

Paycheck Protection Program (PPP) 2.0 – A Summary of the New and Modified Rules

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In late December of 2020, the [Consolidated Appropriations Act, 2021](#) (the “CAA”) was signed into law which contains approximately \$900 billion in additional coronavirus (COVID-19) relief funding programs. Among those programs is an additional \$284 billion in additional aid to small businesses to be allocated via a second round of Paycheck Protection Program (“PPP”) loans. These new loans will be made available both to qualifying new borrowers and borrowers who have previously received a PPP loan.



This second round of PPP (“PPP-2”) loans has been long awaited and will provide much needed funding to struggling businesses. However, in addition to allocation of additional funds, the CAA significantly changes the prior program rules and those looking to get a PPP-2 loan should take note. Below is a summary of the more material changes to the prior loan rules provided for in the CAA.¹

Changes to Maximum Loan Amount Calculation

Under the CAA, the maximum PPP-2 loan amount for any applicant is \$2 million, not \$10 million as under the prior program. That being said, the actual loan amount a particular applicant will be eligible for will (*subject to the \$2 million cap*) be an amount equal to 2.5 times the average total monthly “payroll costs”² of the applicant for either of the following periods (*as selected by the applicant*):³

- the 1-year period before the date on which the loan is made; and
- the 2019 calendar year.

For restaurant, hotel, and other applicants that fall within North American Industry Classification System (NAICS) code, the above multiplier is increased from 2.5 to 3.5.

Expansion of Eligible Borrowers

In addition to the categories of eligible business and non-profit entities under the prior program, the CAA allows for the following new categories of eligible borrowers:

¹ The bulk of the new and modified PPP rules are provided in Division N of the CAA, Title III, entitled the “*Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act.*”

² As defined in the Coronavirus Aid, Relief, and Economic Security Act (the “*CARES Act*”).

³ For seasonal employer applicants, the CAA provides that the applicable calculation period can be any 12-week period between February 15, 2019 and February 15, 2020, as selected by the applicant.

- broadcast news organizations, newspapers, and public broadcasting services that has less than 500 employees;⁴
- 501(c)(6) not-for-profit organizations (*including business leagues, chambers of commerce, real estate boards, and boards of trades, but specifically excluding professional sports leagues or promoters of political activities*): (a) that have less than 300 employees; (b) do not receive more than 15% of its revenues from lobbying activities; (c) whose lobbying activities do not constitute more than 15% of its total activities; and (d) whose costs with respect to its lobbying activities do not exceed more than \$1 million for the most recent tax year ended prior to February 15, 2020;
- nonprofit “destination marketing organizations” (*including state and local tourism boards and certain live event providers*): (a) that have less than 300 employees; (b) do not receive more than 15% of its revenues from lobbying activities; (c) whose lobbying activities do not constitute more than 15% of its total activities; and (d) whose costs with respect to its lobbying activities do not exceed more than \$1 million for the most recent tax year ended prior to February 15, 2020; and
- “housing cooperatives”⁵ that have less than 300 employees.

It should be noted that the CAA also clarifies that an otherwise eligible applicant who is a debtor in a bankruptcy proceeding may obtain a PPP-2 loan if the bankruptcy court approves, and that such PPP-2 loan will be given the priority of an administrative expense claim in such bankruptcy proceeding.

Expansion of Eligible Expenses

Under the prior program rules, in order to get full forgiveness, loan proceeds could only be used for payroll expenses and permitted lease, mortgage interest, and utility payments. The CAA expands the list of eligible expenses to include the following:

- “covered operations expenditures” which means expenses related to any business software or cloud computing service used to facilitate business operations, service, or product delivery (*including software and services related to payroll, processing, billing, accounting, inventory and HR functions*);
- “covered property damage costs” which means expenses related to property damage, vandalism, or looting due to public disturbances that occurred during 2020 which are not covered by insurance;
- “covered supplier costs” which means expenses related to the supply of goods that: (a) are essential to operations of the borrower at the time purchased; and (b) made pursuant to an order or contract which was in effect prior to the applicable covered period (*or, with respect to perishable goods, at any time during the applicable covered period*); and
- “covered worker protection expenditures” which means expenses (*including capital expenditures*) related to adapting the business activities of the borrower to comply with regulations issued by the Department of Health and Human Services (HHS), the Centers for Disease Control (CDC), the Occupational Safety and Health Administration (OSHA) or any other applicable state or local government authority during the period from March 1, 2020 through the date when the COVID-19 national emergency declared by the president expires (*including expenses related to the acquisition of PPE and the purchase, maintenance or renovation capital improvements to conform/expand indoor, or outdoor dining facilities but specifically excluding any such expenses related to residential real property or intangible property*).

The CAA also clarifies that that borrowers can include group benefit insurance expenses (*including expenses related to group life, disability, vision and dental insurance*) as eligible payroll costs. Further, unlike the additional expense categories above which only apply to PPP-2 loans, the inclusion of such group benefit insurance expenses as payroll costs would be applicable to both loans made under the prior program (*to the extent not already forgiven*) and to PPP-2 loans.

It should also be noted that, like under the prior program, in order to be eligible for full forgiveness of a PPP-2 loan the minimum 60% payroll expense to 40% other expense ratio continues to apply.

⁴ Or, where applicable, the larger size standard in number of employees established by the SBA for the NAICS code applicable to the subject business.
⁵ As defined in section 216(b) of the Internal Revenue Code of 1986.

