

Where Are We Now? – Paycheck Protection Program Redux

Summary of Key Changes and Expansion of the Paycheck Protection Program under the Consolidated Appropriations Act, 2021



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DISCLAIMER: This publication will be updated regularly to reflect any further changes in the key terms of the PPP resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed the principal criteria of the program and will endeavor to add updates, it is not possible to cover all of the (ever-changing) rules and guidance published by the SBA and Treasury. THIS PUBLICATION IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION.

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WHERE ARE WE NOW? -- PAYCHECK PROTECTION PROGRAM REDUX
Summary of Key Changes and Expansion of the Paycheck Protection Program
under the Consolidated Appropriations Act, 2021

The [Consolidated Appropriations Act, 2021](#) (the “CAA”), which provides \$900 billion in new COVID-19 relief funding, was signed into law on December 27, 2020. Title III of the CAA, the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (the “Hard Hit Act”), renews until March 31, 2021 and expands upon the Paycheck Protection Program (Section 36 of Section 7(a) of the Small Business Act) (the “PPP” and loans made under such program, “PPP Loans”) implemented by the [Coronavirus Aid, Relief, and Economic Security Act](#) (the “CARES Act”). The Hard Hit Act appropriates a total of \$284.45 billion for the PPP and the new Paycheck Protection Program Second Draw Loan Program (the “Second Draw Program” and loans made under such program, “Second Draw Loans”) (Section 37 of Section 7(a) of the Small Business Act), composed of \$147.45 billion of additional funding for the existing PPP and \$137 billion for the Second Draw Program. This additional funding for the existing PPP program brings total appropriations for that program-date to \$806.45 billion.

The Hard Hit Act further allocates portions of that \$284.45 billion appropriation for PPP Loans and Second Draw Loans for specific categories of lenders and borrowers. On the lender side, the Hard Hit Act sets aside a total of \$30 billion for PPP and Second Draw Loans issued by (a) community financial institutions, including community development financial institutions (CDFIs) and minority depository intuitions (MDIs) and (b) by certain small depository institutions (\$15 billion in the case of each of (a) and (b)). On the borrower side, the Hard Hit Act sets aside (x) \$35 billion for first-time borrowers and (y) \$25 billion for second draw PPP Loans for smaller borrowers with 10 or fewer employees, or loans less than \$250,000 in low- or middle-income areas.

In addition to the PPP, the Hard Hit Act appropriates an additional \$20 billion in new funds for the Economic Injury Disaster Loan program.

I. Paycheck Protection Program, Round 3.

The following identifies key elements of the PPP as detailed in the Hard Hit Act. Many of the changes implemented by the Hard Hit Act retroactively amend the terms of the PPP (implemented by the CARES Act, as amended in the months since its enactment¹) other than for PPP Loans that are already forgiven. Consequently, potential borrowers should presume that except where a change is expressly made in the Hard Hit Act, the PPP terms set out in the CARES Act and in the U.S. Small Business Administration (the “SBA”) rules governing 7(a) loans, rules and interim final rules produced specifically for the PPP, “frequently asked questions”, and procedural notices (“Existing PPP Rules”) produced by the SBA remain applicable. Some of the changes to Section 36 in the Hard Hit Act in fact amend the program to codify Existing PPP Rules. For a summary of the Paycheck Protection Program prior to giving effect to the Hard Hit Act, see our standing client alert: [Paycheck Protection Program – Where Are We Now?](#)²

¹ Specifically by Paycheck Protection Program and Health Care Enhancement Act in April 2020, the Protection Program Flexibility Act in June 2020, and the Paycheck Protection Program Extension Act in August 2020.

² This publication is intended to identify just the key changes implemented by the Hard Hit Act for the PPP-experienced reader, and *Where Are We Now* will be updated to reflect these latest changes to the program (and any future changes) as has been the case over the past year.

A. Borrower Eligibility, Permitted Uses and Other Notable Changes to the Existing Paycheck Protection Program.

Program Duration. The PPP is extended and now expires on March 31, 2021.

