

Pandemic Relief Package – PPP and Federal Reserve Provisions

December 23, 2020

This memo summarizes the amendments to the Federal Reserve's emergency powers, the Paycheck Protection Program (**PPP**), other support for small businesses, and certain other provisions included in the latest COVID-19 relief package (**CARES 2.0**). Passed by Congress on December 21, 2020, CARES 2.0 is a \$900 billion package providing relief for individuals and businesses dealing with the ongoing impacts of the COVID-19 pandemic.

The bill passed the House and Senate late on Monday evening. As of the date of this memo, the President has made public statements criticizing as insufficient the proposed size of stimulus checks to individuals and has not yet signed the bill into law. CARES 2.0 was folded into a bill funding the federal government through the end of the next fiscal year, averting a government shutdown.

Executive Summary

- CARES 2.0 requires the Federal Reserve to terminate certain emergency facilities that were established using CARES Act funding, including the Main Street Lending Program, on January 1, 2021.
- The PPP has been extended to March 31, 2021 and a total of approximately \$280 billion has been appropriated for both additional initial loans for first-time PPP borrowers and second draw PPP loans for smaller and harder hit businesses. Funds have been set aside for smaller and community lenders, smaller borrowers, and borrowers in low- and moderate-income neighborhoods.
- For both existing and new PPP loans, borrowers will be able to spend funds on additional forgivable expenses, including business software, personal protective equipment, and operating or capital expenses to comply with public health directives. There is also a simplified forgiveness application process for loans of less than \$150,000. CARES 2.0 rescinds the provision in the CARES Act that required borrowers to deduct their EIDL Advance grants from their PPP loan forgiveness amounts.
- CARES 2.0 also provides \$15 billion in funding for the SBA to make grants to venue operators, such as museums, event centers, and movie theatres who have faced revenue losses due to the COVID-19 pandemic.

Changes to Federal Reserve Authorities

- *Background on the CARES Act.* In late March, the CARES Act appropriated \$500 billion in economic stabilization funding that included: \$454 billion for the Treasury to provide loans, loan guarantees, and other investments in programs or facilities established by the Federal Reserve; \$29 billion for air carriers; and \$17 billion for businesses critical to national security. Our summary of the CARES Act can be found [here](#). The Federal Reserve has established a number of programs and facilities under Section 13(3) of the Federal Reserve Act (**section 13(3)**), which is the Federal Reserve's emergency lending authority. Some, but not all, of these programs and facilities rely upon a backstop provided by the Treasury using its CARES Act funding.
- *Rescission of any remaining funds.* CARES 2.0 rescinds, immediately upon enactment, \$429 billion of the remaining funds that were appropriated in the CARES Act but are unused. Any remaining funds of the \$500 billion made available under the CARES Act are permanently rescinded on January 9, 2021. Any obligations incurred by Treasury before January 1, 2021 are not affected.
 - Included in the permanent funds that are rescinded on January 9:
 - any obligated but not disbursed loans, loan guarantees, and other investments that the Secretary of the Treasury has committed to make under the CARES Act; and

- any obligated and disbursed loans, loan guarantees, and other investments that the Secretary of the Treasury has made or committed to make under the CARES Act that are not needed to meet commitments, as of January 9, 2021, of the programs and facilities established under section 13(3) of the Federal Reserve Act.
- Excepted from the amount of funds that are permanently rescinded on January 9 are:
 - \$100 million made available for administrative expenses;
 - \$25 million made available for the Special Inspector General for Pandemic Recovery; and
 - \$5 million made available for the Congressional Oversight Commission.
- Thus, in addition to CARES Act funding for Federal Reserve facilities and programs, CARES Act funding allocated to direct loans to passenger air carriers, cargo air carriers and businesses critical to national security will be zeroed out after December 31, 2020.
- **Expiration of Federal Reserve 13(3) Facilities.** After December 31, 2020, the Federal Reserve cannot make any new investments, loans or loan guarantees, or extensions of credit through the subset of its section 13(3) programs and facilities that were established using CARES Act funding. The affected facilities are the Primary Market Corporate Credit Facility, the Secondary Market Corporate Credit Facility, the Main Street Lending Program, the Municipal Liquidity Facility, and the Term Asset-Backed Securities Loan Facility.
 - For any Main Street Lending Program loan submitted to the Program's lender portal on or before December 14, 2020, the Federal Reserve has until January 8, 2021 to purchase a participation interest in such loan.
 - After December 31, 2020, the Federal Reserve cannot modify the terms and conditions of any program or facility established under 13(3) that was established with CARES Act funding, including by authorizing transfer of such funds to a new program or facility established under 13(3). The Secretary of the Treasury also cannot use its Stabilization Fund to make available any funds to any program or facility established under section 13(3) that was established using CARES Act funding, **except** the Term Asset-Backed Securities Loan Facility.
 - The Federal Reserve may, however, modify or restructure loans or extensions of credit made or purchased through these facilities in certain circumstances, including where the modification is necessary to minimize costs to taxpayers that could arise from a default of the loan.
 - CARES 2.0 will not impact facilities that were not established using CARES Act funding, including the Primary Dealer Credit Facility, the Paycheck Protection Program Liquidity Facility, the Commercial Paper Funding Facility, and the Money Market Mutual Fund Liquidity Facility, all of which have been extended until March 31, 2021.
- **Clarification Regarding the Federal Reserve's Section 13(3) Powers.** CARES 2.0 explicitly notes that nothing in the Act modifies or limits the authority of the Federal Reserve under section 13(3) as of the day before the date of the enactment of the CARES Act.

