

SUPPLEMENTAL STIMULUS:

HIGHLIGHTS OF THE RECENT AID BILL
AND IMPLEMENTING REGULATIONS

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. PAYCHECK PROTECTION PROGRAM	2
A. Eligibility	3
B. Loan Forgiveness	6
C. Audit Process	7
D. Tax Treatment	8
E. Support for Underserved Communities	9
II. FEDERAL RESERVE LENDING PROGRAMS	10
A. CARES Act Provisions	10
B. The Supplemental Stimulus Act's Changes	12
C. Oversight	12
III. AVIATION INDUSTRY RELIEF	13
A. Direct Payment of Payroll Support	14
B. Other Airline-Related Provisions	14

EXECUTIVE SUMMARY

On December 21, 2020, Congress passed the Consolidated Appropriations Act, 2021, a massive legislative package that provided \$1.4 trillion to fund the federal government and \$900 billion in long-delayed stimulus to respond to the continuing effects of the coronavirus pandemic (the Supplemental Stimulus Act).¹ After initially signaling that he might veto the law, President Trump eventually signed the bill into law on December 27, 2020. After last March's stimulus legislation (the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)), the Supplemental Stimulus Act marks the second-largest economic stimulus bill in American history.

The sweeping law takes up and extends many, but not all, of the same programs first implemented in last year's CARES Act. Regarding small businesses, the Supplemental Stimulus Act provides \$284 billion in new funding for the popular Paycheck Protection Program (PPP), administered by the Small Business Administration (SBA), and makes various changes to the program that will affect new and existing PPP borrowers. Most notably, the Supplemental Stimulus Act, and the follow-up implementing regulations published by the SBA on January 6, 2021, expands eligibility for forgivable PPP loans to a handful of new classes of borrowers; widens the class of eligible expenses to include, for instance, the purchase of essential goods and other costs relating to business disruption; simplifies the forgiveness process for borrowers who received under \$150,000; permits businesses that received PPP loans to take tax deductions for expenses covered by forgiven loans; allows for a second round of PPP borrowing (up to \$2 million) for businesses with 300 or fewer employees that can demonstrate that their revenues have been negatively impacted by the pandemic; and earmarks additional funds targeted at underserved communities. At the same time, notwithstanding months of reporting about the fraud and misuse that has plagued the massive program, Congress has taken only modest steps to address those issues, with new conflict of interest provisions preventing certain well-connected businesses from receiving funds; a requirement that the SBA submit an audit plan to Congress with periodic updates; and an additional \$50 million to the SBA for audits and other fraud-prevention activities.

Yet, even as it extended small business relief, the Supplemental Stimulus Act sunsetted the "Title IV" CARES Act programs that enabled the Treasury Department and Federal Reserve to provide an essential lifeline to the debt markets in 2020. As detailed in our [prior alerts](#), the CARES Act set aside \$500 billion for Treasury-backed loans to help stabilize the economy in the face of the pandemic. With a portion of those funds, the Treasury and Federal Reserve initiated various programs (including the [Main Street Lending Program](#), the [Corporate Credit Facilities](#), and the Municipal Liquidity Facility) that were intended to provide liquidity in the markets for lending to mid-sized businesses, larger public companies, and municipal bond issuers. Although each had relatively little uptake, the net effect of those programs was to assure market participants that a key alternative source of funding was available to borrowers, and had the ameliorative effect of stabilizing various debt markets. Following Treasury Secretary Steven Mnuchin's remarkable announcement that he would terminate the programs and claw back the CARES Act funds that were allocated to them, the Supplemental Stimulus Act officially brings those programs to a close,

¹ Throughout this alert, we use "the Supplemental Stimulus Act" to refer generally to the stimulus-related provisions of the Consolidated Appropriations Act, 2021, most of which appear in Division M (Coronavirus Response and Relief Supplemental Appropriations Act, 2021) and Division N (Additional Coronavirus Response and Relief) of the legislation.

while permitting the Federal Reserve to continue using much smaller “emergency” lending authority, given after the 2008 financial crisis. The scope of any such future programs is yet to be seen. The Supplemental Stimulus Act also extends oversight of the winding down programs by the patchwork of oversight bodies previously established.

In addition to all this, the Supplemental Stimulus Act provides various forms of targeted relief to particular industries, such as airlines, live entertainment venues, educational institutions, and others. For instance, the Supplemental Stimulus Act renews the “Payroll Support Program” that provided support for the airlines and companies that support them in the form of \$15 billion dollars in new grants to maintain payroll. It provides an additional \$15 billion in grants to shuttered entertainment venues and related businesses, such as live venue operators, promoters and theater producers, independent movie theater operators, and museum operators. And the Supplemental Stimulus Act provides billions in new funds for educational institutions. This is all in addition to other well-publicized provisions of the new law, including \$600 checks to most individuals, the extension of previously authorized unemployment benefits and tax breaks, and additional support for the healthcare system.