Who is Eligible? In addition to the businesses, nonprofit organizations, Tribal business concerns, and veterans organizations that satisfy the eligibility size standard (which is generally that it has no more than 500 employees)³ that are already eligible under the CARES Act to receive PPP Loans, the Hard Hit Act adds:

- **Housing Cooperatives** – Cooperative housing corporations as defined in section 216(b) of the Internal Revenue Code of 1986 that employ not more than **300 employees**. In assessing eligibility, the SBA's affiliation rules apply to Housing Cooperatives.
- **Broadcast News Organizations** – (a) news organizations (including FCC-licensed broadcasters) that employ no more than **500 employees** or the applicable NAICS size standard and (b) public college or university broadcasting entities⁴ may receive a PPP Loan if two eligibility requirements are satisfied: (i) it is majority owned or controlled by a business concern that is assigned a NAICS beginning with 511110 (Newspaper Publishers) or 5151 (Radio or Television Broadcasting) or, with respect to a public broadcasting entity, has a trade or business that falls under such a code; and (ii) it makes a good faith certification that loan proceeds will be used to support expenses in producing or distributing locally focused emergency information. Such borrowers are exempt from the SBA's affiliation rules, therefore newspapers, TV and radio broadcasters, and such public broadcasters with multiple locations or stations can receive a PPP Loan on a location-by-location basis subject to the existing PPP rules about maximum PPP Loans per corporate group (see below). Such borrowers are referred to herein as a "News Entities."
- **501(c)(6) Organizations (Generally)** – A 501(c)(6) organizations is eligible to receive a PPP Loan so long as: (i) it is not a professional sports league or organization that has a purpose of promoting or participating in a political campaign or other activity; (ii) such organization does not receive more than 15% of its receipts from lobbying activities; (iii) lobbying activities of the organization do not comprise more than 15% of the total activities of the organization; (iv) the total cost of the organization's lobbying activities did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and (v)

³ Unless otherwise expressly stated, an applicant must (i) qualify as a "small business concern" under the SBA's size standards for the applicable North American Industry Classification System (NAICS) code; (ii) have not more than 500 employees (on a full-time, part-time or other basis); (iii) meet an "alternative size standard" test of having not more than \$15 million in tangible net worth and not more than \$5 million in average net income after Federal income taxes for the two full fiscal years prior to the date of application; or (iv) in the case of businesses in the "accommodation and food services" sector (NAICS code beginning with 72), have not more than 500 employees per physical location. The SBA's affiliation rules apply in calculating employee headcount, other than for accommodation and food service businesses, certain franchises, SBIC portfolio companies, faith-based organizations where the application would "substantially burden" religious exercise, and certain additional limited statutory exceptions.

⁴ Defined as nonprofit organization or organization otherwise subject to section 511(a)(2)(B) of the Internal Revenue Code of 1986 that is a public broadcasting entity. While not expressly stated, it should be presumed that the eligibility size standards generally applicable to PPP borrowers (e.g., a cap of 500 employees) apply to such entities.

the organization does not employ more than **300 employees**. In assessing eligibility, the SBA's affiliation rules apply to such (otherwise eligible) 501(c)(6) organizations. Such borrowers are referred to herein as "Eligible 501(c)(6) Organizations."

- **Destination Marketing Organizations** – "Destination Marketing Organizations," which are organizations described in 501(c) of the Internal Revenue Code and exempt from taxation under 501(a) of the Code, or quasi-governmental entities or State political subdivisions, that are (i) engaged in marketing and promoting communities and facilities to businesses and leisure travelers through assisting the location of meeting and convention sites; providing travel information on area attractions, lodging accommodations, restaurants, and maps; and organizing group tours of local historical, recreational, and cultural attractions or (ii) engaged in, and derive the majority of their operating budget from revenue attributable to providing live events, are eligible to receive PPP Loans if: (w) the organization does not receive more than 15% of its receipts from lobbying activities; (x) lobbying activities of the organization do not comprise more than 15% of the total activities of the organization; (y) the total cost of the organization's lobbying activities did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and (z) the organization does not employ more than **300 employees**. In assessing eligibility, the SBA's affiliation rules apply to Destination Marketing Organizations.
- **Business in Bankruptcy** – The Existing PPP Rules rendered a borrower that is in bankruptcy ineligible to receive a PPP Loan. The Hard Hit Act removes that barrier for certain debtors and provides a pathway for businesses in bankruptcy to receive PPP Loans. (See **PPP Loans and Bankruptcy** below).

