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Renewed Payroll Support Program for air carriers

By Adam Tarosky

On December 28, 2020, the latest—and long-awaited—economic stimulus and pandemic relief bill was signed into law. Among the myriad appropriations in the nearly 6,000-page legislation is $16 billion more in Payroll Support Program (PSP) funding for passenger and cargo air carriers and contractors.

Since the PSP's inception in March 2020, Nixon Peabody has worked extensively with carriers and contractors as they have secured millions of dollars in funding. Perhaps more importantly, we have helped PSP recipients understand and navigate the thicket of compliance and reporting obligations that Congress and the Department of the Treasury have imposed. The renewed PSP (PSP II) is similar to the first iteration, *but* with certain important exceptions.

We summarize in this alert what would-be beneficiaries need to know now, but we emphasize that anytime taxpayer dollars are involved, it is always best to consult with counsel.

GENERAL ELIGIBILITY

If you received PSP funding under the CARES Act:	– You are eligible to receive the same amount that you received the first time "(without taking into account any pro rata reduction) . . . plus an additional 15 percent of such amount." – Within 72 hours of signing a PSP II agreement, you must recall any employee involuntarily furloughed between October 1, 2020, and the date of the PSP II agreement. – You must also provide back pay and benefits to any such employee to cover the period between December 1, 2020, and the date of the PSP II agreement.
If you did not receive PSP funding under the CARES Act, but wish to apply for PSP II funding:	– You are eligible to receive PSP II funding in an amount approximately equal to the total salaries and related fringe benefits that you paid between October 1, 2019, and March 31, 2020. – Within 72 hours of signing a PSP II agreement, you must recall any employee involuntarily furloughed between March 27, 2020, and the date of the PSP II agreement.

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	- You must also provide back pay and benefits to any such employee to cover the period between December 1, 2020, and the date of the PSP II agreement.

Other Terms and Conditions

- For the most part, the same terms and conditions set forth in the CARES Act apply to PSP II funding.
- PSP II recipients must refrain from conducting involuntary furloughs or reducing employee pay rates and benefits until March 31, 2021.
- PSP II recipients may not pay dividends or make certain capital distributions until March 31, 2022 (and if listed on a national security exchange, may not engage in certain equity security transactions until March 31, 2022).
- As with PSP, restrictions on certain officer and employee compensation also apply.

The Application Process

- Like PSP, PSP II will be administered by the Department of the Treasury.
- Last time, Treasury posted an online application form and various guidance and FAQ documents on its website.
- This time, Congress expects Treasury to use "streamlined and expedited procedures," which are to be published by January 4, 2021. (The PSP II application is likely to be web-based and similar to the one used for PSP.)
- To assure prompt receipt of PSP II funding, would-be recipients should apply "[n]ot later than 10 days after the date of enactment" of the PSP II legislation.
- Nixon Peabody recommends that carriers and contractors complete, vet, certify, and submit their applications no later than January 7, 2021.

Compliance

- As with PSP, PSP II funding comes with significant reporting and compliance obligations.
- Of particular note, the new legislation amends the CARES Act to provide that "[t]he Inspector General of the Department of the Treasury shall audit certifications" made by carriers and contractors in their PSP II applications.
- As Nixon Peabody has advised, such certifications often give rise to audit and investigation by the government, including under the False Claims Act (31 U.S.C. §§ 3729–33), and by private whistleblowers, or "relators," who claim to have material, non-public information.
- Great care should be taken in applying for PSP II funding, receiving and managing the money, reporting to Treasury on its use, and remaining compliant with the various other restrictions governing PSP and PSP II grants.

Nixon Peabody has followed every facet of the Payroll Support Program since its inception and has developed a suite of services to assist PSP and PSP II applicants and recipients. In the process, we have developed important relationships with Treasury officials who administer the program and provide ongoing compliance guidance, as well as critical industry groups and numerous general aviation and cargo air carriers and contractors.

For more information about the content of this alert, please contact your Nixon Peabody attorney or:

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