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Paycheck Protection Program: A Second Round of Funding for Some New and Existing Borrowers; Other Changes to Benefit All Borrowers

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On December 27, 2020, President Trump signed the Consolidated Appropriations Act, 2021 (the "Appropriations Act"), which includes a new round of funding for certain qualifying, existing Paycheck Protection Program (PPP) borrowers, opens the PPP to some previously ineligible entities, authorizes additional business expenditures that are eligible for forgiveness, and makes other changes to the PPP. The changes to the PPP are part of the "Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act" (the "Economic Aid Act") included as part of the Appropriations Act. In addition to the changes made to the PPP through the Economic Aid Act, the Appropriations Act provides other benefits to small businesses. Congress funded the PPP with an additional $284 billion (some of which is from cancellation of unused authority from the first and second round of PPP funding) and extended the PPP until March 31, 2021.

Although the changes to the PPP are significant, and should be of great benefit to many borrowers, the Economic Aid Act left intact the core provisions of the PPP (such as no borrower guarantee fees, no collateral or borrower guarantee requirements and requiring that 60 percent of loan proceeds be used for payroll purposes). The Economic Aid Act directs the Small Business Administration (SBA) and Treasury Department to issue regulations implementing the provision of the Economic Aid Act within specific time periods; the first deadline was January 6, 2021.

On January 6, 2021, the SBA issued two Interim Final Regulations implementing provisions of the Economic Aid Act: "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act" and "Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans" (the "Implementing Regulations"). The first Implementing Regulation is a recapitulation of general PPP requirements as amended by the Economic Aid Act, including provisions relating to loans to newly eligible borrowers. The second Implementing Regulation addresses additional funding to be made available to certain qualifying PPP borrowers.

The following summarizes significant aspects of the Appropriations Act and Implementing Regulations.

Changes Affecting Existing Loans

- Broadens uses of PPP loan funds eligible for forgiveness to include:
  - "Covered operations expenditures" such as business software costs, cloud computing costs and payroll services and tracking costs
  - "Covered property damage costs," which are costs relating to damages to property arising from the civil unrest of 2020
  - "Covered supplier costs" covering payments to suppliers for materials essential to the borrower's business, subject to certain limitations
  - "Covered work protection expenditures," which include operating expenditures (*e.g.*, for disposable personal protective equipment) and capital expenditures (*e.g.*, installation of a sneeze guard or improvements to reduce contact such as pass-through windows).

  - Includes group life insurance premiums as an eligible payroll cost and clarifies that "health benefits" includes dental, vision and disability insurance premiums.

- Provides a variable "covered period" of not less than eight weeks, and not more than 24 weeks, selectable by the borrower, for expenditure of PPP loan funds for forgiveness purposes

- Requires the SBA to develop a simplified forgiveness application for PPP loans of $150,000 or less. The application:

  - Cannot exceed one page
  - Cannot require the borrower to certify more than:
    - Number of employees retained
    - Estimated amount spent on payroll during the covered period
    - Total loan amount
    - Borrower has complied with all PPP requirements and will maintain records evidencing compliance with employment requirements for four years and documents evidencing compliance with all other requirements for three years

- Requires the SBA to submit a plan for conducting borrower audits (including procedures for conducting audits and metrics to be used in selecting borrowers for audit) to the appropriate House and Senate small business committees within 45 days to help remove uncertainty regarding the audit process, policies and procedures for PPP loans

- Removes the requirement that the amount of any Economic Injury Disaster Loan (EIDL) emergency grant received by a borrower be deducted from the borrower's loan forgiveness amount

- Allows a borrower that returned some or all of its PPP loan, or that did not close a PPP loan due to eligibility concerns, to re-apply if the borrower has subsequently determined it would be eligible for a PPP loan or eligible for the entire amount of the PPP loan originally authorized

- Prohibits recipients of "shuttered venue" grants from receiving PPP loans

Newly Eligible Entities

Entities previously ineligible for PPP loans but now eligible include:

- Nonprofit organizations described in Section 501(c)(6) of the Internal Revenue Code (business leagues, chambers of commerce, real estate boards and boards of trade, but excluding professional sports leagues and organizations that promote or participate in a political campaign or similar activities), subject to the following:

  - May not have more than 300 employees
  - May not receive more than 15 percent of its receipts from lobbying activities
  - Lobbying activities may not comprise more than 15 percent of the total activities of the organization.
  - Cost of the lobbying activities of the organization did not exceed $1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020

- Housing cooperatives

- Destination Marketing Organizations (501(c)(6) nonprofit organizations and political subdivisions that market and promote communities and facilities to businesses and leisure travelers through a range of activities such as convention and visitor bureaus), subject to the following:

  – May not have more than 300 employees
  – May not receive more than 15 percent of its receipts from lobbying activities.
  – Lobbying activities may not comprise more than 15 percent of the total activities of the organization
  – Cost of the lobbying activities of the organization did not exceed $1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020

- News organizations, including those operating under FCC licenses, may be eligible, subject to certain requirements:

  – Generally, must have a NAICS code starting with 511110 or 5151
  – May not have more than 500 employees or, if multiple locations, not more than 500 employees at any one location

- A debtor in possession or trustee in bankruptcy may receive a PPP loan upon approval of the bankruptcy court

Second Draw Loans

The Economic Aid Act authorizes certain borrowers with a PPP loan to receive an additional advance of PPP loan funds. The Economic Aid Act imposes significant limitations on these "second draw" loans, however. Significant provisions applicable to second draw loans are described below.

- The borrower must have a first PPP loan that is fully expended on or before the date of disbursement of the second draw loan (this includes newly eligible borrowers).

- The borrower may not have more than 300 employees or, if it has a "72" NAICS code, it cannot have more than 300 employees at any single location.

- The borrower must have had at least a 25 percent reduction in gross receipts in at least one calendar quarter of 2020 as compared to the same calendar quarter in 2019.

- The maximum amount of the second draw is the lesser of (i) the 2.5 times average monthly payroll for 2019, 2020 or the 12 months ending on the date the loan is made (selectable by the borrower), and (ii) $2,000,000.

- Members of a "corporate group" are limited to an aggregate maximum of $4,000,000 in second draw loans (members of a corporate group were eligible for an aggregate maximum of $20,000,000 in loans under the original PPP).

- For second draw loans exceeding $150,000, the borrower must provide evidence of the revenue decrease in the form of tax returns, financial statements or other documentation; for loans up to $150,000, the borrower may self-certify revenue decreases in its application, but must submit evidence of the decrease prior to forgiveness.

- For borrowers with a "72" NAICS code, the maximum amount of the second draw is the lesser of (i) the 3.5 times average monthly payroll for 2019, 2020 or the 12 months ending on the date the loan is made (selectable by the borrower), and (ii) $2,000,000.

- Exclusions include:

  - Any entity created under the laws of the People's Republic of China or the Hong Kong Special Administrative Region or in which any entity created under the laws of the People's Republic of China or the Hong Kong Special Administrative Region owns a 20 percent or greater equity/profits interest, or which has "significant operations" in the People's Republic of China or the Hong Kong Special Administrative Region, or in which any resident of the People's Republic of China is on the governing board
  - Any person who is required to register as an agent of a foreign government
  - Any entity that is primarily engaged in the business of lobbying, including any entity which is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public document.

Other Increases in Loan Amounts

A borrower that would be eligible for a greater PPP loan amount than originally allowed due to regulatory or statutory changes will be allowed an additional draw to increase the amount of its loan to the maximum amount for which it would now be eligible.

Set-aside for Very Small and Disadvantaged Businesses

The Economic Aid Act specifically sets aside funds for new and smaller borrowers, for borrowers in low- and moderate-income communities, and for community and smaller lenders. These set-asides include:

- $15 billion for first and second draw loans for loans by community financial institutions

- $15 billion for first and second draw loans for lending by Insured Depository Institutions, Credit Unions, and Farm Credit System Institutions with consolidated assets of less than $10 billion

- $35 billion for new First Draw Loans

- $15 billion for first draw and $25 billion for second draw borrowers having no more than 10 employees and for loans of not more than $250,000 to borrowers in low- or moderate-income neighborhoods

Miscellaneous Changes

- Except for certain news organizations, publicly traded entities or entities owned by publicly traded entities are prohibited from receiving a PPP loan after the date of adoption of the Appropriation Act either as a newly eligible entity or with respect to a second draw loan.

- Any entity in which the U.S. President, Vice President, the head of an Executive Department, or a Member of Congress (including through or combined with their spouses) owns a 20 percent or greater equity interest is prohibited from receiving a new PPP loan or a second draw. Any borrower with a current PPP loan and having such ownership must report the fact to the Administrator of the SBA.

- Farmers and ranchers are confirmed as eligible borrowers and are provided a method to calculate an eligible loan amount using IRS Form 1040, Schedule F. Farmers and ranchers that previously received a PPP loan may apply for the difference between the amount previously received and the amount authorized under the calculation method provided in the Economic Aid Act.

- Lenders are only obligated to pay agent fees if the lender entered into an agreement with the agent; otherwise the borrower is responsible for any agent fees.

Our team of attorneys and advisors continues to monitor these changes and will provide further updates about these matters. For additional information please contact one of the authors and visit the Coronavirus (COVID-19): Navigating the Path Ahead information page on our website.