New Eligibility Limitations. Existing PPP Rules and terms of the PPP governing a prospective PPP borrower's eligibility are largely unchanged by the Hard Hit Act, including expressly ineligible industries such as hedge funds and private equity firms and other businesses primarily engaged in lending or investment or those engaged in passive investment in real estate. The Hard Hit Act provides that businesses and organizations in the following additional categories are now also expressly ineligible to receive a PPP Loan:

- a business/organization that was not in operation on February 15, 2020 (to be clear, this limitation has retroactive effect to the passage of the CARES Act as set forth in the Hard Hit Act);
- a person or entity that receives a "Save Our Stages" grant under section 24 of the Hard Hit Act;
- beginning on December 27, 2020 (the enactment date), an issuer of publicly traded securities registered on a national exchange (this would not apply to such issuers who have already received a PPP Loan under the CARES Act);⁵ and

⁵ However, the fact that a News Entity's affiliate (including any entity that owns or controls a News Entity) is a publicly-traded news organization does not render the News Entity itself ineligible. There is some suggestion that this carve-out is intended to apply to publicly-traded news organizations, but the text of the Hard Hit Act is unclear.

- as noted above, a 501(c)(6) organization that is a professional sports league or organization that has a purpose of promoting or participant in a political campaign or other activity.

Payroll Costs. The Hard Hit Act expands upon the categories of expenditures that constitute permitted Payroll Costs – a term utilized both in the calculation of a borrower’s loan amount and in defining which costs are permitted uses of a PPP Loan. Payroll Costs now expressly include group life, disability, vision and dental insurance benefits.

The Hard Hit Act reaffirms that there is a \$100,000 annualized cap on the inclusion in Payroll Costs of compensation of an individual employee or income of a sole proprietor or independent contractor. Now such compensation or payments may not exceed \$100,000 on an annualized basis, as prorated for the period during which the compensation/payment is made or the obligation to pay is incurred.

Expansion of Permitted Uses. In addition to the expansion of Payroll Costs (which are permitted PPP Loan uses), the Hard Hit Act expands upon the categories of permitted uses for PPP Loans to include the following (each of which is also a forgiveness eligible use):

- **Covered Operations Expenditures** – Payments made 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 Costs** – Costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 not covered by insurance or other compensation.
- **Covered Supplier Costs** – Expenditures made by an entity to a supplier of goods for the supply of goods that (1) are essential to the operations of the entity at the time at which the expenditure is made; and (2) are made pursuant to a contract, order, or purchase order (i) in effect at any time before the covered period with respect to the applicable covered loan; or (ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan.
- **Covered Worker Protection Expenditures** – Operating or capital expenditures to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government beginning on March 1, 2020 and ending on the date on which the COVID-19 national emergency expires (per executive action by the President). Such expenditures may include purchase, maintenance, or renovation of assets that create or expand:
 - a drive-through window facility;
 - indoor, outdoor, or combined air or air pressure ventilation or filtration system;
 - a physical barrier such as a sneeze guard;
 - an expansion of additional indoor, outdoor, or combined business space;
 - an onsite or offsite health screening capability;

- other assets relating to expenditures made to facilitate the adaptation of a business or entity in compliance with Covered Worker Protection Expenditures requirements as determined by the SBA in consultation with the Secretary of Health and Human Services and the Secretary of Labor; or
- the purchase of materials as described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation, filtering face piece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization, and/or other kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor.

Note, however, that Covered Worker Protection Expenditures do not include residential property or intangible property.

Conversely, the Hard Hat Act expressly prohibits use of PPP Loan proceeds for lobbying activities.⁶

Interest Rate. The Hard Hat Act clarifies that the *maximum* 4.0% interest rate on PPP Loans is to be calculated on a non-compounding, non-adjustable basis. Such interest rate and non-compounding, non-adjustable terms apply to all go-forward PPP Loans and existing PPP Loans if agreed upon by the PPP lender and eligible recipient. Under the Existing PPP Rules, the SBA has provided that the interest rate on PPP Loans is 1.00%. It remains to be seen whether the SBA will preserve that rate going forward.

Calculation of the Maximum Loan Amount. Other than with respect to seasonal employers, the methodology for calculating a potential PPP Loan borrower's maximum loan amount is unchanged by the Hard Hat Act. Borrowers are still generally eligible to receive a loan equal to 2.5x trailing 12-month average total monthly payroll costs (though under SBA guidance, an applicant can either use trailing 12-month amounts or calendar year 2019 amounts) up to a maximum amount of \$10 million and subject to a cap on total PPP Loans for a "single corporate group" (owned, directly or indirectly, by a common parent) of \$20 million.

