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New COVID-19 relief legislation provides new funding, expands eligible entities, but narrows some criteria for business support

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Included in the Consolidated Appropriations Act, 2021, along with the approximately $900 billion in coronavirus (COVID-19) relief agreed to by congressional leadership with administration support last night, is some $300 billion in additional Paycheck Protection Program (PPP) funding. Tucked into Division N, Title III, of the consolidated legislation is the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the "Economic Aid Act"). This new chapter in the PPP saga will provide more funding, and in some cases an additional lifeline, to businesses struggling as a result of the coronavirus pandemic. In particular, the new legislation expands permissible expenses for new and existing borrowers, adds new categories of borrowers to permit some previously ineligible entities to seek PPP funding, and provides for a new opportunity to obtain PPP loans. At the same time, however, the legislation narrows eligibility for a few categories of borrowers.

Expanded expense categories

The Economic Aid Act adds four significant categories of additional covered expenses to those already considered valid for purposes of calculating amounts that can be forgiven under a PPP loan: (1) costs for software and cloud computing, (2) costs of damage from vandalism or looting (not covered by insurance or other source) suffered by the borrower as a result of public disturbances during 2020, (3) "supplier costs" (as defined in a new Section 7A(a)(7) of the Small Business Act),[1] and (4) costs for personal protective equipment (PPE) and other investments to make facilities safer during the pandemic. In addition, the legislation clarifies that borrowers can include group benefit insurance (dental, vision, life, disability) as payroll costs in their calculations. Importantly, these expanded expense categories are valid for both existing and new PPP loans.

[1] In essence, this would be "an expenditure" by contract, order, or purchase order for "goods that . . .are essential to the operations of the entity at the time at which the expenditure is made; and" that were ordered "at any time before the covered period with respect to the applicable covered loan; or . . . with respect to perishable goods, . . . at any time during the covered period with respect to the applicable covered loan."

Expanded categories of borrowers: News organizations, 501(c)(6) entities, destination marketing organizations, and housing cooperatives

The Economic Aid Act allows several new categories of entities to become borrowers for purposes of PPP loans. This includes broadcast news stations, newspapers, and public broadcasting services; 501(c)(6) not-for-profit organizations; "destination marketing" entities; and housing cooperatives. There are some restrictions on the news organizations, but unlike the rest of the other new eligible borrowers, they can have up to 500 employees and remain eligible for PPP funds.

Section 501(c)(6) organizations are not-for-profit entities defined by the IRS as "business leagues, chambers of commerce, real estate boards, boards of trade[,] and professional football leagues."[2] The category is actually larger than it might seem because a "business league" can be any "association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. Trade associations and professional associations are business leagues."[3] The Economic Aid Act does, however, exclude "professional sports leagues" and political campaign organizations from this broad category (and thus from qualification for PPP funding) and also excludes any of the remaining organizations if they engaged in lobbying activity that constitutes more than 15% of their activity or produces more than 15% of their receipts. The maximum size of eligible 501(c)(6) organizations is capped at 300 or fewer employees.

"Destination marketing" organizations include both what the name seems to imply—not-for-profit entities (and state or local government entities) that promote tourism—and less obviously a not-for profit entity "that is engaged in, and derives the majority of" its operating budget from revenue "attributable to providing live events." Like eligible 501(c)(6) organizations, the size of such organizations is capped at 300 or fewer employees, and the same limitations on lobbying activity and revenues apply.

Finally, there was substantial doubt whether the Small Business Administration's regulations appearing to exclude housing cooperatives from PPP borrowing properly should have done so during the last round of PPP lending. The Economic Aid Act eliminates this issue for co-ops of 300 or fewer employees.

Second draw loans

Lawmakers sought to focus aid on the "hardest hit" small businesses in the Economic Aid Act. This is why the new law requires most organizations (including not for profits) seeking PPP aid as a result of the Act to have payrolls of 300 or fewer employees. This contrasts with the original PPP program that tracked the more typical Small Business Administration definitions and, generally, capped employment at 500 for eligibility.

In addition, loan applicants under the new program would generally need to demonstrate a loss of revenue of 25% relative to the same quarter for any of the first three quarters of 2020. The original March 2020 CARES Act legislation required borrowers only to certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

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[2] *See, e.g.*, IRS guidance on Business Leagues/501(C)(6) organizations.

[3] *Id.*

The new law does allow borrowers that received funding under the initial PPP loan program to apply again under the new program. However, applicants applying for a new loan must already have used or will have used their first PPP loan before the new loan is received. Only one PPP loan can be outstanding per business (although existing borrowers can request an increase in their original loan amount based on updated regulations).

Under the new PPP program funded through the Economic Aid Act, the loan amount for most businesses will be calculated as a maximum of 2.5 times the average monthly payroll for the 12-month period prior to the loan or calendar year 2019. Businesses in the hard hit Accommodations and Food Services (NAICS 72) industry category can receive loans up to 3.5 times their payroll. But under either calculation, the maximum loan amount under the new program is $2 million, not $10 million.

The same waivers of affiliation rules that applied for the first PPP program will apply to the new program. Also, like the last program, borrowers can seek forgiveness for payroll and other costs at a 60% payroll to 40% other expenses ratio (but now with the new expense categories described above available to them).

Excluded businesses

In addition to the limitations and exclusions noted above, the Economic Aid Act specifically *excludes* from eligibility businesses referenced in 13 C.F.R. § 120.110 which are not otherwise *included* under a different provision. Section 120.110 has been the source of some concern because it could exclude a wide range of businesses, like many real estate based companies, which were clearly eligible under the plain language of the original PPP provisions of the CARES Act. Other businesses excluded from eligibility in the new program are publicly traded companies, lobbying organizations, companies organized in or with significant operations in China or Hong Kong, and companies with board members who are residents of China.

Other provisions

The Economic Aid Act has a number of other more targeted or technical provisions. For example, it expands "hold harmless" protection for lenders participating in the PPP program. It allows borrowers to choose when to end the "covered period" for their loan between 8 and 24 weeks after loan origination (a good change for borrowers). And it clarifies that companies in bankruptcy may obtain a PPP loan (with bankruptcy court approval), and that such loan shall be given administrative expense priority in the bankruptcy.

The new legislation also simplifies the loan forgiveness process. For example, loans of under $150,000 may be forgiven based on a simplified certification.

Conclusion

The items above are some of the important aspects of the new PPP program under the Economic Aid Act. But the consolidated legislation of which it is a part covers some 5,000 pages, with the PPP portion alone taking almost 200 pages of that. And there will soon be additional regulations promulgated by the Small Business Administration. So while Nixon Peabody will continue to be analyzing the new law and monitoring new developments, individual businesses that have questions about how the program may be utilized should contact their Nixon Peabody attorney or:

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