

It's Back: Paycheck Protection Program 2.0

By James M. Kane, James W. Morrissey, Daniel C. McKay, II, Jennifer Durham King, Juan M. Arciniegas and Mark C. Svalina

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On December 27, 2020, as part of a larger government funding bill, President Donald J. Trump signed into law the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the "Act"). The Act, among other things, restarts the Paycheck Protection Program ("PPP"), as administered by the Small Business Administration ("SBA"), provides borrowers with greater flexibility in using PPP loan proceeds and expands the types of expenses eligible for loan forgiveness. The following is a summary of these provisions; however, please note that the SBA is required to issue implementing regulations by January 6, 2020 and we expect further guidance on the Act's provisions at that time.

General

What is the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act? In general, the Act appropriates \$325 billion to the PPP and other programs, including (a) \$284.45 billion committed to providing eligible borrowers with the opportunity to obtain a second round of PPP loan funding ("PPP Second Round"), (b) \$20 billion committed for the Economic Injury Disaster Loan ("EIDL") advance program; (c) \$3.5 billion committed for the Section 7(a) debt relief program; (d) \$2 billion committed for SBA lending enhancements; and (e) \$15 billion committed for grants for shuttered live venues, theaters, museums and zoos.

Existing PPP Loans

Does the Act expand the types of expenses that are eligible for forgiveness? Yes. While borrowers are still required to spend at least 60% of their PPP loan proceeds on eligible "payroll costs" in order to be eligible for full forgiveness, the Act expands the permissible use of PPP loan proceeds for which borrowers may receive forgiveness to the following:

- Additional Group Insurance Expenditures (Payroll Costs) – The Act redefines "payroll costs" to specifically include group insurance payments made on group life, disability, vision and dental insurance.
- Covered Supplier Cost Expenditures – Expenditures made (a) to a supplier of goods for goods that are essential to the borrower's operations at the time the expenditure is made and (b) pursuant to a contract, order or purchase order in effect at any time before the PPP loan is disbursed, provided that for perishable goods such expenditure need not be tied to a contract or purchase order that existed prior to the PPP loan.
- Covered Worker Protection Expenditure – Expenditures that are made to facilitate the adaptation of the business activities of a borrower to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, the Occupational Safety and Health Administration or a state or local government, subsequent to March 1, 2020. These expenditures may include the purchase, maintenance or renovation of drive-through windows, air filtration systems, physical barriers (sneeze guards), expanded indoor or outdoor operating space, onsite or offsite health screening and other expenditures as necessary. Expenditures on real estate and other intangible property are not covered under this category.

- Covered Operations Expenditure – Expenditures for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses.
- Covered Property Damage Cost – Expenditures related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that were not covered by insurance or other compensation.

How does the Act otherwise impact a borrower's ability to obtain full forgiveness?

- Applicable Covered Period – A borrower may elect, at its option, to choose a “covered period” ending at any time between 8-weeks and 24-weeks after loan origination. Regardless of the chosen covered period, each borrower must use the full amount of the PPP loan proceeds on eligible expenses during its chosen covered period to be eligible for full loan forgiveness.
- Simplified Forgiveness Process for PPP Loans up to \$150,000 – The Act provides for a simplified loan forgiveness process for PPP loans of up to \$150,000. Specifically, applicable borrowers will be eligible for loan forgiveness if the borrower signs and submits a one page certification to the lender (a) describing the number of employees the borrower was able to retain because of the PPP loan, the estimated amount spent on eligible payroll costs and total PPP loan value and (b) attesting that it accurately provided the required certification and complied with applicable PPP requirements. The form of the above described certification is expected to be available by January 20, 2021.
- Economic Injury Disaster Loans Advances – Borrowers that received both a PPP loan and an EIDL advance will no longer be required to subtract the EIDL advance from their PPP forgiveness calculation.

If a borrower has already received a forgiveness determination from the SBA, may the borrower refile its loan forgiveness application to take advantage of the expanded provisions governing forgivable uses of PPP loan proceeds?

No. The Act provides that its provisions expanding expenses eligible for loan forgiveness will not apply to a borrower that “received forgiveness before the date of enactment” of the Act. Please note that although the Act is not explicit on this point, it appears, based on the foregoing language of the Act, that if a borrower only received a portion of its requested loan forgiveness prior to enactment of the Act, such borrower would not be able to claim the additional covered expenses described above as forgivable expenses. In addition, the Act does not specifically address whether a borrower that has filed its loan forgiveness application and is awaiting a forgiveness determination by the SBA may re-file its application to take advantage of the expanded provisions concerning expenses eligible for loan forgiveness.

PPP Second Round Loans

What borrowers are eligible to obtain a PPP Second Round loan? In order to be eligible for a PPP Second Round loan, a borrower must be “a business concern, nonprofit organization, housing cooperative, veterans organization, [tribal] business concern, eligible self-employed individual, sole proprietor, independent contractor, or small agricultural cooperative” and be able to demonstrate the following:

- it has no more than 300 employees; and
- it has suffered a 25% or more reduction in gross revenues between comparable quarters in 2019 and 2020.

