

WBA Summary: Banking Provisions in Omnibus Legislation¹

A comprehensive, nearly 5,600-page bill called the “Consolidated Appropriations Act of 2021,” was signed by President Trump on December 27, 2020, which included provisions related to the Paycheck Protection Program and other items of interest to the banking industry. This publication provides a detailed overview of these changes.

The “Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act” contains several changes of importance to bankers, most notably related to the Paycheck Protection Program. The new law sets aside \$284 billion for PPP both for new borrowers and for those borrowers meeting the criteria for a “second draw.” Of this amount, there are specific allocations of \$15 billion for CDFIs and MDIs; and \$15 billion for depository institutions under \$10 billion in assets.

Except as otherwise provided, the new law requires SBA to promulgate rules within 10 days of enactment of this law to implement this section. To meet its obligation, SBA released two interim final rules late yesterday. The first, consolidates twenty-four interim final rules (and important guidance) issued to date governing borrower eligibility, lender eligibility, and PPP application and origination requirements for new PPP loans, as well as provides general rules relating to loan increases and loan forgiveness. The new rule is not intended to substantively alter or affect PPP rules that were not amended by the new law. The second interim final rule implements the key provisions of section 311 of the new law which added a second temporary program to SBA’s 7(a) Loan Program, titled “Paycheck Protection Program Second Draw Loans”.

The application period for this new round of PPP loans will be open until **March 31, 2021**.

Expansion of Permitted Purposes for PPP Covered Loans

The new law adds four more “allowable uses” of PPP covered loans (which are retroactively effective except if a borrower already received forgiveness) to include the following:

- VIII. “Covered operations expenditures” as defined in the new law to mean: a payment 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.
- IX. “Covered property damage costs” as defined in the new law to mean: a cost related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation.
- X. “Covered supplier costs” as defined in the new law to mean: an expenditure made by an entity to a supplier of goods for the supply of goods that (A) are essential to the operations of the entity at the time at which the expenditure is made; and (B) is 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.
- XI. “Covered worker protection expenditures”, as defined in the new law to mean:

¹ Original article written December 22, 2020

As of January 6, 2021

(A) means an operating or a capital expenditure 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, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et 8 seq.) with respect to the Coronavirus Disease 2019 (COVID-19) expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19;

(B) may include—

(i) the purchase, maintenance, or renovation of assets that create or expand—

- (I) a drive-through window facility;
- (II) an indoor, outdoor, or combined air or air pressure ventilation or filtration system;
- (III) a physical barrier such as a sneeze guard;
- (IV) an expansion of additional indoor, outdoor, or combined business space;
- (V) an onsite or offsite health screening capability; or
- (VI) other assets relating to the compliance with the requirements or guidance described in subparagraph (A), as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and

(ii) the purchase of—

- (I) covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation;
- (II) particulate filtering face piece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or
- (III) 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; and

(C) does not include residential real property or intangible property.

These new four categories for which PPP loan monies may be used were also added to other important areas of the existing law related to forgiveness. These changes mean that if a small business owner received or receives a PPP loan, any monies spent in one or more of these new 4 categories will also be considered forgivable expenses under the program. However, these costs along with other allowed “non-payroll costs” are still subject to the 40% test. This means that the PPP loan proceeds must continue to be used 60% for payroll costs and 40% for non-payroll costs.

Expansion of Eligible Entities²

The new law expands the businesses eligible for a PPP loan to include certain 501(c)(6) organizations (excluding those that engage in political or lobbying activities and professional sports leagues); destination marketing organizations; housing cooperatives; newspapers, broadcasters, and radio stations.

² Added on January 6, 2021

As of January 6, 2021

Clarification of and Additional Limitations on Eligibility³

The new law clarifies that if a business or organization was not in operation on February 15, 2020, then it is not eligible for a PPP loan. Furthermore, the new law clarifies that any entity that received a shuttered venue operator grant is also not eligible for a PPP loan. Finally, publicly traded companies are also prohibited from receiving PPP funds.

Simplified PPP Forgiveness Application

The new law provides a simplified forgiveness application for covered loans up to \$150,000, regardless of when made, which SBA is required to create within 24 days after the date of enactment. The form, which may not exceed one page in length, will contain certifications from the borrower, and shall only require the borrower to provide: a description of the number of employees the borrower was able to retain because of the covered loan; the estimated amount of the covered loan amount spent by the borrower on payroll costs; and the total loan value. The form will also contain attestations that the borrower accurately provided the required certification and complied with the requirements in the law.