Small Business Support

- The SBA has 10 days after enactment to issue regulations implementing CARES 2.0. In line with SBA practice implementing the PPP, we expect these will be issued as interim final rules on an emergency basis.

Changes to Existing PPP Loans

- The changes discussed in this section apply to all new and existing PPP loans, including forgiveness on existing loans, unless otherwise indicated.
- The PPP has been extended to **March 31, 2021**, and a total of **\$284.45 billion** in total funding has been appropriated for businesses who are applying for new PPP loans, as well as businesses applying for a second PPP loan, described further below.

- Of this total, amounts have been set aside for certain borrowers and lenders for at least 25 days, after which the SBA may adjust the set-asides:
 - **Lenders:** \$15 billion for initial and second draw PPP loans made by CDFIs¹ and minority depository institutions and \$15 billion for initial and second draw PPP loans made by banking organizations with less than \$10 billion in consolidated assets.
 - **Borrowers:** \$35 billion for first-time borrowers; and (i) \$15 billion for first draw loans and (ii) \$25 billion for second draw loans specifically for borrowers with 10 or fewer employees or loans of \$250,000 or less in low- or moderate-income neighborhoods.

Loan Origination and Use of Proceeds

- In addition to payroll, rent, mortgage interest, and utilities, PPP funds may also be used on **additional forgivable expenses**, including expenses for business software, cloud computing services, or payroll processing; costs related to property damage, vandalism, or looting due to public disturbances in 2020; payments to suppliers that are essential to the business' operations; and operating or capital expenses to comply with public health directives, including the installation of ventilation systems or physical barriers and the purchase of personal protective equipment. Existing and new borrowers whose loans have not yet been forgiven as of the date of enactment of CARES 2.0 are eligible to include the above expenses for loan forgiveness.
 - The definition of payroll costs has also been expanded to include payments for the provision of group life, disability, vision, and dental insurance benefits.
- CARES 2.0 **expands eligibility** for PPP loans to:
 - Housing cooperatives, as defined in Section 216(b) of the Internal Revenue Code, that have 300 or fewer employees.
 - Businesses that have not more than 500 employees, or the SBA size standard for the borrower's industry, per physical location and that are majority owned or controlled by newspaper publishers, radio and TV broadcasters, or public broadcasters.
 - These businesses need to make a good faith certification that proceeds of the loan will be used for expenses at the component of the business that produces or distributes local or emergency information.
 - The SBA's affiliation rules and the restriction on loans for publicly traded companies are waived for these businesses.
 - 501(c)(6) organizations, such as trade associations and chambers of commerce, except professional sports leagues and political campaigns, and nonprofits, states, or state instrumentalities that engage in destination or tourism marketing or providing live events (**destination marketing organizations**) which:
 - (i) receive less than 15% of receipts from lobbying activities; (ii) have lobbying activities make up less than 15% of their activities; (iii) have less than \$1 million in lobbying costs for the preceding tax year; and (iv) have fewer than 300 employees.
- CARES 2.0 imports into the PPP the **conflict of interest** provisions from Title IV of the CARES Act,² which generally prohibit funds from being provided to entities, known as "covered entities," in which the President, the Vice President, the head of an Executive Department or a Member of Congress (or their spouse) has a "controlling interest," defined as direct or indirect control of 20%+ by vote or value of any class of equity.

¹ Community Development Financial Institutions are financial institutions focused on lending to low-income and other marginalized individuals and communities.

