after December 27, 2020, including forgiveness of such a loan.

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*h. Is there anything that is expressly excluded from the definition of payroll costs?*

Yes. The Act expressly excludes the following:

- i. Any compensation of an employee whose principal place of residence is outside of the United States;
- ii. The compensation of an individual employee in excess of \$100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred;
- iii. Federal employment taxes imposed or withheld during the applicable period, including the employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and
- iv. Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Public Law 116–127).

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*7. If a seasonal employer received a PPP loan before December 27, 2020, can the loan amount be increased based on a revised calculation of the maximum loan amount?*

Yes. If a seasonal employer received a PPP loan before December 27, 2020, and such employer would be eligible for a higher maximum loan amount under section 336 of the Economic Aid Act, as described in subsection B.4.c., the lender may electronically submit a request through SBA's E-Tran Servicing site to increase the PPP loan amount, even if the loan has been fully disbursed and even if the lender's first SBA Form 1502 report to SBA on the PPP loan has already been submitted. In no event can the increased loan amount exceed the maximum PPP loan amount (\$10 million for an individual borrower or \$20 million for a corporate group). Additionally, the borrower must provide the lender with required documentation to support the calculation of the increase. Any request for an increase must be submitted electronically in E-Tran on or before March 31, 2021, and is subject to the availability of funds.

I also wanted to ensure you are aware of the SBA determination of Gross Receipts:

Page 22-23 of IFR for Second Draw Loans:

(2)(i) Gross receipts includes all revenue in whatever form received or accrued (in accordance with the entity's accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered "total income" (or in the case of a sole proprietorship, independent contractor, or self-employed individual "gross income") plus "cost of goods sold," and excludes net capital gains or losses as these terms are defined and reported on IRS tax return forms. Gross receipts do not include the following: taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees); proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts.

Regarding Second Draw Loans, the SBA has reserved the 3.5x multiplier for businesses with NAICS codes starting with 72. I have attached the Interim Final Rule for Second Draw Loans. Here are some sections that may be particularly relevant to you:

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Consistent with the Economic Aid Act, subsections (f)(3) and (f)(4) of the IFR include tailored calculation methodologies for seasonal businesses, new entities that did not exist for the full twelve-month period preceding the Second Draw PPP Loan, and borrowers assigned a NAICS code beginning with 72 at the time of disbursement. For borrowers assigned a NAICS code beginning with 72 at the time of disbursement, the Economic Aid Act provides that the maximum loan amount is equal to three-and-a-half (3.5) months of payroll costs rather than two-and-a-half (2.5) months. These subsections also provide that, for a borrower with a NAICS code beginning with 72 that would fall into more than one category listed in subsection (f) (for example, a business with a NAICS code beginning with 72 that is also a seasonal business or is also a new entity without 12 months of payroll costs), the borrower may calculate its average monthly payroll costs based on the methodology that applies to the entity but may use the 3.5 multiplier applicable to businesses with a NAICS code beginning with 72.

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The documentation required to substantiate an applicant's payroll cost calculations is generally the same as documentation required for First Draw PPP Loans. However, no additional documentation to substantiate payroll costs will be required if the applicant (i) used calendar year 2019 figures to determine its First Draw PPP Loan amount, (ii) used calendar year 2019 figures to determine its Second Draw PPP Loan amount (instead of calendar year 2020), and (iii) the lender for the applicant's Second Draw PPP Loan is the same as the lender that made the applicant's First Draw PPP Loan. In such cases, additional documentation is not required because the lender already has the relevant documentation supporting the borrower's payroll costs. The lender may request additional documentation, however, if on further review the lender concludes that it would be useful in conducting the lender's good-faith review of the borrower's loan amount calculation.

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(3) The maximum amount of a Second Draw PPP Loan to a borrower that is a seasonal employer (meaning an employer that does not operate for more than 7 months in any calendar year or that during the preceding calendar year, had gross receipts for any 6 months of that year that were not more than 33.33 percent of the gross receipts of the employer for the other 6 months of that year) is calculated as the lesser of:

- i. the product obtained by multiplying:
  - a. at the election of the borrower, the average total monthly payments for payroll costs incurred or paid by the borrower for any 12-week period between February 15, 2019 and February 15, 2020; by
  - b. 2.5 (or, only for a borrower assigned a NAICS code beginning with 72 at the time of disbursement as defined in subsection (f)(10), 3.5); or
- ii. \$2,000,000.

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(10) For purposes of calculating a borrower's maximum payroll costs, a borrower may multiply its average monthly payroll costs by 3.5 only if the borrower is in the Accommodation and Food Services sector and has reported a NAICS code beginning with 72 as its business activity code on its most recent IRS income tax return.