

April 23, 2020

Paycheck Protection Program

Stimulus Legislation To Replenish the Paycheck Protection Program by Providing an Additional \$310 Billion

SUMMARY

Earlier today, the U.S. House of Representatives passed the “Paycheck Protection Program and Health Care Enhancement Act” (the “Act”). The Act amends the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) to increase by \$310 billion the amount authorized for the Small Business Administration (the “SBA”) to commit for loans under the Paycheck Protection Program (the “PPP”). This increase brings the total authorized level to \$659 billion. The initial \$349 billion in funding authorized by the CARES Act was depleted within two weeks of the program’s launch, and many small businesses were reportedly unable to obtain funds. The Act was adopted on Tuesday in the U.S. Senate by a voice vote and in the U.S. House of Representatives today by vote of 388 to 5.

Of the additional \$310 billion of PPP funding, the Act sets aside funding into three buckets:

- \$30 billion for loans made by insured depository institutions and credit unions with consolidated assets of between \$10 billion and \$50 billion;
- \$30 billion for loans made by insured depository institutions and credit unions with consolidated assets of less than \$10 billion, and community financial institutions (*i.e.*, community development financial institutions, minority depository institutions, SBA certified development companies and microloan intermediaries); and
- \$250 billion for loans made by any PPP authorized lender.

In addition to increasing the total PPP funding, the Act allocates an additional \$10 billion for the SBA to provide emergency grants under its Economic Injury Disaster Loan (“EIDL”) program, bringing the total authorized level to \$20 billion, and appropriates an additional \$50 billion for SBA loans under the EIDL program. The Act also authorizes an additional \$75 billion for eligible healthcare providers and \$25 billion to “research, develop, validate, manufacture, purchase, administer, and expand capacity for COVID-19 tests,” and related activities.

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Separately today, the SBA, in consultation with the U.S. Department of the Treasury (the “*Treasury*”), issued an additional response to “Frequently Asked Questions” making it clear that public companies with substantial market value and access to capital markets, as well as other borrowers that have access to other liquidity sources sufficient to support their ongoing operations, likely would not qualify for PPP Loans. The SBA indicated that any such borrower that obtained PPP loans prior to the issuance of this guidance would be deemed to have made the required certification in good faith, notwithstanding this subsequent interpretation, if it repays the loan in full by May 7, 2020.¹

BACKGROUND

In response to the COVID-19 pandemic, Congress has previously adopted three federal legislative responses to provide relief for families and the U.S. economy. The first – the “Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020” – was signed into law on March 6, 2020. It provided \$8.3 billion in emergency funding for federal agencies to respond to the COVID-19 outbreak, including \$20 million for the SBA’s EIDL program to support the SBA’s administration of loan subsidies for small businesses.² The second – the “Families First Coronavirus Response Act” – was signed into law on March 18, 2020 and provides for, among other things, insurance coverage of COVID-19 testing and paid sick and family leave for eligible employees of certain employers.³

The third – the “Coronavirus Aid, Relief, and Economic Security Act” or the “*CARES Act*” – was signed into law on March 27, 2020 and authorized approximately \$2 trillion in relief for businesses and workers affected by the COVID-19 outbreak.⁴ Notably, the CARES Act expanded EIDL program eligibility and established the PPP, a nearly \$350 billion lending program for eligible small businesses administered by the SBA under Section 7(a) of the Small Business Act. For additional information on the PPP, please refer to our previous [memorandum](#).⁵

The SBA launched the PPP on April 3, 2020,⁶ and, within two weeks, the initial \$349 billion in funding authorized by the CARES Act had been depleted. The SBA and the Secretary of the Treasury urged Congress to provide additional funding for the PPP.⁷

In light of the unmet demand for PPP loans, Congress adopted the Act as “Phase 3.5” of the coronavirus response.

KEY PROVISIONS

As noted above, Section 101(a) of the Act increases the amount authorized for the SBA to guarantee loans under the PPP by \$310 billion, to a total authorized level of \$659 billion. Of the newly authorized \$310 billion of PPP funding, Section 101(d) of the Act sets aside \$60 billion for loans to be issued by certain financial institutions.

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Specifically, the Act expressly requires that the SBA, in making loan guarantees after the date of enactment of the Act, guarantee not less than \$30 billion in loans made by insured depository institutions and state and federal credit unions with consolidated assets between \$10 billion and \$50 billion.⁸ Separately, the Act expressly requires that the SBA, in making loan guarantees after the date of enactment of the Act, guarantee not less than \$30 billion in loans made by insured depository institutions and credit unions with less than \$10 billion in consolidated assets and “community financial institutions.” The term “community financial institution” is defined to include (i) community development financial institutions, as defined in section 103 of the Riegle Community Development and Regulatory Improvement Act of 1994, (ii) minority depository institutions, as defined in section 308 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, (iii) development companies certified under title V of the Small Business Investment Act of 1958, and (iv) intermediaries, as defined in section 7(m) of the Small Business Act, for the SBA Microloan Program. The remaining \$250 billion of additional funding may be used by the SBA to guarantee PPP loans issued by any lender authorized to participate in the program.