Finally, the borrower is required to retain records relevant to the form that prove compliance with the requirements. For employment records, the borrower is required to retain those documents for the 4-year period following submission of the forgiveness application. For all other records, the borrower is required to retain those documents for the 3-year period following submission of the form. Borrowers of a covered loan not more than \$150,000 shall not, at the time of applying for forgiveness, be required to submit any application or documentation in addition to the one-page form and information required to substantiate forgiveness. Nonetheless, nothing in the new law would exempt a borrower from having to provide additional documentation if required by the lender, or if required by the SBA pursuant to an audit.

The documentation requirements for covered loans more than \$150,000 did not change.

Specific Group Insurance Payments as Payroll Costs

The new law codifies a previous interpretation by providing that payments for group life, disability, vision, or dental insurance are included in the definition of “payroll costs” in addition to group health care benefits which was enumerated in the original CARES Act. This change is effective retroactively as well.

Collection of Certain Demographic Information

The new law requires that both the loan origination application and the forgiveness application be modified to collect certain optional information related to the owner of the borrower, including the sex, race, ethnicity, and veteran status of the owner.

PPP Second Draw Loans

The new law creates a new structure where certain borrowers that already received a PPP loan are able to request a second loan subject to very specific terms and conditions. Most of the definitions of the PPP program found in the original CARES Act are retained for this purpose with the notable exception of “eligible entity.” This new term is intended to be used instead of borrower or “eligible recipient” wherever those terms are found in the original law.

An “eligible entity” is defined to mean:

³ Added on January 6, 2021

As of January 6, 2021

- I. Any business concern, nonprofit organization, housing cooperative, veterans organization, Tribal business concern, eligible self-employed individual, sole proprietor, independent contractor, or small agricultural cooperative that—

(aa) employs not more than 300 employees; **and**

(bb)(AA) except as provided in subitems (BB), (CC), and (DD), had gross receipts during the first, second, third, or, only with respect to an application submitted on or after January 1, 2021, fourth quarter in 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the same quarter in 2019;

(BB) if the entity was not in business during the first or second quarter of 2019, but was in business during the third and fourth quarter of 2019, had gross receipts during the first, second, third, or, only with respect to an application submitted on or after January 1, 2021, fourth quarter of 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the third or fourth quarter of 2019;

(CC) if the entity was not in business during the first, second, or third quarter of 2019, but was in business during the fourth quarter of 2019, had gross receipts during the first, second, third, or, only with respect to an application submitted on or after January 1, 2021, fourth quarter of 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the fourth quarter of 2019; or

(DD) if the entity was not in business during 2019, but was in operation on February 15, 2020, had gross receipts during the second, third, or, only with respect to an application submitted on or after January 1, 2021, fourth quarter of 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the first quarter of 2020.

The law further describes a narrow set of additional entities that may be eligible and delineates several that are specifically ineligible.

The SBA guarantee will be in place for these covered loans as well under the same terms as lenders were given in the original CARES Act, except as otherwise stated in this section.

The maximum loan amount for these second draw PPP loans varies based on the type of business applying. In general, the maximum loan amount is the lesser of: 2.5 times the average total monthly payment for payroll costs incurred by the eligible entity during the one year period before the date on which the loan is made (or, at the election of the eligible entity, calendar year 2019); **or** \$2,000,000.

For seasonal employers, the maximum loan amount is the lesser of, at the election of the eligible entity, 2.5 times the average total monthly payments for payroll costs incurred by the eligible entity for any 12-week period between February 15, 2019 and February 15, 2020; **or** \$2,000,000.

For new entities that did not exist in the one-year period prior to February 15, 2020, the maximum loan amount is the lesser of:

As of January 6, 2021

- (I) the product obtained by multiplying—
 - (aa) the quotient obtained by dividing—
 - (AA) the sum of the total monthly payments by the eligible entity for payroll costs paid or incurred by the eligible entity as of the date on which the eligible entity applies for the covered loan; by
 - (BB) the number of months in which those payroll costs were paid or incurred; by
 - (bb) 2.5; or
- (II) \$2,000,000.

The maximum amount of a covered loan made to an eligible entity that is assigned a North American Industry Classification System code beginning with 72 (generally, the food service sector) at the time of disbursal is the lesser of: 3.5 times the average total monthly payment for payroll costs incurred by the eligible entity during the 1-year period before the date on which the loan is made (or at the election of the eligible entity, calendar year 2019); or \$2,000,000.

For loans up to \$150,000, an eligible entity may certify that it suffered a 25% revenue loss in any quarter compared to that same quarter in 2019. If an entity certifies to this revenue loss, then on or before submission of a forgiveness application, the entity must submit documentation to substantiate that revenue loss.

Lender's Fees

The lender's fees for all loans are different only for smaller dollar loans than what lenders receive for PPP loans last year. For a loan amount up to \$50,000, lenders will receive the lesser of 50% of the principal loan amount or \$2,500. For loans of more than \$50,000 to \$350,000, lenders will receive 5% of the principal loan amount. For loans greater than \$350,000, lenders will receive 3% of the principal loan amount.

