

New Federal COVID-19 Small Business Relief: More CARES Act Funding and Updated Eligibility Guidance

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Overview

On April 23, 2020, Congress passed the [Paycheck Protection Program and Health Care Enhancement Act \(the “Act”\)](#), which provides approximately \$484 billion in relief in addition to the Coronavirus Aid, Relief and Economic Security Act (the “CARES Act”) enacted on March 27, 2020. The Act authorizes additional funds for the Paycheck Protection Program (the “PPP”) and economic injury disaster loans program (“EIDL”) available through the Small Business Administration (the “SBA”). As discussed in our [main alert](#), the PPP program provides forgivable loans up to \$10 million to small businesses, facilitated through lenders enrolled in the SBA’s 7(a) loan program, and the EIDL program provides loans up to \$2 million, with a nonrefundable application advance of up to \$10,000, for small businesses that have suffered substantial economic injury from COVID-19. In addition, on the same day the SBA released guidance suggesting it will be difficult for public companies to use the PPP program.

Key Points

- 1. Increase in PPP Commitments.** The Act increases the PPP program by \$310 billion, from \$349 billion to \$659 billion. \$60 billion of the increased PPP amount will be set aside for smaller lending institutions.
- 2. Increase in EIDL Commitments.** The Act increases the EIDL program by \$10 billion, from \$10 billion to \$20 billion.
- 3. No Statutory Changes to PPP and EIDL Requirements; SBA Guidance.** Other than the additional appropriations mentioned above, the substance of the requirements for the PPP and EIDL loans remain unchanged. In particular, the Act does not modify existing standards regarding (a) affiliation analysis for meeting the small business size standards or (b) an applicant’s demonstrated need for the funds. However, in a Frequently Asked Questions release, the SBA for the first time stated that other sources of liquidity would be taken into account in determining an applicant’s need for a paycheck protection loan and suggested that most public companies will be unable to demonstrate the required need:

“31. Question: Do businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?”

Answer: . . . 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. . . 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. *Increase in SBA's Other Disaster Loan Programs.* An additional \$50 billion was authorized for other SBA's disaster loan programs, including the [Home and Personal Property Loans](#), [Business Physical Disaster Loans](#) and [Military Reservist Economic Injury Loans](#). Additional information on the SBA's entire disaster loan programs can be found on the [>SBA's website](#).

The good news for small businesses is that funding for both the PPP and EIDL programs has been substantially renewed. For public companies and even for private companies with venture capital investors, however, recent SBA guidance suggests that these loans will become more difficult to obtain absent a showing of unusual need and the inability to access additional liquidity from existing capital sources. Foley Hoag will continue to provide client alerts as needed in the coming days and weeks, including to address additional regulations that are expected to be issued by the SBA with regard to the PPP and EIDL programs.

For more information on these topics, please contact [Jennifer Audeh](#), [Robert Sawyer](#), [Malcolm Henderson](#), [Thomas Draper](#) or [Heekyoung Lee](#).

Foley Hoag has formed a firm-wide, multi-disciplinary [task force](#) dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Page](#) or contact your Foley Hoag attorney.

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