

UPDATE

News of Developments in the Financial Sector and Related Areas

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Paycheck Protection Program Second Round

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President Trump signed into law the Consolidated Appropriations Act, 2021 (the "Act") on December 27, 2020, that expands certain provisions of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") which provides for a second round of lending under the Paycheck Protection Program ("PPP").

Hard-hit businesses that already received PPP loans will be eligible for a second round of funds. The Act defines eligibility for the PPP second round as small businesses that: have no more than 300 employees; used or will use all proceeds of the first PPP loan for permitted purposes; and demonstrate at least a 25% reduction in gross revenues between comparable quarters in 2019 and 2020. The amount of any additional PPP loan that may be obtained is 2½ times average monthly payroll, except that businesses in NAICS Code 72 (Accommodation and Food Services) may obtain an additional PPP loan up to 3½ times average monthly payroll. However, all second round PPP loans are capped at \$2 million per borrower.

The Act includes enhancements to the PPP loan program that include:

- Expansion of the category of forgivable expenses to include certain COVID-related outlays, including costs incurred for personal protective equipment; costs incurred to comply with federal or state health and safety guidelines; costs incurred for software, cloud computing, and other human resources and accounting needs; and costs related to property damage due to public disturbances that took place in 2020 that were not covered by insurance.
- Expenses paid with the proceeds of PPP loans may be deducted for income tax purposes even if the loan is forgiven.
- Borrowers can self-select a covered period of between eight and twenty-four weeks from when the loan was received, rather than having to pick either eight *or* twenty-four weeks, and the covered period can extend through March 31, 2021.
- Borrowers who returned all or part of the PPP loan may reapply for the maximum amount applicable if they have not yet received forgiveness.
- Borrowers that would be eligible for a higher loan amount as a result of interim final rule changes may work with lenders to modify their loan

amounts, even after forgiveness.

- Simplified processes for both applications for and forgiveness of PPP loans under \$150,000.
- Repeal of the requirement that borrowers must deduct the \$10,000 Economic Injury Disaster Loan ("EIDL") advance amount from the forgivable amount of the PPP loan.
- Clarification on certain applications and interpretations of the CARES Act that were disputed, including that publicly traded companies are not eligible for PPP loans.

Details regarding application of the PPP loan rules come in the form of regulations and guidance issued by the Small Business Administration ("SBA"). The Act requires the SBA to adopt regulations implementing the provisions of the Act providing deadlines for guidance on specific provisions.

The Act also includes provisions encouraging lenders to work with troubled borrowers and extends other lending-related relief to borrowers:

- Extends the ability of banks to modify loans of borrowers impacted by COVID-19 without having to classify the loan as "troubled debt restructuring" from December 30, 2020, to January 1, 2022.
- Extends the Debt Relief Program established under the CARES Act and provides for government payment of the principal and interest due on any qualifying SBA loan, including most 7(a), 504, and Microloan loans, for three additional months beginning February 1, 2021, up to \$9,000/month. This is in addition to the six months of payments provided under the CARES

Act, which remains available for most new SBA-guaranteed loans.

- Increases the SBA loan guarantee amount under the 7(a) loan program to 90% until October 1, 2021, plus increases the maximum amount of other SBA loans and provides more flexibility for the SBA to defer payments.

Lenders will still be entitled to fees from the SBA associated with the origination of PPP loans. However, the Act enhances these provisions for lenders with respect to loans up to \$50,000. For those loans, a lender will be entitled to reimbursement of the lesser of 50% of the principal amount of the loan or \$2,500, which is a change from 5% of loans up to \$350,000 under the CARES Act.

The Act provides lenders with a liability safe harbor. Under the Act, a lender may rely on any certification or documentation submitted by a borrower for the initial or second draw PPP loan. No enforcement action may be taken under the Act against the lender, and the lender will not be subject to penalties, for relying on any such certification or documentation if (i) the lender acts in good faith relating to loan origination or forgiveness and (ii) all relevant federal and state statutory and regulatory requirements are satisfied.

The Act will be of benefit to both banks and their borrowers.

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