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Hotels Give the New Paycheck Protection Program 2 ½ Stars

December 27, 2020 saw the passage of the Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act (the “Act”). The Act provides the opportunity for new borrowers to access PPP loans (“First Draw PPP Loans”) and for existing PPP borrowers to obtain a second round of PPP funds (“Second Draw PPP Loans”). This was welcome news to those in the hospitality industry, which continues to be disproportionately affected by the ongoing COVID-19 pandemic. However, there are changes to the PPP that may not give hotels the relief they need to stay open until business returns.

New Guidance for First Draw PPP Loans

For those in the hospitality industry who did not obtain a PPP in 2020, this latest round of funding may be an attractive option. Generally, the new First Draw PPP Loans’s requirements continue to apply unless specifically addressed by the Act or the accompanying guidance. These loans continue to provide for a maximum loan amount of up to 2.5 times *the monthly payroll of the PPP borrower*, capped at \$10 million.^[1]

Despite intensive lobbying by the American Hotel and Lodging Association (AHLA) and other hospitality interest groups, there have been no changes or clarifications to the program to address the unusual employment structure of the hotel industry, where most property owners have no direct employees but bear the ultimate cost of employees hired by the management company to work at the hotel. While it was common practice for hotel owners to apply for PPP loans on the basis of these employees, or to apply for PPP loans through an upper-tier affiliate of the hotel owner, there is still no direct guidance indicating that this is acceptable.

The Act also does not change the \$20 million limit for any single corporate group, which may seem like a new requirement to a lot of borrowers. The cap on the loan amount for a single corporate group was made in late May 2020 so it did not apply to the majority of

borrowers who received PPP loans in April or early May. A “single corporate group” is defined as any applicants who are majority-owned, directly or indirectly by a common parent. This limitation applies regardless of the waiver of the SBA’s affiliation rules, and therefore applies to any PPP loans (or any portion thereof) disbursed after the guidance was issued.

Changes Made to all PPP Loans

The changes made to all PPP loans were largely beneficial to applicants. For example, borrowers may now choose a covered period (in which to pay expenses eligible for forgiveness) of anywhere between eight and 24 weeks beginning when the loan is disbursed, rather than being limited to choosing one of the two extremes. In addition, PPP borrowers may now choose to use either 2019 or 2020 as their payroll basis, rather than being required to use only 2020 numbers, again providing flexibility. The scope of permitted uses of loan proceeds was also expanded to include certain operation expenses, uninsured property damage, costs of certain supplies and the cost of certain covered worker protections aimed at mitigating risks related to COVID-19.[\[2\]](#)

The Act also limited who is eligible to obtain a PPP loan. For example, public companies are ineligible for PPP loans. While the SBA had previously provided guidance that it would be difficult for public companies to make the “necessity” certification required to obtain a PPP loan, based on their access to the capital markets and other potential sources of funding, the inclusion of public companies as strictly ineligible borrowers is new. This is unfortunate for publicly traded hospitality companies who wish to apply for PPP loans, since access to the capital markets remains largely theoretical in early 2021. Note the Act does not expressly address the eligibility of subsidiaries or affiliates of publicly traded companies. One last limitation to keep in mind is that the PPP borrower may not be “permanently” closed, although temporary closures are not prohibitive.

Second Draw PPP Loan Program

The Second Draw PPP Loan Program is available to a narrower group of potential borrowers, although many in the hospitality industry will still qualify. First, a Second Draw PPP Loan is available only to borrowers who took a First Draw PPP Loan, and who have used or will use the full amount of the First Draw PPP Loan for eligible expenses before the Second Draw PPP Loan is disbursed. Second, only those companies with fewer than 300 employees (rather than 500 employees for a First Draw PPP Loan) are eligible. The waiver of affiliation rules continues to apply to hospitality companies (having a NAICS code beginning with 72), meaning the requirement for these businesses is that they have less than 300 employees at any one location, without having to count the number of employees of its affiliates. Lastly, the potential borrower must also be able to verify that they suffered a 25% reduction in “gross receipts”^[3] for either (1) any one quarter in 2020 compared to the same quarter in 2019 or (2) for 2020 as a whole compared to 2019.^[4] Because questions remain regarding who the correct borrower should be in the hotel industry, borrowers interested in the Second Draw PPP Loan should consider using the same borrowing entity as the First Draw PPP Loan to be able to show that the borrower previously received a PPP loan and that all funds have been or will be used for authorized uses.

Fortunately for those that meet these qualifications, Congress has acknowledged the disproportionate impact of COVID-19 on the hospitality industry by providing for increased loan proceeds for businesses in the accommodation and food services industry (those having a NAICS code beginning with 72). These companies may receive a loan up to 3.5x average monthly payroll costs, rather than 2.5x average monthly payroll costs for other businesses. It may also be helpful for many hospitality companies that, the borrower may choose to measure average monthly payroll during (i) the one-year period before the date the Second Draw PPP Loan is disbursed, (ii) calendar year 2020 or (iii) calendar year 2019, a distinction which will be critical to many hospitality businesses that had greatly reduced payroll costs for 2020 as compared to 2019. However, the Second Draw PPP Loan amount caps of \$2 million for any single loan and \$4 million total for any single corporate group that applies to all Second Draw PPP Loans will still apply to hospitality businesses.

These limits may be especially problematic for larger hotel groups that used an upper-tier affiliate to apply for the PPP loan in the first round, as that upper-tier entity's Second Draw PPP Loan would be limited to \$2 million.

One last item to keep in mind is that businesses applying for a Second Draw PPP Loan must re-certify that the loan is necessary for the business's continued operation. While this is the same certification required in connection with First Draw PPP Loans and the same safe harbor for businesses who receive less than \$2 million still applies, at least to First Draw PPP Loans, businesses looking to take a Second Draw PPP Loan will need to do a current analysis, as past eligibility is not a guaranty that the requirements continue to be met.

Our SBA Lending Team and Hospitality Industry Teams are available to answer any questions. For more information, please contact [Josh Brock](#), [Geoff White](#), or [Becky Moore](#).

[1] A discussion of those earlier requirements, and the particular challenges they pose for hotels, can be found in our earlier article [Hotels and COVID-19](#).

[2] A general discussion of the updated PPP Loan Programs can be found in our article [New and "Improved" Paycheck Protection Program \(PPP\) Reopens: Second Round Loans, Eligibility and Forgiveness Considerations](#).

[3] Note that the definition of "gross receipts" is the same definition that the SBA uses to determine a company's size (see [13 CFR 121.104](#)), which generally includes all revenue from any source plus interest, dividends, rents, royalties, fees or commissions, less returns and allowances, with specific exclusions for taxes collected for and remitted to a taxing authority (for example, most sales or occupancy taxes), proceeds between affiliates, and amounts collected for another by a travel agent, real estate agent or conference management service provider. See our article [New and "Improved" Paycheck Protection Program \(PPP\) Reopens: Second Round Loans, Eligibility and Forgiveness Considerations](#) for more details.

[4] Typically, “gross receipts” as defined by the SBA would include the gross receipts of all affiliated businesses, however the SBA recently came out with guidance that applicants falling under a waiver to the affiliation rules do not need to count gross receipts of their affiliates.

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