

CLASS A&B, NO. 1,
**BACKGROUND INFORMATION ON CONGRESS’ PAYCHECK
PROTECTION PROGRAM (PPP) RESPONSE TO THE COVID-19 CRISIS**

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I. INTRODUCTION TO THE PAYCHECK PROTECTION PROGRAM (PPP) AND THE RELATED LOAN FORGIVENESS PROGRAM AS ENACTED BY THE CARES ACT¹

Section 1102 of the CARES Act adopts the PPP, the purpose of which is to facilitate lending to certain small businesses. Under the PPP, the Fed make loans to banks and other financial institutions, which in turn make loans to eligible small businesses. Thus, banks and other financial institutions act as conduits through which loans from the Fed are passed on as loans to qualifying small businesses. As will be discussed below, in certain cases, the borrower’s obligation to repay the PPP loan can be forgiven, which in effect converts the loan into a grant.

The PPP is administered by the Small Business Administration (SBA) and the statutory provisions of the CARES Act establishing the PPP are reflected in an amendment in section

¹ This section is adapted from chapter 2 of Thompson, *The Deal Lawyer’s Weapons in the War on COVID-19* (2021).

1102 of the CARES Act to section 7(a) of the federal Small Business Act (15 U.S.C. § 636(a)). Specifically, the PPP is set out as a new subsection 7(a)(36), “Paycheck Protection Program.”

In early April 2020, the SBA issued an Interim Final Rule [SBA Interim Final PPP Rule]² addressing many of the issues under the PPP. There are many twists and turns with the PPP, and the purpose of this section is to focus on what is likely to be one of the most common situations in which a firm utilizes the PPP. In accomplishing this goal, the discussion will be built around the hypothetical facts set out in the next section. It is likely that these hypothetical facts are going to be similar to the prototypical situation involving a PPP loan made to a small company of significant size. * * * [See chapter 2 of Deal Lawyer’s Weapons for a more complete discussion of the PPP.]

II. INTRODUCTION TO THE AMENDMENTS TO THE PPP PROGRAM BY THE PAYCHECK PROTECTION PROGRAM FLEXIBILITY ACT OF 2020

In June 2020, the Congress passed and the president signed the Paycheck Protection Program Flexibility Act of 2020. The Summary of this bill by the Congressional Research Service explains, inter alia:

This bill modifies provisions related to the forgiveness of loans made to small businesses under the Paycheck Protection Program implemented in response to COVID-19 (i.e., coronavirus disease 2019).

Specifically, the bill establishes a minimum maturity of five years for a paycheck protection loan with a remaining balance after forgiveness. The bill also extends the covered period during which a loan recipient may use such funds for certain expenses while remaining eligible for forgiveness. The bill raises the non-payroll portion of a forgivable covered loan amount from the current 25% up to 40%.

The bill extends the period in which an employer may rehire or eliminate a reduction in employment, salary, or wages that would otherwise reduce the forgivable amount of a paycheck protection loan. . . .

² U.S. Small Business Administration, Interim Final Rule, Business Loan Program Temporary Changes, Paycheck Protection Program, 85 Fed. Reg. 20,817 (Apr. 15, 2020) [SBA Interim Final PPP Rule].

Additionally, the bill revises the deferral period for paycheck protection loans, allowing recipients to defer payments until they receive compensation for forgiven amounts. . . .

The bill also eliminates a provision that makes a paycheck protection loan recipient who has such indebtedness forgiven ineligible to defer payroll tax payments.

III. INTRODUCTION TO THE AMENDMENTS TO THE PPP PROGRAM MADE BY THE “COVID RESPONSE AND RELIEF SUPPLEMENTAL APPROPRIATIONS ACT,” DEC. 27, 2020

H.R. 133, Division M – Coronavirus Response and Relief Supplemental Appropriations Act, 2021, Pub.L. 116-260, 116th Congress (2019–2021) (Signed by the President on Dec 27, 2020)

H.R. 133 DIVISION-BY-DIVISION SUMMARY OF COVID-19 RELIEF PROVISIONS

In addition to the text of the Fiscal Year 2021 appropriations bills and authorizing matters, the spending package includes emergency coronavirus relief.