In addition to the increase in PPP funding, Section 101(b) of the Act increases the amount authorized for the SBA to provide in emergency grants under the EIDL program by \$10 billion, to a total authorized level of \$20 billion. The Act also appropriates an additional \$50 billion for SBA loans under the EIDL program in response to the COVID-19 outbreak. Further, Section 101(c) of the Act provides that agricultural enterprises with 500 or fewer employees may be eligible to receive emergency grants and loans under the EIDL program.

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ENDNOTES

- 1 See Paycheck Protection Program, Frequently Asked Questions (FAQs), Question 31, <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> (as of April 23, 2020).
- 2 Pub. L. No. 116-123.
- 3 Pub. L. No. 116-127. For further information on employer takeaways related to this legislation, see our Client Memorandum, “*Families First Coronavirus Response Act—Employer Takeaways: For Private Employers with Fewer than 500 Employees and Public Agencies, This Emergency Act Expands the Family and Medical Leave Act of 1993 and Enacts an Emergency Paid Sick Leave Act. The Legislation Provides for Certain Payroll Tax Credits to Cover Wages Paid Under These Programs and Certain Qualified Health Plan Expenses*,” dated March 19, 2020 (updated April 22, 2020), available at <https://www.sullcrom.com/families-first-coronavirus-response-act-becomes-law-employer-takeaways>, and our Client Memorandum, “*U.S. Department of Labor Issues Regulations Implementing the Families First Coronavirus Response Act’s Leave Provisions*,” dated April 16, 2020 (updated April 22, 2020), available at <https://www.sullcrom.com/sandc-publication-families-first-coronavirus-response-acts-leave-provisions-implementing-regulations>.
- 4 Pub. L. No. 116-136.
- 5 Sullivan & Cromwell LLP Client Memorandum, “*Coronavirus Aid, Relief, and Economic Security Act*,” dated March 29, 2020, available at <https://www.sullcrom.com/sandc-publication-coronavirus-aid-relief-and-economic-security-act>. For further information on the PPP, the CARES Act and other coronavirus-related updates, see <https://www.sullcrom.com/corona-virus-update>.
- 6 Over the period following April 3, 2020, the SBA, in consultation with Treasury, has issued rules and guidance for lenders and borrowers participating in the PPP in a number of formats, including information sheets for [lenders](#) and [borrowers](#) issued March 31, 2020; an overview of the [program](#) issued March 31, 2020; an overview of [applicable affiliation rules](#) issued April 3, 2020; an [interim final rule](#) issued April 2, 2020 on implementation of the PPP; an [interim final rule](#) issued April 3, 2020 on applicable affiliation requirements; an [interim final rule](#) issued April 14, 2020 on additional eligibility criteria and requirements for certain pledges of PPP loans; responses to a number of [frequently asked questions](#) on the PPP issued on an ongoing basis; application forms for [borrowers](#) and [lenders](#) issued April 2, 2020; and agreements with the SBA for [banks](#) and [nonbanks](#) seeking to participate in the program, issued April 3, 2020 and April 8, 2020, respectively.
- 7 See Press Release, SBA’s Paycheck Protection Program for Small Businesses Affected by the Coronavirus Pandemic Launches (April 3, 2020), available at <https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches>; Statement from Secretary Steven T. Mnuchin & Administrator Jovita Carranza on the Success of the Paycheck Protection Program (April 17, 2020), available at <https://home.treasury.gov/news/press-releases/sm983>. Prior to the lapse in funding, the Board of Governors of the Federal Reserve System had announced, on April 9, 2020, the establishment of a Paycheck Protection Program Lending Facility to provide non-recourse term financing to enhance the ability of eligible financial institutions to originate PPP loans. For additional information on the Paycheck Protection Program Lending Facility, see our Client Memorandum, “*Federal Reserve COVID-19 Response*,” dated April 13, 2020, available at <https://www.sullcrom.com/sandc-publication-federal-reserve-additional-new-and-expanded-lending-facilities>.
- 8 The term “insured depository institutions” is defined by reference to section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813). 15 U.S.C. 636(A)(i). The terms “credit union” means a State credit union or a Federal credit union, as those terms are defined, respectively, in section 101 of the Federal Credit Union Act (12 U.S.C. 1752). 15 U.S.C. 636(a)(36)(A)(xii).

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