Alerts & Publications

New COVID-19 Relief Package Revives and Expands Paycheck Protection Program

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In the waning days of 2020, the Paycheck Protection Program ("PPP") was given new life. On December 27, 2020, President Trump signed H.R. 133, a $2.3 trillion omnibus spending package that includes the Coronavirus Response and Supplemental Appropriations Act, which provides $900 billion in additional relief to businesses and individuals hard hit by the pandemic and the resulting recession.

PAYCHECK PROTECTION PROGRAM

Most notably, the Act revives the PPP through $285 billion for additional loans and extends the deadline to apply for a loan to March 31, 2021. The Act also allows certain businesses to receive a second PPP loan, with extra relief for hotels and food service businesses. The Act also changes the program's eligibility requirements and expands the types of expenses that PPP funds may be used to cover.

Changes Applicable to New PPP Loans

Second Draw PPP Loans

The Act removes the CARES Act's blanket prohibition on any one borrower receiving multiple PPP loans and authorizes smaller, second PPP loans to certain hard-hit businesses.

Eligibility

Businesses must meet these criteria:

- They and their affiliates employ no more than 300 employees;
- They have used, or will use, the full amount of their initial PPP loan; and
- They have lost at least 25% of their revenue in any quarter of 2020 compared to the same quarter in 2019.

Maximum Amount

The Act sets the cap on second draw PPP loans at $2 million per borrower.

Increased Amounts for Food Service and Hotel Industries

While most second-draw PPP borrowers may receive a loan of up to 2.5 times their average monthly payrolls, to help the hard-hit food service and hospitality industries, the Act allows hotels and food service businesses to receive PPP loans up to 3.5 times their average monthly payrolls. But the $2 million cap still applies to all second draw PPP loans, regardless of industry.

Restrictions on People's Republic of China and Hong Kong-affiliated Entities

A borrower is ineligible for a second-draw loan if (1) an entity created or organized under the laws of the People's Republic of China ("PRC") or Hong Kong, or that has significant operations in the PRC or Hong Kong, holds 20% or greater interest in the borrower or (2) a member of the borrower's Board of Directors is a resident of the PRC.

Expanded Eligibility

The Act expands the kinds of entities that are eligible for new PPP loans.

First, certain 501(c)(6) organizations that were ineligible under the CARES Act are now eligible for PPP loans. To qualify, the 501(c)(6) organization must have no more than 300 employees and cannot be significantly involved in political or lobbying activities.[1]

Second, some news organizations previously ineligible because of their affiliation with other businesses or newspapers can now receive PPP loans. To qualify, a news organization must either employ no more than 500 employees per physical location (or otherwise meet the applicable SBA size standard) and be majority-owned by a business in the news industry or be a non-profit public broadcasting entity. This provision is specifically designed to support local news outlets and newspapers. All news organization recipients must certify that their PPP loan proceeds will be used specifically to support the dissemination of local or emergency news.

Finally, the Act explicitly bars publicly traded companies (except news organizations) from receiving PPP loans. Previously, publicly traded companies were not explicitly barred categorically but likely would have found themselves ineligible anyway due to the SBA and the Treasury Department's interpretations of the statutory requirement that borrowers certify that the loan is "necessary to support the ongoing operation."

Changes Applicable to All Existing and New PPP Loans

Expanded Uses for PPP Loan Proceeds

The Act expands the permitted and forgivable uses of PPP loan proceeds. Previously, PPP loan proceeds could be used only to cover payroll costs and certain mortgage, rent, and utility expenses. The Act allows borrowers to use the money to pay for supplier costs, operating expenses (such as software and cloud computing services), personal protective equipment and other worker protection expenses, and repairs to property damage caused by any demonstrations over the summer (to the extent not covered by insurance). It also allows PPP borrowers to use loan proceeds for additional types of employer-provided insurance costs, including group life insurance, disability insurance, vision insurance, and dental insurance.

Notably, while these changes apply to new loans and also to loans that have already been issued, they do not apply to loans for which the borrower has already received forgiveness.

Clarification of Tax Treatment

The Act allows PPP recipients to deduct payroll costs and other expenses covered by forgiven loans. This reverses a previous Treasury Department ruling[2] that treated such deductions as "double-dipping"—because the loans themselves are not taxable income. The Act also states that PPP borrowers will not incur a tax-attribute reduction or a denial of a basis increase solely because PPP loan forgiveness amounts were excluded from gross income totals.