² Our summary of the CARES Act can be found [here](#).

- For any PPP loans made to such entities prior to enactment of CARES 2.0, the CEO or similar individual must disclose to the SBA that the entity is a covered entity within 30 days of enactment of CARES 2.0, if the borrower has already submitted a forgiveness application, or within 30 days of submitting a forgiveness application.
- No new initial or second draw PPP loans may be made to a covered entity.
- After the enactment of CARES 2.0, [publicly traded companies are ineligible for a PPP loan](#). This constraint does not appear to prohibit companies that are owned or controlled by publicly traded companies from being eligible, though these borrowers may nonetheless be restricted by existing or future SBA guidance.
- The SBA must issue rules or guidance allowing borrowers who returned amounts disbursed under a PPP loan or did not accept the full amount of a PPP loan to [reapply](#) for the difference between the amount they retained and the maximum amount they are eligible for, as long as their loan has not been forgiven as of the date of enactment of CARES 2.0.
 - This provision overrides an SBA interim final rule that prohibited loan increases for most borrowers whose loans were fully disbursed and where the lender had already submitted a Form 1502 report on the loan.
- [Seasonal employers](#) are defined as businesses that do not operate for more than seven months in a calendar year or earned no more than one-third of their receipts in any six months in the prior calendar year.
 - Seasonal employers may calculate their maximum loan amount by using any 12-week period between February 15, 2019 and February 15, 2020. This amends an existing SBA interim rule that permitted seasonal employers to use any 12-week period between May 1, 2019 and September 15, 2019. This does not apply to borrowers who have already received forgiveness before the enactment of CARES 2.0.
- PPP loan proceeds may not be used for [lobbying activities](#) or lobbying expenses.
- CARES 2.0 includes a specific calculation for the maximum loan amount for certain [farmers and ranchers](#) and allows Farm Credit System Institutions to be eligible to make PPP loans.

Loan Forgiveness

- Borrowers may elect a [covered period](#) for loan forgiveness that ends at a point of the borrower's choosing between eight and 24 weeks after origination of the loan. That is, while the covered period for loan forgiveness will still begin on the date the loan was disbursed to the borrower, the borrower can now choose to have it last anywhere from eight to 24 weeks.
- [Loan forgiveness applications for loans up to \\$150,000 have been simplified](#). The simplified application requires the borrower to submit a certification that is one page long or less and only requires the borrower to describe the number of employees the borrower was able to retain because of the PPP loan, the estimated amount of the loan spent on payroll, and the total loan amount. The borrower will also be required to attest that they accurately provided this certification and complied with all program requirements, and retain records proving compliance with program requirements for up to four years.
 - Lenders are nonetheless permitted to require borrowers to submit additional documentation required to comply with relevant statutory or regulatory requirements or in connection with an SBA audit.
 - The SBA may review and audit these loans, and in the case of fraud, ineligibility, or other material noncompliance with applicable requirements, modify the loan amount or the loan forgiveness amount.
- [Clarification of tax treatment on forgiveness of PPP loans](#). CARES 2.0 clarifies that no expenses, deductions, or basis increases shall be denied, and no tax attribute shall be reduced, because the forgiveness of PPP loans (or receipt of EIDL Advance grants) is excluded from gross income.
- Borrowers who received [EIDL Advance](#) grants, also known as EIDGs, are no longer required to deduct the amount of their EIDL Advance from their PPP loan forgiveness amount. The SBA is also required to issue rules to ensure the equal treatment of all borrowers affected by this change, including those who already received loan forgiveness.

- For loans made after enactment of CARES 2.0, the existing [safe harbors](#) on restoring FTE and salaries and wages are extended to the last day of the covered period.
 - The SBA and Treasury Department are also permitted to jointly modify any date in section 7A(d), that is, relating to the FTE and salary reductions and the safe harbors, consistent with the purposes of the PPP.

Bankruptcy Provisions

- CARES 2.0 permits debtors that have filed under chapter 11 of the Bankruptcy Code to obtain PPP loans, subject to authorization from the bankruptcy court after notice and a hearing. Debtors may obtain PPP loans notwithstanding provisions in existing contracts or prior bankruptcy court orders to the contrary.
- These PPP loans are treated as a debt (to the extent not forgiven in accordance with the PPP) and are given superpriority administrative claim status, giving taxpayers and the participating banks providing the PPP loans a superior right to payment over all other unsecured creditors in the bankruptcy process.
 - However, CARES 2.0 also permits debtors to emerge from bankruptcy without necessarily paying PPP loans in full, so long as the debtor emerges under a plan that proposes to make payments on PPP loans in accordance with their original terms. Typically, superpriority administrative claims must be paid in full and in cash in order for a debtor to emerge from bankruptcy.
- The provisions in CARES 2.0 related to the Bankruptcy Code would take effect only upon a written determination by the SBA that certain small business debtors are eligible for PPP loans and would sunset two years from the date of enactment.