Division M – Coronavirus Response and Relief Supplemental Appropriations Act, 2021

Prepared by the Democratic Staff of the House Committee on Appropriations * * *

Section 311: Paycheck Protection Program Second Draw Loans.

- Creates a second loan from the Paycheck Protection Program, called a “PPP second draw” loan for smaller and harder-hit businesses, with a maximum amount of \$2 million.
 - Eligibility. In order to receive a Paycheck Protection Program loan under this section, eligible entities must:
 - Employ not more than 300 employees;
 - Have used or will use the full amount of their first PPP; and
 - Demonstrate at least a 25 percent reduction in gross receipts in the first, second, or third quarter of 2020 relative to the same 2019 quarter. Provides applicable timelines for businesses that were not in operation in Q1, Q2, and Q3, and Q4 of 2019. Applications submitted on or after January 1, 2021 are eligible to utilize the gross receipts from the fourth quarter of 2020.
- Eligible entities must be businesses, certain non-profit organizations, housing cooperatives, veterans’ organizations, tribal businesses, self-employed individuals, sole proprietors, independent contractors, and small agricultural co-operatives.
- Ineligible entities include: entities listed in 13 C.F.R. 120.110 and subsequent regulations except for entities from that regulation which have otherwise been made eligible by statute or guidance, and except for nonprofits and religious organizations; entities involved in political and lobbying activities including engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public document, entities affiliated with entities in the People’s Republic of China; registrants under the Foreign Agents Registration Act; and entities that receive a grant under the Shuttered Venue Operator Grant program.

- Loan terms. In general, borrowers may receive a loan amount of up to 2.5X the average monthly payroll costs in the one year prior to the loan or the calendar year. No loan can be greater than \$2 million.
 - Seasonal employers may calculate their maximum loan amount based on a 12-week period beginning February 15, 2019 through February 15, 2020.
 - New entities may receive loans of up to 2.5X the sum of average monthly payroll costs.
 - Entities in industries assigned to NAICS code 72 (Accommodation and Food Services) may receive loans of up to 3.5X average monthly payroll costs.
 - Businesses with multiple locations that are eligible entities under the initial PPP requirements may employ not more than 300 employees per physical location.
 - Waiver of affiliation rules that applied during initial PPP loans apply to a second loan.
 - An eligible entity may only receive one PPP second draw loan.
 - Fees are waived for both borrowers and lenders to encourage participation.
 - For loans of not more than \$150,000, the entity may submit a certification attesting that the entity meets the revenue loss requirements on or before the date the entity submits their loan forgiveness application and non-profit and veterans organizations may utilize gross receipts to calculate their revenue loss standard.
- Loan forgiveness. Borrowers of a PPP second draw loan would be eligible for loan forgiveness equal to the sum of their payroll costs, as well as covered mortgage, rent, and utility payments, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures incurred during the covered period. The 60/40 cost allocation between payroll and non-payroll costs in order to receive full forgiveness will continue to apply.
- Lender eligibility. A lender approved to make loans under initial PPP loans may make covered loans under the same terms and conditions as the initial loans.
- Lender compensation. The Administrator is authorized to reimburse a lender by a tiered structure: For loans up to \$50,000, the lender processing fee will be the lesser of 50 percent of the principal amount or \$2,500. For loans between \$50,000 and \$350,000, the lender fee will be five percent. For loans \$350,000 and above, the lender fee will be three percent.
- Guidance to prioritize underserved communities. Directs the Administrator to issue guidance addressing barriers to access to capital for underserved communities no later than 10 days after enactment.
- Standard Procedures. Directs the SBA to allow lenders to approve loans made under this paragraph utilizing existing program guidance and standard operating procedure, to the maximum extent possible, as the standard SBA 7(a) program.
- Churches and religion organizations. Expresses the sense of Congress that the Administrator's guidance clarifying the eligibility of churches and religious organizations was proper and prohibits the application of regulations otherwise rendering ineligible businesses principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs. Codifies that the prohibition on eligibility in 13 CFR 120.110(k) shall not apply for initial and second draw loans.
- Application of Exemption Based on Employee. Extends existing safe harbors on restoring FTE and salaries and wages. Specifically, applies the rule of reducing loan forgiveness for the borrower reducing the number of employees retained and reducing employees' salaries in excess of 25 percent. Allows the SBA and Treasury Department to jointly modify any date in section 7A(d) consistent with the purposes of the Paycheck Protection Program.