Choice of "Covered Period" for PPP Loan Forgiveness

The Act allows borrowers to choose the length of the "covered period" during which they may use their loan proceeds to pay for qualified expenses for purposes of calculating loan forgiveness. They may choose a "covered period" between eight and 24 weeks from the date the loan originated.

Repeal of Economic Injury Disaster Loan Advance Deduction

The Act repeals a CARES Act provision requiring PPP borrowers to deduct the amount of their Economic Injury Disaster Loan ("EIDL") advance from their PPP loan forgiveness amount.

Simplified Loan Forgiveness Application for Small Borrowers

The Act creates a simplified forgiveness process for borrowers with loans of $150,000 or less. To receive forgiveness, the borrower need only submit a one-page certification stating the number of employees retained because of the loan, the estimated amount of loan proceeds spent on payroll costs, and the total loan value.

Disclosure Requirements for Government Officials

The Act imposes disclosure requirements for existing PPP borrowers "controlled"[3] by government officials and bans such businesses from receiving any new PPP loans. This provision applies to the president, the vice president, heads of cabinet agencies, members of Congress, and to their spouses. Businesses meeting the applicable criteria must disclose their status within 30 days of submitting their forgiveness applications.

Additional Protection for Lenders

The Act aims to protect lenders from enforcement actions stemming from a borrower's ineligibility for a loan or falsification of application documents. A lender is shielded from enforcement action so long as it acted in good faith when reviewing and processing the application and complied with all federal, state, local, and other statutory and regulatory requirements applicable to the particular PPP loan. This safe harbor applies to all PPP loans, including those already issued.

Enhanced Oversight and Investigations

The Act requires the SBA to comply with requests from the Government Accountability Office within two weeks and to submit a justification to Congress if it is unable to comply. It also mandates that the Secretary of the Treasury and the SBA Administrator testify before Congress regularly.

The Act also appropriates an additional $50 million specifically earmarked for PPP reviews and audits. It also mandates that the SBA Administrator submit an audit plan to Congress along with monthly reports on the status of its PPP audits.

OTHER RELIEF PROVISIONS

Extension of Debt Relief: The Act extends the CARES Act program in which the SBA pays the principal, interest, and fees on existing non-PPP 7(a) loans, 7(m) microloans, and 504 long-term fixed asset loans for six months. The Act allocates $3.5 billion to extend the program for another six months (for a total of one year).

Additional Economic Injury Disaster Loan Grants: The Act includes $20 billion to extend the EIDL grant program for one year, under which applicants can receive a forgivable advance of up to $10,000 on their EIDL loans.

Extension of Employee Retention Tax Credit: The Act extends the refundable Employee Retention Tax Credit ("ERTC"), which was established in the CARES Act, through July 1, 2021. It also increases the credit percentage from 50% to 70%, expands eligibility, and increases the limit on per-employee wages. Importantly, it also clarifies that PPP borrowers may still claim the ERTC for payroll costs not paid with forgiven PPP loan proceeds.

Grants for Operators of Shuttered Venues: The Act authorizes $15 billion in tax-free grants of up to $10 million to eligible operators and owners of live entertainment venues, movie theaters, zoos, and museums. Another $2 billion is reserved for entities with fewer than 50 full-time employees. The grants are in many ways similar to PPP loans, with similar restrictions on eligible expenses. Only entities that saw a 90% or greater loss in revenue between April 1, 2020 and December 31, 2020—compared to the same period in 2019

—are eligible to receive funds within the first 14 days of the program. Entities that lost 70% or more in revenue are eligible to receive funds after the next 14-day period. And after the first 28 days of issuing grants, all eligible entities may receive the grants.

Airline Industry Relief: The Act extends the CARES Act's Payroll Support Program for airlines and their workers. It includes $15 billion for airline payrolls, $1 billion for airline contractor payrolls, and $2 billion for airports and airport concession operators.

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[1] Lobbying activities cannot represent more than 15% of a business's revenues and cannot exceed $1 million in costs in the most recent taxable year. Lobbying activities include any activities designed to influence the enactment of legislation, appropriations, regulations, administrative actions, or executive orders.

[2] https://www.irs.gov/pub/irs-drop/n-20-32.pdf.

[3] A "controlling interest" is defined as owning or controlling 20% or more of any class of equity interest in an entity.