Lender Provisions

- The [hold harmless](#) provision in the CARES Act has been expanded to cover loan origination as well as forgiveness for both initial and second draw loans. Lenders may rely on certifications and documents provided by borrowers. Enforcement actions may not be taken against lenders who rely on such certifications and documentation in good faith and comply with all other relevant federal, state, local and other statutory and regulatory requirements applicable to the lender. This language codifies into law similar protections that were available to lenders under the interim final rules promulgated by the SBA implementing the PPP.
- Lenders who make PPP loans after the enactment of CARES 2.0 will receive a [processing fee](#) based on a schedule set out in the Act. The processing fee, for existing and new loans, can only be required to be repaid if the lender is found guilty of an act of fraud in connection with the loan.
 - Borrowers who knowingly retain an agent must pay the agent's fee. The agent's fee cannot be paid out of the loan proceeds. For both existing and new loans, lenders are only required to pay an agent's fee when the lender has directly contracted with the agent.

SBA Oversight

- The SBA is required to submit an [audit plan](#) to the House and Senate small business committees within 45 days detailing how they are going to conduct reviews and audits and the metrics used to determine which loans will be audited. The SBA also has to provide monthly updates on its review and audit activities.
- The SBA is required to comply with any data or information requests from the Comptroller General within 15 days or justify any delay to the House and Senate small business committees. The SBA Administrator and Secretary of the Treasury must also testify before the House and Senate small business committees within 120 days of the enactment of CARES 2.0 and twice each year after that for two years.

PPP Second Draw Loans

- CARES 2.0 also provides funding to allow smaller and harder-hit businesses to receive a second forgivable PPP loan, called a [second draw loan](#).
- Loan and forgiveness terms and borrower and expense eligibility criteria are all the same as initial PPP loans, as amended by the changes outlined above, subject to the following [additional modifications](#):

- *Eligibility* is limited to small businesses with **300 or fewer** employees that have sustained at least a **25 percent** revenue loss in the first, second, or third quarter of 2020³ relative to the same 2019 quarter (subject to special provisions for businesses not in operation in 2019).
 - In addition to the existing SBA ineligible business list, as modified for the PPP, ineligible businesses include entities which have certain ties to Mainland China or Hong Kong (including having directors that are residents of Mainland China), registrants under the Foreign Agents Registration Act, political or lobbying organizations, think tanks, and entities that receive a grant under the Shuttered Venue Operator Grant program.
 - To obtain a second draw loan, a borrower must use the full amount of its first PPP loan. Borrowers may only receive one second draw loan.
 - **Loans up to \$150,000 have simplified requirements.** The borrower may submit a certification attesting that they meet the revenue loss requirements and, on or before the date the borrower submits their loan forgiveness application, they can produce documentation showing the revenue loss. Nonprofit and veterans organizations may utilize gross receipts to calculate their revenue loss standard.
- *Loan terms.* Borrowers may receive loans up to 2.5 times average monthly payroll costs in (i) the one year prior to loan origination or (ii) calendar year 2019, up to **\$2 million**.
 - **Hotels** and **restaurants** may receive loans up to **3.5 times** average monthly payroll costs.
 - **Seasonal employers** may calculate their maximum loan amount based on any 12-week period between February 15, 2019 and February 15, 2020.
 - Businesses not in operation for the year prior to February 15, 2020 may calculate their maximum loan amount based on average monthly payroll costs for the period they were in operation.
- *Lender compensation.* The lender processing fee is determined based on a tiered structure:
 - Loans up to \$50,000: the lesser of (i) 50 percent of the principal amount and (ii) \$2,500.
 - Loans between \$50,000 and \$350,000: five percent.
 - Loans of \$350,000 and above: three percent.
- *Guidance to prioritize underserved communities.* The SBA is directed to issue guidance addressing barriers to capital for underserved communities no later than 10 days after enactment.
- The SBA is directed to allow lenders to use existing program guidance and standard operating procedures for second draw loans to the maximum extent possible.