With respect to seasonal employers, the Hard Hat Act provides that they can calculate their average total monthly payroll costs using any 12-week period between February 15, 2019 and February 16, 2020. Further, the Hard Hat Act redefines a seasonal employer to mean an entity that does not operate for more than seven (7) months in any calendar year, or during the preceding calendar year has gross receipts for any six (6) months of that year that were not more than 33.33% of the gross receipts of the employer for the other six (6) months of that year. The Hard Hat Act also provides for an alternative mechanism to calculate the maximum PPP Loan amount for farmers and ranchers.

Advisor Fees. The Hard Hat Act clarifies that PPP Loan recipients may not pay agents retained to prepare applications for a covered loan with covered loan proceeds and lenders are only permitted to pay

⁶ The lobbying activities prohibited are defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602). "Lobbying activities" means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others."

fees for which the lender directly contracts with the agent. Further, lenders are not required to repay reimbursement for loans unless found guilty of fraud in connection with the covered loan.

B. PPP Loan Forgiveness Expansion.⁷

Forgiveness Eligible Uses. The Hard Hit Act expands upon eligible covered expenses to include (i) covered operations expenditures, (ii) covered property damage costs, (iii) covered supplier costs, and (iv) covered worker protection expenditures (described above). The limitations on forgiveness are unchanged as a PPP borrower must still use at least 60% of the covered loan amount for payroll costs. However, now, the 40% portion may *also* be used to pay for any covered operations expenditure, any covered property damage cost, any covered supplier cost, and any covered worker protection expenditure. As part of a forgiveness application, a borrower will need to supply evidence of payments (e.g., purchase orders, orders, invoices or other documents) of such covered operations expenditures, property damage costs, supplier costs or worker protection expenditures.

Loan Forgiveness Period. As revised in the Hard Hit Act, the covered forgiveness-eligible period begins on the date of the origination of the covered loan and ends on a date selected by the eligible recipient that occurs during the period beginning eight (8) weeks after origination and ending 24 weeks after the origination date. The Hard Hit Act does not alter the Existing PPP rules, which dictate whether certain expenses incurred or paid during a borrower's covered period are forgiveness eligible.

Loan Forgiveness Reductions and Exemptions. The Hard Hit Act generally leaves unchanged the Existing PPP Rules and the terms of the CARES Act with respect to required reductions in the eligible forgiveness amount (e.g., for reductions in FTE employees or employee compensation) and the related "safe harbors" to those reductions. However, the Hard Hit Act alters the time period for a borrower to avail itself of a safe harbor to forgiveness amount reduction. For existing PPP Loans, the outside date for the applicability of such safe harbors (i.e., levels must be restored by such time) remains December 31, 2020. For all PPP Loans after December 27, 2020, the outside date for such safe harbors is the last day of the covered forgiveness period for such PPP Loan. For example, if a borrower utilizing a 24 week covered forgiveness period (first 24 weeks from loan originations) reduces its FTE levels during that covered period, in order to receive "safe harbor," the FTE levels must be reduced by the end of that 24-week period (unless one of the other safe harbors applies as of the end of that 24-week period).

Simplified Forgiveness Application Process for Loans of up to \$150,000. Loans that are not more than **\$150,000** may now be forgiven if the PPP borrower provides a one (1) page certification that describes: (i) the number of employees the eligible recipient was able to retain because of the covered loan, (ii) the estimated amount spent on payroll costs, and (iii) the total loan value. The borrower must attest that the information provided is accurate and that it complied with the requirements under section 7(a)(36). Such a PPP borrower is required to retain records that affirm compliance with such requirements (as to employment records, for the four (4) year period following submission, and for other records, for the three (3) year period following submission). The Hard Hit Act expressly states that such PPP borrowers are not required to submit as part of the forgiveness application process any additional application or documentation to substantiate forgiveness. This new easy application process for loans of not more than \$150,000 has retroactive effect, and applies to existing PPP Loans and PPP Loans made on or after the

⁷ The Hard Hit Act expressly makes the loan forgiveness provisions of the CARES Act (as amended to date, including by the Hard Hit Act) Section 7A of the Small Business Act.

enactment of the Hard Hit Act. The SBA is required to produce such a certification form within 24 days after enactment of the Hard Hit Act.

Forgiveness Audit Plan. The Hard Hit Act requires the SBA to present to Congress by February 10, 2021 (45 days after the December 27th enactment) an audit plan that details (i) policies and procedures that the SBA intends to use for conducting forgiveness reviews and audits of PPP Loans and the metrics that will be used to determine which loans to audit. Within 30 days after the submission of such audit plan (and on a monthly basis thereafter), the SBA must submit to Congress a report on the forgiveness review and audit activities conducted that will include (i) the number of active reviews and audits, (ii) the number of reviews and audits that have been ongoing for more than 60 days, and (iii) any substantial changes made to the audit plan.