A borrower may either be a first time PPP borrower or have previously received a PPP loan. Importantly, on the Act's face, it is unclear whether a borrower may avail itself of (a) the SBA's alternative employee-based and revenue-based size standards corresponding to a borrower's primary industry (i.e., the NAICS industry classification) or (b) the SBA's alternative maximum tangible net worth and net income standards for purposes of determining its eligibility under the PPP Second Round.

Does the Act expand PPP Second Round loan eligibility to certain entity types? Yes. New entities that are eligible to participate in the PPP Second Round include certain Section 501(c)(6) nonprofits, including trade organizations and chambers of commerce, and nonprofits and government instrumentalities that engage in destination or tourism marketing (defined as “destination marketing organizations”) with (a) 300 or fewer employees, (b) that do not receive more than 15% of their revenue from lobbying (capped at \$1 million during the most recent tax year prior to February 15, 2020) and, (c) if engaged in lobbying activities, that do not engage in lobbying activities which comprise 15% or more of total business activities. In addition, certain local newspapers, television, and radio stations, which were largely ineligible to participate in the first round of the PPP by their affiliation with other stations, are also eligible to participate.

Are certain entity types ineligible to participate in the PPP Second Round? Yes. The Act renders the below types of persons and entities ineligible to participate in the PPP Second Round.

- Those entity types that are generally prohibited from participating in the SBA's 7(a) lending programs listed at [13 C.F.R. 120.110](#), which includes, among other things, financial businesses primarily engaged in lending;
- Publicly traded companies, provided that businesses that are owned or controlled by publicly traded companies may still be eligible.
- Any business primarily engaged in political or lobbying activities;
- Any business (a) organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong or (b) that has a person who is a resident of the People's Republic of China on its board of directors; and
- Any person required to register as a foreign agent under the Foreign Agents Registration Act of 1938.

Is a borrower that returned all or part of its first round PPP loan eligible to reapply for a PPP Second Round loan?

Yes. The Act provides that a borrower that returned all or part of its first round PPP loan may reapply for the maximum amount applicable under the Act.

Is a borrower that is in bankruptcy eligible for a PPP Second Round loan? Yes, under certain circumstances. Pursuant to the Act, a procedure is established for certain bankruptcies, including Chapter 11 bankruptcies, whereby a debtor in possession, or a trustee of a debtor, may request the Bankruptcy Court's permission to obtain a PPP Second Round loan. The PPP Second Round loan will be “treated as a debt to the extent the loan is not forgiven” and will have super-priority equal to “administrative expenses.”

Are borrowers still required to apply the affiliation rules in determining whether the borrower is eligible to participate in the PPP Second Round? Yes. The Act explicitly provides that the affiliation rules are applicable. However, the Act maintains existing expansions in eligibility for businesses assigned a North American Industry Classification System (“NAICS”) Code 72 (Accommodation and Food Services).

What is the maximum loan amount a borrower is eligible for under the PPP Second Round? Under the PPP Second Round, a borrower will be eligible to obtain a loan amount equal to the lesser of (a) 2.5x its average monthly payroll costs, as measured during either (i) the one year period before the date the PPP Second Round loan is disbursed or (ii) calendar year 2019, or (b) \$2 million. In addition, for a borrower assigned a NAICS Code of 72 (Accommodation and Food Services), the borrower will be eligible to receive a PPP Second Round loan in an amount equal to the lesser of (a) 3.5x its average monthly payroll costs or (b) \$2 million.

Lender Provisions – Existing PPP Loans and PPP Second Round Loans

Did the Act set aside a portion of the appropriated funds for specific types of financial institutions? Yes. Of the approximately \$284.5 billion appropriated to the PPP Second Round, (a) \$15 billion will be allocated for guaranteeing PPP loans made by community banks and credit unions with less than \$10 billion in consolidated assets, and (b) \$15 billion will be allocated for guaranteeing loans made by community development financial institutions and minority depository institutions.

Does the Act provide for greater protections for PPP lenders? Yes. The Act provides that the SBA will hold a PPP lender harmless, provided it has acted in good faith and adhered to federal, state and local laws. These provisions are summarized below.

- **Reliance** – PPP lenders may rely on certifications and documentation submitted by a borrower, provided that (a) the certification and documentation satisfies the applicable PPP laws and regulations and (b) the borrower attests it has accurately provided the certification or documentation to the lender in accordance with applicable PPP laws and regulations.
- **No Enforcement Actions** – The SBA will not take an enforcement action or assess a penalty against a PPP lender, provided the lender (a) has acted in good faith and (b) complied with applicable federal, state and local requirements.

What PPP lenders are eligible to participate in the PPP Second Round? All lenders previously approved to originate PPP loans may participate in the PPP Second Round pursuant to existing PPP requirements.

What are the loan processing fees for PPP Second Round loans? The loan fees that PPP lenders will be entitled to are noted below.