Agent Fees⁴

The new law clarifies, retroactive to the beginning of the CARES Act, that lenders are required to pay agent fees only where there is a direct contract in place with the agent. If a borrower knowingly retains an agent, the borrower pays the agent out of funds that are not from the PPP loan.

PPP Forgiveness and EIDL⁵

The new law repeals the language in the CARES Act that caused borrowers that received both an EIDL advance and a PPP loan to not receive full forgiveness of the PPP loan. This provision is retroactive; however, at this time it is unknown how SBA will handle reimbursing borrowers where forgiveness decisions have already been made. SBA's API vendor updated its software on Dec. 29, 2020 to stop the EIDL deductions from occurring. The agency expects to address retroactive payment of previously deducted EIDL advances in forthcoming guidance.

INCREASED ABILITY FOR PPP BORROWERS TO REQUEST AN INCREASE IN PPP LOAN AMOUNT.⁶

⁴ Added on January 6, 2021

⁵ Updated information added on January 6, 2021

⁶ Added on January 6, 2021

As of January 6, 2021

The new law allows current PPP borrowers that have not applied for forgiveness that may not have accepted the maximum loan amount allowed or that may have returned some portion of the original loan proceeds to request an increase up to the maximum amount originally applicable. SBA has 17 days from the date of enactment of the new law to write rules such that an eligible recipient of an included covered loan that had returned amounts disbursed or did not accept the full amount of the included covered loan for which the eligible recipient was approved—

(1) in the case of an eligible recipient that returned all or part of an included covered loan, the eligible recipient may reapply for a covered loan for an amount equal to the difference between the amount retained and the maximum amount applicable; and

(2) in the case of an eligible recipient that did not accept the full amount of an included covered loan, the eligible recipient may request a modification to increase the amount of the covered loan to the maximum amount applicable, subject to the requirements of section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)).

An eligible recipient of an included covered loan that is eligible for an increased covered loan amount may submit a request for an increase in the included covered loan amount even if— (1) the initial covered loan amount has been fully disbursed; or (2) the lender of the initial covered loan has submitted to SBA a Form 1502 report related to the covered loan

Hold Harmless

The new law provides greater hold harmless clarity for lenders, stating that lenders may rely on all documentation and certifications submitted by a borrower, and is not subject for enforcement action for any falsehoods contained in a borrower's origination or forgiveness application if the lender acts in good faith and follows all relevant laws and regulations.

Other PPP Changes⁷

There are other changes made to the PPP program not described above that are unique to certain situations. For example, a business in bankruptcy is entitled to receive a PPP loan. In addition, the new law provides tax relief for borrowers on forgiven PPP loans by overriding Treasury/IRS guidance that disallowed the deductibility of qualified expenses related to the forgiveness.

The following highlights the provisions in the new law of interest to bankers that are not related to the PPP program.

New Round of Economic Impact Payments

A new round of economic relief payments are being made such that an individual with an income of \$75,000 or less may receive a maximum amount of \$600. The amount of payment will be prorated for individuals with an income greater than \$75,000. An individual with an income greater than \$87,000 will not receive payment unless the individual has dependents. If a couple files a joint tax return, the couple can receive up to \$1,200 for an income threshold of up to \$150,000, with a cutoff from payment at \$174,000. A dependent may also receive \$600. These EIP payments are exempt from garnishment orders.

Extension of Section 1112 Debt Relief⁸

⁷ Updated information added on January 6, 2021

⁸ Added on January 6, 2021

As of January 6, 2021

The new law provides additional money to resume the principal and interest (P&I) payments of new and existing small business loans guaranteed by the SBA under the 7(a), 504 and Microloan programs. SBA is granted authority to continue to make 3 months' worth of P&I payments on existing SBA loan products (not PPP), starting with the first payment due on or after February 1, 2021, capped at \$9,000 per borrower per month. For borrowers considered to be underserved, they will be eligible to receive an additional 5 months of P&I payments (for a total of 8 months), also capped at \$9,000 per borrower per month.

Enhancement of Existing SBA Loan Programs⁹

The new law provides \$2 billion to enhance existing SBA government guarantee loan programs including the 7(a), 504 and Microloan programs in ways that are very attractive for borrowers. Importantly, the new law waives borrower and lender fees within the 7(a) and 504 loan programs. It also increases the 7(a) loan guarantee to 90% through October 1, 2021 after which the guarantee drops to 85% for loans with a balance under \$150,000 and 75% for loans with a balance above \$150,000. The new law extends the \$1 million loan limit for SBA Express Loans until October 1, 2021 after which it drops to \$500,000. For loans under \$350,000, the guarantee is increased to 75% until October 1, 2021, after which it reverts to 50%. The new law also establishes a 504 Express Loan Program, and enhances the Microloan program to supply financial and technical aid to businesses affected by the pandemic.