Offset of EIDL Advance Against PPP Forgiveness Amount. The CARES Act required that an EIDL advance (\$10,000) be deducted from a PPP Loan borrower's forgiveness amount. The Hard Hit Act removes this requirement, and has retroactive effect to the enactment of the CARES Act.

C. PPP Loans and Bankruptcy.

The Hard Hit Act (Sec. 320) amends section 364 of the Bankruptcy Code, which governs postpetition financing, to permit a Bankruptcy Court (i) to authorize a debtor to obtain a PPP Loan after notice and a hearing, and (ii) like the treatment afforded to a DIP lender, to grant "superpriority" administrative expense status to such claim if the SBA does not otherwise forgive the PPP Loan. Importantly, because Sec. 320 only applies to those debtors authorized to operate in bankruptcy under section 1183, 1184, 1203, 1204, or 1304 of title 11, thereby excluding debtors authorized to operate under section 1106 and 1107 (i.e., chapter 11), it limits PPP Loan eligibility to debtors in subchapter V (small businesses with no more than \$7.5 million of debt), chapter 12 (family farmers or fishermen), and chapter 13 (individuals). While Bankruptcy Code section 1129(a)(9)(A) does not permit a debtor to confirm a plan of reorganization unless it pays all administrative claims in full in cash, the Hard Hit Act further provides that an eligible debtor can confirm a plan of reorganization that implicates an administrative expense claim derived from a PPP Loan without paying the claim in full in cash, so long as the plan proposes to make payments on account of such claim when due under the terms of the PPP Loan. Moreover, the Hard Hit Act also authorizes an eligible debtor to obtain a PPP Loan on such terms even if a contract or loan agreement expressly prohibits the debtor from doing so. When read together, these amendments give enormous flexibility to certain, but not all, businesses seeking to restructure while also availing themselves of PPP benefits.

D. Increased Ability for PPP Borrowers to Request an Increase in Loan Amount.

The Hard Hit Act requires that by Wednesday, January 13, 2021 (within 17 days of enactment) the SBA must produce rules or guidance that enable a PPP Loan borrower that has not yet received forgiveness to increase a loan amount if it has:

- ***Returned a Portion of PPP Loan*** – if such a borrower returned a portion of its PPP Loan amount, such borrower may reapply for a PPP Loan (and distinct from a Second Draw Loan) in an amount equal to the difference between the amount retained and such applicant's maximum loan amount; or

- ***Declined a Portion of PPP Loan*** – if such a borrower declined to accept part of its PPP Loan, such borrower may request that the PPP lender modifies such borrower’s PPP Loan to increase the loan amount to the maximum amount for which such borrower is eligible.

These provisions would apply even if the full loan had already been disbursed and a lender had already issued a Form 1502 with the SBA.

II **Paycheck Protection Program Second Draw Loans.**

Section 7(a) of the Small Business Act is amended to add a new section (37) for the Second Draw Program. The parameters and terms governing the administration, permitted uses, and forgivable uses of the PPP and PPP Loans are largely also applicable to the Second Draw Program and Second Draw Loans. Until the SBA produces rules and guidance specifically governing the Second Draw Program, potential borrowers should presume that the Existing PPP Rules will likewise apply to the Second Draw Program.

Eligibility. Under the Second Draw program, the parameters for borrower eligibility are narrower than the PPP. To be eligible for a Second Draw Loan, an applicant 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 that:

1. ***Prior (Eligible) Borrower*** - (i) has received a PPP Loan and (ii) on or before the expected date on which a Second Draw Loan is disbursed, has used, or will use such PPP Loan;
2. ***Size Test*** – employs not more than **300 employees**⁸; and
3. ***Gross Receipts Revenue Test*** – demonstrates a loss of **not less than 25%** of gross receipts⁹ during Q4 2020 as compared to Q4 2019. In the case of a borrower of a Second Draw Loan of not more than **\$150,000**, this test can be satisfied by submission of a certification that the entity meets the applicable revenue loss requirement and later documentation supporting that the revenue loss standard was in fact met prior to submitting for forgiveness of the borrower’s Second Draw Loan.