- **\$50,000 or less** – PPP lenders will be entitled to the lesser of either (a) 50% of the PPP loan amount disbursed or (b) \$2,500.
- **More than \$50,000, and up to \$350,000** – PPP lenders will be entitled to 5% of the PPP loan amount disbursed.
- **More than \$350,000** – PPP lenders will be entitled to 3% of the PPP loan amount disbursed.

When are a borrower's agent fees required to be paid? It depends. If a borrower has “knowingly retained an agent,” then applicable agent fees will be paid by the borrower and may not be paid out of the PPP loan proceeds. A lender is only required to pay agent fees where the lender has “directly” contracted with the agent.

PPP Audits

Does the Act provide for greater clarity on how the SBA will audit existing PPP loans and PPP Second Round loans?

While the Act itself does not provide for greater clarity, the Act requires the SBA to issue its forgiveness audit plan, policies and procedures to Congress by February 10, 2021. This guidance should provide greater transparency with respect to how and when the SBA will audit PPP loans.

Section 7(a) Loan Programs

How does the Act impact ordinary Section 7(a) business loans? The Act also provides for certain enhancements to existing Section 7(a) business loans. As a means of ensuring the SBA has adequate tools to address the needs of small businesses during the pandemic, the Act temporarily enhances the terms of the 7(a) loan program by (a) increasing the loan guarantee to 90% until October 1, 2021 and (b) reducing or eliminating borrower and lender fees until September 30, 2021.

Separately, until October 1, 2021, the Act temporarily increases the loan guarantee for Section 7(a) express loans in an amount less than \$350,000 to 75%, while keeping the current 50% guarantee for loans larger than \$350,000.

Shuttered Venue Operators

What types of venue operators are eligible to receive a grant under the Act? In general, a business is eligible to receive a grant under the Act if it is a “live venue operator or promoter, theatrical producer, or live performing arts organization operator, a relevant museum operator, a motion picture theatre operator, or a talent representative” that was both (a) fully operational on February 29, 2020 and (b) that demonstrates a 25% reduction from the gross earned revenue during the same quarter in 2019 (or 2020, as applicable). Certain venue operators are not eligible to participate (e.g., venue operators owned by public companies, offering performances of a prurient sexual nature, receiving more than 10% of gross revenue from federal funding).

We note that, as of the date of the grant, the business must be open or intend to reopen.

What is the amount of grants that may be made to a venue operator? Initial grants may be in an amount equal to 45% of gross earned revenue in 2019. A venue operator may qualify for a second grant equal to 50% of the amount of the first grant, but the total amount of grants may not exceed \$10 million.

In what priority will grants be awarded? For a 14-day period, the SBA will award priority grants to the venue operators that have seen at least a 90% decline in revenue comparing the period between April 1, 2020 and December 31, 2020 against the comparable period in 2019. Immediately thereafter, for another 14-day period, the SBA will then award second priority grants to venue operators that have seen at least a 70% decline in revenue. After both priority grants have been satisfied, all other venue operators may then apply. We note that the Act reserves \$3 billion for venue operators that do not qualify under the priority grant provisions.

Is a grant recipient restricted in how it uses the grant funds? Yes. A recipient must use the grant funds for the following expenses which were incurred between March 1, 2020 and December 31, 2021: payroll costs; and certain rental obligations, utility payments, mortgage obligations, worker protection costs, payments to certain independent contractors and ordinary/necessary expenses.

PPP Tax Considerations

Did the Act render expenses paid with the proceeds of a forgiven PPP loan deductible? Yes. In a reversal of the Department of Treasury's and Internal Revenue Service's prior guidance, the Act provides that no deduction for business expenses funded with the proceeds of a forgiven PPP loan may be denied by reason of the exclusion of the loan forgiveness from gross income.

Did the Act extend payroll tax deferral periods? Yes. In prior guidance, the Internal Revenue Service permitted employers to defer withholding of the employee's share of social security payroll taxes from September 1, 2020 through December 31, 2020 and to withhold and deposit the applicable taxes ratably between January 1, 2021 and April 30, 2021. The Act extends the withholding and depositing deadline to December 31, 2021.

Did the Act extend the Employee Retention Tax Credit? Yes, the Act extends the Employee Retention Tax Credit ("ERTC") through June 30, 2021. In addition, for calendar quarters beginning after December 31, 2020, the ERTC was expanded by (a) increasing the amount of the tax credit from 50% to 70% of "qualified wages" paid to an employee up to \$10,000 per calendar quarter and (b) expanding a business' eligibility by reducing the threshold for the decline in gross receipts to qualify as an "eligible employer" from 50% to 20%. Further, the Act allows employers that obtained PPP loans to claim the ERTC on eligible wages not used to support PPP loan forgiveness.

If you have any questions regarding the topics discussed in this article, please contact **James M. Kane** at +1 (312) 609 7533, **James W. Morrissey** at +1 (312) 609 7717, **Daniel C. McKay, II** at +1 (312) 609 7762, **Jennifer Durham King** at +1 (312) 609 7835, **Juan M. Arciniegas** at +1 (312) 609 7655, **Mark C. Svalina** at +1 (312) 609 7741, or any Vedder Price attorney with whom you have worked.

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