Section 312: Increased Ability for Paycheck Protection Program Borrowers to Request an Increase in Loan Amount Due to Updated Regulations.

- Requires the Administrator to release guidance to lenders within 17 days of enactment that allows borrowers who returned all or part of their PPP loan to reapply for the maximum amount applicable so long that they have not received forgiveness. Additionally, this section allows borrowers whose loan calculations have increased due to changes in interim final rules to work with lenders to modify their loan value regardless of whether the loan has been fully disbursed, or if Form 1502 has already been submitted.

Section 313: Calculation of Maximum Loan Amount for Farmers and Ranchers under the Paycheck Protection Program. . . .

IV. SBA AND TREASURY PRESS RELEASE: SBA AND TREASURY
ANNOUNCE PPP RE-OPENING, JAN 8, 2021

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WASHINGTON – The U.S. Small Business Administration (SBA), in consultation with the Treasury Department, announced today that the Paycheck Protection Program (PPP) will re-open the week of January 11 for new borrowers and certain existing PPP borrowers. To promote access to capital, initially only community financial institutions will be able to make First Draw PPP Loans on Monday, January 11 and Second Draw PPP Loans on Wednesday, January 13. The PPP will open to all participating lenders shortly thereafter. Updated PPP guidance outlining Program changes to enhance its effectiveness and accessibility was released on January 6 in accordance with the Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act.

This round of the PPP continues to prioritize millions of Americans employed by small businesses by authorizing up to \$284 billion toward job retention and certain other expenses through March 31, 2021, and by allowing certain existing PPP borrowers to apply for a Second Draw PPP Loan.

“The Paycheck Protection Program has successfully provided 5.2 million loans worth \$525 billion to America’s small businesses, supporting more than 51 million jobs,” said Secretary Steven T. Mnuchin. “This updated guidance enhances the PPP’s targeted relief to small businesses most impacted by COVID-19. We are committed to implementing this round of PPP quickly to continue supporting American small businesses and their workers.”

“The historically successful Paycheck Protection Program served as an economic lifeline to millions of small businesses and their employees when they needed it most,” said Administrator Jovita Carranza. “Today’s guidance builds on the success of

the program and adapts to the changing needs of small business owners by providing targeted relief and a simpler forgiveness process to ensure their path to recovery.”

Key PPP updates include:

- PPP borrowers can set their PPP loan’s covered period to be any length between 8 and 24 weeks to best meet their business needs;
- PPP loans will cover additional expenses, including operations expenditures, property damage costs, supplier costs, and worker protection expenditures;
- The Program’s eligibility is expanded to include 501(c)(6)s, housing cooperatives, direct marketing organizations, among other types of organizations;
- The PPP provides greater flexibility for seasonal employees;
- Certain existing PPP borrowers can request to modify their First Draw PPP Loan amount; and
- Certain existing PPP borrowers are now eligible to apply for a Second Draw PPP Loan. A borrower is generally eligible for a Second Draw PPP Loan if the borrower:
 - Previously received a First Draw PPP Loan and will or has used the full amount only for authorized uses;
 - Has no more than 300 employees; and
 - Can demonstrate at least a 25% reduction in gross receipts between comparable quarters in 2019 and 2020.

The new guidance released includes:

- [PPP Guidance from SBA Administrator Carranza on Accessing Capital for Minority, Underserved, Veteran, and Women-owned Business Concerns](#);
- [Interim Final Rule on Paycheck Protection Program as Amended by Economic Aid Act](#); and
- [Interim Final Rule on Second Draw PPP Loans](#).

For more information on SBA’s assistance to small businesses, visit [sba.gov/ppp](https://www.sba.gov/ppp) or [treasury.gov/cares](https://www.treasury.gov/cares).