The Hard Hit Act makes clear that News Entities, Eligible 501(c)(6) Organizations and Destination Marketing Organizations, which are now eligible for PPP Loans, are also eligible for Second Draw Loans. The SBA’s affiliation rules and waivers of such rules under the PPP are applicable to the Second Draw Program, except now the threshold for eligibility is 300 employees rather than 500 employees. Similarly, the provisions of the PPP that permit location-by-location loans for accommodation and food services businesses and News Entities are likewise applicable to the Second Draw Program (except that each such location is subject to a threshold of 300, rather than 500, employees).

An eligible borrower may only receive one (1) Second Draw Loan.

⁸ As drafted the language implies that the other size tests described in fn. 3 above (and that qualified a borrower for the purposes of obtaining a PPP Loan) would **not** apply.

⁹ Gross Receipts for nonprofit organizations, veterans organizations, News Entities, Eligible 501(c)(6) Organizations and Destination Marketing Organizations means gross receipts as defined in section 6033 of the Internal Revenue Code of 1986.

While this appears to be the case, the new legislation does not specifically address if the general cap of \$20 million of total PPP Loans received by a single corporate group will also take into account Second Draw Loans.

Ineligible Businesses and Organizations. The following businesses or organizations are expressly ineligible to receive Second Draw Loans:

- as with the PPP, businesses that are ineligible to receive SBA loans under 13 C.F.R. 120.110 (other than non-profits and certain religious organizations, which are permitted);
- any business engaged in political or lobbying activities (including one organized for research or for engaging in advocacy in areas such as public policy or political strategy, or one that describes itself as a think tank in any public documents);
- any business or entity that is **20%** or more (including as equity shares or a capital or profit interest in a LLC or partnership), directly or indirectly, owned by an entity created in or organized under the laws of or that has significant operations in the People's Republic of China ("PRC") or the Special Administrative Region of Hong Kong ("HK");
- an entity that retains as a member of the board of directors a person who is a resident of PRC;
- any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938; or
- a person or entity that receives a "Save Our Stages" grant under section 24 of the Hard Hit Act.

Second Draw Loan Amount. Generally, an eligible Second Draw Loan borrower can receive a loan amount equal to the product of (i) average total monthly payroll costs incurred or paid during, at the borrower's election, the trailing 12 month period prior to the date on which the loan is made or calendar year 2019 and (ii) **2.5**, subject to a cap of \$2.0 million. However, there are a few notable variations on the Second Draw Loan amount calculations:

- ***Seasonal Employers*** – as with PPP Loans, seasonal employers can instead calculate their average total monthly payments for payroll costs using any 12-week period between 2/16/2019 and 2/15/2020;
- ***New Entities*** – businesses or organizations that were not in existence during the one (1) year period preceding 2/15/2020¹⁰ calculate their average total monthly payments for payroll costs by (i) determining the sum of the total monthly payments for payroll costs paid or incurred as of the date on which the entity applies for a Second Draw Loan and (ii) dividing that total by the number of months in which such payroll costs were paid or incurred; and
- ***NAICS 72 Entities*** – businesses in the "accommodation and food services" sector (NAICS code beginning with 72) may receive a maximum loan amount equal to the product of (i) average total monthly payroll costs incurred or paid during, at the borrower's election, the trailing 12

¹⁰ Note that there is a misalignment with the PPP, as "new entities" are those that were not in business between 2/15/2019 and 6/30/2019. Currently, the PPP does not provide an express mechanism for calculating loan amounts for businesses that were not in operation between 6/30/2019 and 2/15/2020.

month period prior to the date on which the loan is made or calendar year 2019 and (ii) **3.5**, subject to a cap of \$2 million.

Forgiveness of Second Draw Loans. The forgiveness rules governing PPP Loans (as amended by the Hard Hit Act) are also applicable to Second Draw Loans, including the requirement that 60.0% of the Second Draw Loan amount must be utilized for forgiveness eligible payroll costs.

Guidance to Address Barriers. The SBA is required to produce guidance with 10 days after enactment of the Hard Hit Act that addresses barriers to accessing capital for minority, underserved, veteran and women-owned businesses to ensure equitable access to Second Draw Loans.

III. Lender Matters.

Lender Liability. The limitations on PPP lender liability contained in the CARES Act are now expanded under the Hard Hit Act, including to cover Second Draw Loans. PPP lenders may rely on required certifications or documents submitted by a PPP applicant or PPP borrower pursuant to statutory requirements, regulations and guidance. No enforcement actions may be brought against a PPP lender, and the PPP lender will not be subject to any penalties relating to loan origination or forgiveness of the initial or Second Draw Loan, if the lender acted in good faith in relation to the loan origination or forgiveness, and all other relevant Federal, State, local, and other statutory and regulatory requirements are satisfied.