Relief from Certain Certification Requirements

Under the prior program borrowers were required, as part of the application process, to certify that (among other things) “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the [a]pplicant.” This certification, which has been the subject of much confusion, is not required under the CAA in connection with applying for a PPP-2 loan.

Second Draw Loans

The CAA provides that eligible borrowers who received a loan under the prior program would be permitted to apply for a PPP-2 loan (*referred to as a “Second Draw Loan”*). However, such applicants must already have used (*or will have used*) the full amount of their first loan before their PPP-2 loan is received. Only one PPP loan can be outstanding per borrower (*although the CAA provides that existing borrowers can request an increase in their original loan amount based on the updated rules*).

To qualify for a Second Draw Loan, a prospective borrower MUST:

- have less than 300 employees; and
- demonstrate a loss of gross revenues of at least 25% in any quarter of 2020 relative to the same 2019 quarter;⁶

and MUST NOT:

- be engaged in a business of a type referenced in [13 C.F.R. § 120.110²](#) (*including passive real estate businesses and businesses engaged in any illegal activity (which would include cannabis related businesses)*);
- be primarily engaged in political or lobbying activities (*including any entity organized for research related to advocacy of public policy*);
- be a publically traded company;
- be an entity where: (a) 20% or more of the outstanding equity interest of such applicant is owned by an entity which is organized, or which has significant operations, in China or Hong Kong; or (b) a member of the board of such applicant is a resident of China;
- be an entity where 20% or more of the outstanding equity interest of such applicant is owned by the President, the Vice President, the head of an Executive department, a Member of Congress or the spouse of any of the foregoing; or
- have received a “shuttered venue operator” grant.

Second Look for Eligible Existing Loans

Under the CAA, a borrower who has an existing loan under the prior program (*to the extent not already forgiven*) would be eligible to submit a request for an increase in their loan amount if such borrower, for whatever reason (*including borrower’s option*), received a loan of less than the maximum amount they were eligible for.⁸ The maximum amount of the potential increase is the difference between the amount of the loan actually received and the maximum amount such borrower is eligible for. Further, based on the plain reading of the CAA it appears that in calculating the applicable maximum amount with respect to a particular borrower, all PPP rules and other administrative guidance issued to date (*including the CAA, as applicable*)⁹ will be taken into account.

⁶ The CAA provides special rules for the determination of losses with respect to entities that did not exist for some or all of 2019. It should also be noted that for Second Draw Loans of \$150,000 or less, the borrower may submit a certification as to the satisfaction of the above revenue loss requirement.

⁷ Other than in subsections (a) or (k).

⁸ It should be noted that this option is available even if the lender has submitted its “Form 1502” to the SBA for the subject loan.

⁹ It should be noted that the CAA expressly overrides the interim final rule issued by the SBA entitled “Business Loan Program Temporary Changes; Paycheck Protection Program—Loan Increases” (85 Fed. Reg. 29842 (May 19, 2020)).

In addition to the above, the CAA provides that a borrower who received a loan under the prior program and subsequently returned the proceeds (*in whole or in part*) is eligible to re-apply for such loan. The maximum amount such borrower would be eligible to receive would be the difference between the amount of the loan actually kept (*if any*) and the maximum amount such borrower is eligible for. Also, as in the case of an increase, based on the plain reading of the CAA it appears that all PPP rules and other administrative guidance issued to date (*including the CAA, as applicable*) will be taken into account in calculating the applicable maximum amount with respect to a particular borrower.

Additional Provisions

In addition to the above, the CAA also provides for the following. For clarity, each of the following provisions applies both to loans made under the prior program (*to the extent not already forgiven*) and to PPP-2 loans.

- Changes to Forgiveness “Covered Period”

Under the prior program rules the applicable “covered period” was administratively set as either the 8-week or the 24-week period starting from the date the borrower received the loan. The CAA however provides that borrowers are able to select, as their applicable “covered period,” any period of between 8 and 24 weeks following the date the borrower received the loan.

- Simplified Forgiveness Application

The CAA significantly simplifies the forgiveness application process for loans of \$150,000 or less. Such loans will be forgiven if the borrower signs and submits a one-page certification to the lender.

- Reversal of Tax Treatment Related To Expense Deductions

While PPP loan proceeds will not be included as taxable income, the CAA specifically provides that expenses paid with such proceeds that are forgiven will now be tax-deductible. This provision expressly reverses the position previously taken by the Internal Revenue Service¹⁰ and significantly increases the value of forgiven PPP loans to employers.

- Reversal of Effect of EIDL Advances on Loan Forgiveness

The CAA reverses the prior treatment of EIDL advances and provides that they will no longer need to be reduced from the amount eligible for forgiveness.

The above is only a summary of some of the more important aspects of the EAA and the CAA as they relate to the PPP and PPP-2 loans and should not in any way be viewed as inclusive. Further, although not yet released, there will be additional guidance and regulations released by the SBA which may materially affect the interpretation and administration of the above summarized provisions. Accordingly, while we will continue to follow updates on the CAA, the EAA and the PPP-2 program as they arise, businesses that have questions regarding these and related matters should contact Anthony J. Zeoli (azeoli@freeborn.com) or another member of the Freeborn & Peters LLP CARES Act team.

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Tony concentrates his practice in the areas of banking and commercial finance, securities, real estate, and general corporate law. Anthony is also an industry leader in the areas of crowdfunding, blockchain, securities based cryptocurrency/token offerings, peer-to-peer (P2P) lending, and Regulation A+ offerings. He also personally drafted the Illinois intrastate crowdfunding exemption, which was unanimously passed into law by the Illinois House of Representatives.

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