Continuation of Unemployment Benefits

The relief bill has extended unemployment aid. The new level of payment is \$300 per week for payments beginning after December 26, 2020 until March 14, 2021. As banks in Wisconsin have experienced high levels of unauthorized or fraudulent payments related to unemployment benefits, banks should continue their diligent monitoring and identification of such transactions or activity.

Temporary Relief from CECL Standards

The relief bill has also extended the implementation period of CECL for banks. The new period for implementation of the CECL standard is the earlier of the first fiscal year of the bank that begins after the termination date of the national pandemic emergency, or January 1, 2022. This is an extension from December 31, 2020. Banks are still encouraged to work closely with their accounting resources regarding how best to implement requirements under CECL. Banks' regulators should also be kept apprised of decisions and implementation status.

Extension of Relief from Troubled Debt Restructuring (TDR)

The termination date of the CARES Act provisions which allowed banks greater flexibility when classifying a credit as a TDR has been extended. The original relief was to expire next week on December 31, 2020. The relief bill extends relief afforded by TDRs under the CARES Act until January 1, 2022. The extension will allow banks the necessary flexibility to continue to work with struggling borrowers. Banks are encouraged to continue to work with struggling borrowers, to keep in constant contact with borrowers so as to identify risks, and act accordingly in a timely manner.

Cybersecurity of Financial Systems Resiliency

The relief bill requires the federal banking regulators to report to Congress within 180 days after enactment of the relief bill, and annually thereafter, of the steps the agencies have taken to strengthen cybersecurity within the financial services industry. Banks can expect continued

⁹ Added on January 6, 2021

As of January 6, 2021

heightened regulator scrutiny in examination as the topic of cybersecurity continues to be a focus of bank regulators.

Extension of Eviction Moratorium

The order issued by the Center of Disease and Control Prevention (CDC) entitled, Temporary Halt in Residential Eviction to Prevent the Future Spread of COVID-19, has been extended through January 31, 2021.

Revision to Certain Bankruptcy Processes

The relief bill has made revision to procedures under Titles 11 and 13 of the U.S. Codes. One example, is the creation of a new procedure to allow the bankruptcy court to grant discharge of debt dischargeable to debtor who has not completed payments to the trustee or creditor holding a security interest in a principal residence if the debtor defaults on no more than three monthly payments on or after March 13, 2020, caused by a material, financial hardship related to COVID-19. Other revisions include the creation of a CARES forbearance claim. Only a creditor is authorized to file the supplemental proof of claim. Banks will need to continue to work closely with counsel as it relates to bankruptcy filings and procedures to ensure revisions made by the relief bill are incorporated into bank's bankruptcy strategy.

Additional Relief for Agriculture Sector¹⁰

The relief bill provides \$13 billion in funding to help address COVID-related impacts on farmers, ranchers, grower, and rural communities. Most of this money will go to the USDA for ag producers and processors. The USDA will provide relief including supplemental aid to price trigger crops and flat rate crops of \$20 per acre; extend the term of marketing help loans for any loan commodity to 12 months; and make payments to livestock and poultry producers for losses incurred due to the depopulation of livestock and poultry due to insufficient processing access during the pandemic. In addition, the legislation directs money for the following programs: Specialty Crop Block Grants, Local Agriculture Marketing Programs, Dairy Donation Program, and to State Departments of Agriculture to expand or sustain stress assistance programs.

Grants for Shuttered Venue Operators¹¹

The relief law provides grants for venue operators that were closed as a result of the pandemic. The entities eligible for such grants, subject to certain requirements, include a live venue operator or 24 promoter, theatrical producer, or live performing arts organization operator, a museum operator, a motion picture theatre operator, or a talent representative.

Extension of Tax Credits for FFCRA Leave¹²

The relief bill extends FFCRA tax credits for employers through end of March. As a result, employers who, between January 1, 2021 and March 31, 2021, voluntarily provide paid sick leave and expanded family medical leave will receive tax credits in same fashion had the leave been provided before December 31, 2020. The extension does not change or increase the amount of leave available under FFCRA. If an employee used all available FFCRA leave in 2020, the employee does not receive additional FFCRA despite the extended tax credit period. Also, the qualifying COVID related reasons for when an employee may take leave, the caps on

¹⁰ Added on January 6, 2021

¹¹ Added on January 6, 2021

¹² Added on January 6, 2021

As of January 6, 2021

the amount of pay an employee may be entitled to receive, and all documentation requirements of FFCRA remain the same.