Lender Fees. PPP Loans made after December 27, 2020 will be subject to an adjusted pay scale for lender processing reimbursement. For PPP Loans made prior to December 27, 2020, PPP lenders were reimbursed: 5% for loans not more than \$350,000; 3% for loans more than \$350,000 and less than \$2,000,000; and 1% for loans not less than \$2,000,000.

For PPP Loans made after the enactment of the Hard Hit Act, lenders will be reimbursed by the SBA as follows:

- for a loan not more than \$50,000, the lesser of 50% of the balance of the financing outstanding at the time of disbursement of the covered loan or \$2,500;
- 5% for loans more than \$50,000 and not more than \$350,000;
- 3% for loans more than \$350,000 and less than \$2,000,000; and
- 1% for loans not less than \$2,000,000.

For Second Draw Loans, lenders will be reimbursed by the SBA as follows:

- for a loan not more than \$50,000, the lesser of 50% of the balance of the financing outstanding at the time of disbursement of the covered loan or \$2,500;
- 5% for loans more than \$50,000 and not more than \$350,000;
- 3% for loans more than \$350,000.

IV. Economic Industry Disaster Loans and Grants.

The Hard Hit Act extends the Economic Injury Disaster Loan (made under section 7(b)(2) of the Small Business Act) program implemented in response to the COVID-19 pandemic under the CARES Act until December 31, 2021, including the (up to) \$10,000 advance grant component of the program on EIDL.

The Hard Hit Act makes a few notable changes to the EIDL program as implemented under the CARES Act (described below), but largely retains the existing terms of such program.

Applicant Review Process. The Hard Hit Act now provides that the SBA may approve an applicant based upon an applicant's credit score or by using alternative methods to determine an applicant's ability to repay. The SBA may also use information from the U.S. Department of the Treasury to confirm that the applicant is eligible to receive such a loan or that the information contained in an application for such a loan is accurate.

Timing for Application Review. The SBA is required to verify, not later than 21 days from an applicant's EIDL request, whether the entity is eligible for a loan under section 7(b)(2) of the Small Business Act, and if verified as eligible, provide the requested EIDL advance (up to the \$10,000 cap). If an applicant is determined to be ineligible, the SBA is required to provide the applicant with notice as to the basis for such determination.

As noted above, the Hard Hit Act removes the offset against a PPP borrower's forgiveness amount for EIDL advances.

V. Tax Matters.

The following summarizes key tax provisions of the CAA relevant to the PPP and related matters, including the employee retention tax credit (the "ERTC"). For additional information on the tax provisions contained in the CAA more broadly please see our *Tax Talks* blog post [Coronavirus: President Trump Signs Consolidated Appropriations Act, 2021; Summary of the Tax Provisions](#).

A. Expenses Related to PPP Loan Forgiveness are Deductible.

Under the CARES Act, the forgiveness of a PPP Loan does not give rise to taxable cancellation of indebted income, or a loss of tax attributes. However, the IRS had held that expenses that gave rise to PPP Loan forgiveness were *not* deductible. The CAA reverses this rule and permits taxpayers whose PPP Loans are forgiven to deduct the expenses relating to their loans to the extent they would otherwise qualify as ordinary and necessary businesses expenses. This rule applies retroactively to the effective date of the CARES Act so that expenses paid using funds from PPP Loans previously issued under the CARES Act are deductible regardless of when the loan was forgiven.

B. Eligibility for the Employee Retention Tax Credit.

The CARES Act provided an eligible employer with a refundable payroll tax credit equal to 50% of certain "qualified wages" (including certain health plan expenses) paid to its employees beginning March 13, 2020 through December 31, 2020 if the employer is engaged in a trade or business in 2020 and the wages are paid (i) while operation of that trade or business is fully or partially suspended due to a governmental order related to COVID-19 (the "suspension test") or (ii) during the period beginning in the first quarter in which gross receipts for that trade or business are less than 50% of gross receipts for the same calendar quarter of 2019 and ending at the end of the first subsequent quarter in which gross receipts are more than 80% for the same calendar quarter of 2019 (the "gross receipts test"). The ERTC can be used to offset all federal payroll taxes, including federal withholding tax, and the employer's and employee's share of social security tax and Medicare, but not the federal unemployment tax.