Grants for Shuttered Venue Operators

- CARES 2.0 also establishes a grant program to assist venue operators.
 - Authorizes **\$15 billion** for the SBA to make grants to eligible live venue operators or promoters, theatrical producers, live performing arts organization operators, museum operators, movie theatre operators, or talent representatives (**venue operators**) who were in business as of February 29, 2020 and sustained a 25 percent revenue loss in the first, second, or third quarter of 2020⁴ relative to the same 2019 quarter.
 - 60-day set-aside of **\$2 billion** for eligible entities that employ not more than 50 full-time employees.

³ Or fourth quarter of 2020 for businesses that submit an application in 2021.

⁴ Or fourth quarter of 2020 for businesses that submit an application in 2021.

- As of the date of receiving the grant, the venue operators must be open or intend to reopen. CARES 2.0 also specifies additional eligibility criteria, including, for example, that there is a defined performance and audience space, and that there is a paid ticket or cover charge to attend performances.
- **Ineligibility.** The following entities are ineligible:
 - Venue operators owned or controlled by publicly traded companies.
 - Venue operators receiving more than 10% of 2019 gross revenue from federal funding, except for funding from the Robert T. Stafford Disaster Relief and Emergency Assistance Act.
 - Venue operators owned or controlled by an entity with more than two of the following characteristics: (i) owning venue operators in more than one country; (ii) owning venue operators in more than 10 states; or (iii) having more than 500 employees.
- The SBA may make an initial grant of 45 percent of 2019 revenue (subject to proration for venue operators not in operation for all of 2019), and a supplemental grant that is equal to 50 percent of the initial grant for harder-hit venue operators as of April 1, 2021.
 - Neither the initial grant nor the combined grant may exceed **\$10 million**.
 - May not also receive a PPP loan.
 - Not more than five affiliates of a venue operator may receive a grant.
 - \$2 million is set aside for 60 days for venue operators with 50 employees or fewer.
- Grants prioritized for hardest hit venue operators:
 - In the initial 14-day period of implementation of the program, grants reserved for venue operators that have faced **90 percent** or greater revenue loss.
 - From day 15 to 28, grants reserved for venue operators that have faced **70 percent** or greater revenue loss.
 - After 28 days, grants shall be awarded to all other eligible entities, and 20% of the funds are reserved for these entities.
- **Eligible expenses.**
 - Payroll costs, rent, utilities, scheduled mortgage payments, interest on preexisting debt, personal protective equipment, and other “ordinary and necessary business expenses.”
- The SBA must conduct increased oversight of entities receiving these grants, such as to require the venue operator to retain records documenting compliance with grant requirements.

Additional Provisions

- **CECL:** CARES 2.0 delays required compliance for certain depository institutions, bank holding companies, or any affiliate thereof with CECL accounting standards until January 1, 2022. This extends the time by which banking organizations are required to comply with the CECL standard, but does not require them to delay compliance. Larger banks have already begun to implement the CECL standard with 90 of the largest U.S. banks meeting the CECL standard by the second quarter of 2020.
- **Troubled Debt Restructuring:** CARES 2.0 extends the Troubled Debt Restructuring relief provided in the CARES Act to January 1, 2022.

Changes to Tax Law

- **Payment to individuals.** CARES 2.0 provides a payment of up to \$600 to each eligible taxpayer (\$1,200 in the case of eligible individuals filing a joint return) and for each qualifying child dependent. The payments are based on the taxpayer’s 2019 income and begin to phase out at an income of \$75,000 for single filers and \$150,000 for married taxpayers filing jointly.

- **Extension of repayment for deferred payroll taxes.** The IRS had previously allowed employers to defer withholding and depositing certain payroll taxes otherwise due between September 1, 2020 and December 31, 2020 and to withhold and deposit the taxes between January 1, 2021 and April 30, 2021. CARES 2.0 extends the April 30, 2021 deadline to December 31, 2021.
- **Deductibility of business meals.** CARES 2.0 temporarily allows the full deduction (rather than the current 50% deduction) of business meal expenses incurred in 2021 or 2022 for food or beverages provided by a restaurant.
- **Increase in IRS enforcement budget.** CARES 2.0 increases IRS funding by \$409 million, with a total of \$11.92 billion appropriated to the IRS for fiscal year 2021. IRS's enforcement budget saw an increase of \$203 million to \$5.2 billion.
- **Extension of carbon sequestration, wind and solar credits.** CARES 2.0 extends and creates certain tax credits for clean energy, such as the credits for carbon oxide sequestration, onshore and offshore wind facilities, and solar facilities.

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