

Money? What Money? Is It Time to Give Your Money Back? Updates to the PPP and the FAQ's

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Certain provisions of the coronavirus/COVID-19 economic stimulus legislation are subject to the issuance of government regulations and other government action; thus, certain details regarding the legislation may be clarified or added.

On Tuesday, April 21, 2020, the U.S. Senate passed the **Paycheck Protection Program and Health Care Enhancement Act**¹ (the "Enhancement Act"). The Enhancement Act amends the **CARES Act**². The CARES Act has been summarized in a prior **Client Alert**, and its implications for the startup and venture community were published in a **Forbes article** penned by Ed Zimmerman.³

Although the primary focus of this Client Alert is to summarize the key takeaways from the Enhancement Act (which as of April 23, 2020, at noon, awaits House and presidential approval), at the outset we would like to note that the U.S. Department of the Treasury has updated its Paycheck Protection Program (PPP) **FAQ sheet** and has clarified, via Question 31, whether businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan. The FAQ sheet states:

In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by

the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.⁴

¹ See Paycheck Protection Program and Health Care Enhancement Act, 116th Cong. (as passed by Senate, April 21, 2020).

² See Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, 116th Cong. (2020) (enacted).

³ See Ed Zimmerman, *Wait What?! Treasury Clarifies 'Affiliation' Rules For SBA Section 7(a) Loans (& Startups Are...)*, Forbes (April 4, 2020, 9:52 PM).

⁴ U.S. Department of Treasury, Paycheck Protection Program Loans, Frequently Asked Questions (FAQs), <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> (last visited April 23, 2020).

The remainder of this Client Alert summarizes the key takeaways from the Enhancement Act. The CARES Act established the PPP, which, among other things, provided small-business loans that could potentially be forgiven (for more information on forgiveness, see our prior [Client Alert](#)). The PPP was initially funded with \$349 billion, which was exhausted within approximately two weeks.⁵ Section 101⁶ of the Enhancement Act amends the requirements for the PPP, economic injury disaster loans (EIDLs), and emergency grants, as follows:

1. Increases the authorized amount in the PPP by \$310 billion (from \$349 billion to \$659 billion)
2. Increases the availability of funds for EIDL emergency grants by \$10 billion (from \$10 billion to \$20 billion)⁷
3. Adds \$50 billion in funds to the disaster loan programs account for the cost of direct loans authorized by Section 7(b) of the Small Business Act (i.e., an EIDL)
4. Creates a \$60 billion set-aside (taken from the \$310 billion described in No. 1 above) for smaller lending facilities such as insured depository institutions, credit unions, and community financial institutions⁸
5. Adds \$2.1 billion for SBA's administrative expenses

In addition to small-business funding, the deal includes \$75 billion for hospitals and medical facilities to fight the coronavirus and \$25 billion for COVID-19 testing. The \$25 billion is for necessary expenses to research, develop, validate, manufacture, purchase, administer, and expand capacity for COVID-19 tests. Almost half of the funding for COVID-19 testing is allocated to states, localities, territories, and tribes, while the rest is apportioned among the Centers for Disease Control and Prevention, the National Institutes of Health, the Biomedical Advanced Research and Development Authority, the Food and Drug Administration, and community health centers and rural health clinics. Up to \$1 billion may be used to cover costs of testing for the uninsured.

The House is expected to vote on the legislation on Thursday, April 23.

The Enhancement Act increases the PPP funding pool but makes no other material changes to the program. If you were in the act of applying when funds ran out, neither you nor your lender needs to learn any new rules. If you already applied for a PPP loan but have not yet been approved or received funding, consult with your lending institution to determine next steps. If you have not yet applied for a PPP loan, you should immediately determine your eligibility and apply as soon as the second round of funds under the Enhancement Act becomes available.

To see our prior alerts and other material related to the pandemic, please visit the [Coronavirus/COVID-19: Facts, Insights & Resources](#) page of our website by clicking [here](#).

⁵ See U.S. Small Business Administration, https://connect.sba.gov/?mod=article_inline (which, as of April 16, 2020, indicated that the SBA was no longer accepting new borrower or lender applications for the PPP) (last visited April 22, 2020).

⁶ See Paycheck Protection Program and Health Care Enhancement Act, 116th Cong., § 101 (as passed by Senate, April 21, 2020).

⁷ The Enhancement Act amends, among other things, Section 1110(a)(2) of the CARES Act so that an agricultural enterprise (as defined in section 18(b) of the Small Business Act (18 U.S.C. 647(b))) with not more than 500 employees is now eligible for an EIDL.

⁸ For clarity, "community financial institution" is defined as minority depository institutions, certified development companies, microloan intermediaries, and state or federal credit unions. Under the Enhancement Act, the SBA Administrator will guarantee \$30 billion in loans made by insured depository institutions and credit unions that have assets between \$10 billion and \$50 billion; the SBA Administrator will guarantee \$30 billion in loans made by community financial institutions, small insured depository institutions, and credit unions with consolidated assets of less than \$10 billion.

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