The CAA makes several changes to the ERTC and extends the availability of the ERTC through July 1, 2021. One such change is that, whereas the CARES Act denied the ERTC to any employer that receives a PPP Loan, and defined the term “employer” expansively, potentially causing acquiring corporations with ERTCs to lose or recapture those tax credits if they acquired a target company that had received a PPP Loan, the CAA instead permits an employer that receives a PPP Loan to receive the ERTC. However, to prevent any double-dipping, an employer must either exclude “qualified wages” that allowed the employer to claim ERTCs from “payroll costs” for purposes of determining its loan forgiveness under the PPP (so as to reduce the amount of loan forgiveness), or exclude “qualified wages” that qualified for PPP Loan forgiveness from “payroll costs” (so as to reduce the ERTC). This change applies retroactively to the effective date of the CARES Act.

Additional changes (each of which is effective for calendar quarters beginning after December 31, 2020) are highlighted in the following chart and summarized below.

	CARES Act	CAA
<i>Limitations on credit</i>	50% of qualified wages; \$5,000 annual cap	70% of qualified wages; \$28,000 annual cap
<i>Eligibility of PPP borrowers</i>	Not eligible	Eligible (with election to exclude qualified wages from either payroll costs for PPP purposes or from calculation of credit). As noted, this applies retroactively to the effective date of CARES Act.
<i>Large employer threshold for additional limitations</i>	100 full-time employees	500 full-time employees
<i>Governmental organizations</i>	Not eligible	Certain governmental instrumentalities are eligible
<i>Availability</i>	Through December 31, 2020	Through July 1, 2021

- **Credit increased to 70% of qualified wages; cap on credit increased to \$28,000** – The CARES Act provided for a refundable payroll tax credit of 50% of certain “qualified wages”, capped at \$5,000/employee (50% of up to \$10,000 of qualified wages for all calendar quarters). The CAA increases the credit cap from \$5,000 for the year to \$7,000 (70% of \$10,000) for any calendar quarter. Accordingly, the CAA will increase the maximum amount of credit available in 2021 for each employee from \$5,000 to \$28,000.
- **Helpful changes to the gross receipts test** – Under the CARES Act, an employer qualified for the ERTC under the gross receipts test for the period beginning with the first calendar quarter for which gross receipts for the employer’s trade or business were less than 50% of gross receipts for the same calendar quarter of 2019 and ending at the end of the first subsequent quarter in which gross receipts were more than 80% for the same calendar quarter of 2019. Under the CAA, in 2021, an employer now qualifies for the period beginning in a calendar quarter in which the employer’s gross receipts are less than 80% (instead of 50%) of gross receipts for the same calendar quarter of 2019 and ending at the end of the first subsequent quarter in which gross receipts are more than 80% for the same calendar quarter of 2019. Furthermore, employers may elect to apply the gross receipts test based on gross receipts from the prior calendar quarter to determine their eligibility for the ERTC. The CAA also makes

the ERTC available in 2021 to employers that were not in existence in 2019 by permitting them to apply the gross receipts test based on 2020 gross receipts.

- **Large employer threshold** – For an employer with more than 100 full-time employees, the CARES Act imposed an additional restriction: the ERTC is available only with respect to wages paid to an employee who is not providing services due to circumstances described in (i) the suspension test or (ii) the gross receipts test. The CAA increases the threshold for this rule in 2021 to 500 full-time employees (so that employers with between 101 and 500 full-time employees would no longer be subject to this restriction).
- **Tax-exempt organizations and governmental entities** –
 - The CAA provides that, for purposes of the ERTC, the term “gross receipts” of a section 501(c) tax-exempt organization means the amounts the organization receives during its annual accounting period from all sources without subtracting any costs or expenses. This change applies retroactively to the effective date of the CARES Act.
 - Under the CARES Act, federal, state or local governments (and their agencies) were not eligible for the ERTC. The CAA permits federal credit unions, public colleges and universities, and public medical and healthcare providers to receive the ERTC if they otherwise satisfy the requirements for the credit. For purposes of determining eligibility, public colleges and universities, and public medical and healthcare providers are treated as being engaged in a trade or business.
- **Health plan expenses** – The CAA includes health plan expenses in the definition of “qualified wages” for purposes of the ERTC, including in cases where an employer furloughs employees but continues to provide health benefits to them. This change applies retroactively to the effective date of the CARES Act.

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, the Consolidated Appropriations Act, 2021, related rules and regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