In this alert, we build on our prior alerts concerning the CARES Act and related programs (available [here](#)), by providing an overview of the key provisions of the Supplemental Stimulus Act relating to small business relief (PPP), as well as supplements to the CARES Act’s Title IV programs. We do not endeavor to provide a comprehensive overview of the Supplemental Stimulus Act or the related spending bill. Additional alerts concerning particular topics, such as tax and education, will be published separately. We encourage you to reach out with particular questions or to obtain additional information about the topics covered in this alert or otherwise.

* * *

I. PAYCHECK PROTECTION PROGRAM

In the CARES Act, Congress enacted one of the most widely known stimulus programs of the pandemic period—the Paycheck Protection Program (PPP), which was designed to support small businesses through forgivable loans guaranteed by the SBA. Details around that program, including changes that were made to it through subsequent legislation and often-changing regulations, are set forth in numerous [prior alerts](#). Instead of reciting the myriad details about the PPP covered in those prior alerts, this alert provides information on the updates to the program.

In the new legislation, Congress reopened the PPP program, supplemented the funds available to borrowers by an additional \$284 billion, and enacted provisions that, among other things, change the universe of eligible borrowers; streamline the forgiveness process for PPP recipients who borrowed less than \$150,000; and permit certain hard-hit businesses to get a second forgivable loan. The previously expired program was relaunched on January 11, 2021.

On January 6, 2021, the SBA issued initial guidance on these changes. In two interim final rules (IFRs), the SBA implemented the new rules for borrowers seeking either a first or second PPP loan.²

² The new guidance is available on the SBA’s website [here](#) (for first draw PPP loans) and [here](#) (for second draw PPP loans).

The IFR addressing initial loans also “consolidates and restates” the rules and guidance previously issued by the SBA to date, and notes that the new legislation “overrides any conflicting guidance in the FAQs.” The SBA subsequently released new borrower application forms for first and second PPP loans.³ As with the first rollout of the PPP in the wake of the CARES Act, the guidance will inevitably evolve. In large part the rules mirror the language of the Supplemental Stimulus Act, but in several places also provide clarifying detail.

This section outlines some of the key aspects of the new PPP legislation and implementing regulations.

A. Eligibility

The Supplemental Stimulus Act makes several eligibility changes that affect both new PPP applicants and those who have already tapped the program.

1. Eligible Uses

Under the CARES Act, PPP borrowers could use funds for only a narrow class of expenses should they want to obtain forgiveness, principally payroll, but also certain other eligible expenses like rent or utility payments. This narrow scope of eligible uses was criticized as failing to capture the dark reality faced by many struggling small businesses. Although the Supplemental Stimulus Act retains the preference for paying employees (and still requires that at least 60% of the PPP funds must be used for meeting payroll expenses in order to receive full forgiveness),⁴ it has expanded the range of expenditures eligible for forgiveness of the other 40% of the loan. These now include:

- Payments for business software or cloud computer services that facilitate operations or other human resources or accounting needs;
- Property damage costs related to business disruptions during 2020 not covered by insurance;
- Payments for the supply of goods essential to a borrower’s operations at the time of the expenditure, and made under a contract or order either in place prior to a borrower’s covered period or, for perishable goods, prior to or during the covered period; and
- Expenditures to comply with public health directives, such as the purchase of Personal Protective Equipment or facility modifications (e.g., ventilation and air filtration systems, physical barriers, and other protective measures).

³ The new applications are available on the SBA’s website [here](#) (for first draw PPP loans) and [here](#) (for second draw PPP loans).

⁴ We describe the progression of this requirement, including its significant criticism, in a [prior alert](#). See also Mark Niquette, *Trump Administration Keeps Payroll Requirement for PPP Loans*, Wash. Post (May 17, 2020), https://www.washingtonpost.com/business/on-small-business/trump-administration-keeps-payroll-requirement-for-ppp-loans/2020/05/15/f888fd88-9724-11ea-87a3-22d324235636_story.html.

For borrowers who previously received a PPP loan, these new categories are retroactive, meaning that a borrower who has not yet obtained forgiveness may include these expenses in its forgiveness application.

2. Eligible Borrowers

Certain businesses left out of the PPP under the CARES Act lobbied for subsequent inclusion,⁵ and at the same time, some borrowers who received a first PPP loan advocated for additional relief. The Supplemental Stimulus Act addresses both cases. It expands the types of businesses that can apply for a first PPP loan, and allows many businesses that already participated in the program to take out a second PPP loan, something that was previously not allowed. The Supplemental Stimulus Act also imposes new restrictions on the program, including, for example, that publicly-traded companies are not eligible for either a first or second PPP loan. While not imposed by the Supplemental Stimulus Act, under SBA guidance businesses that are “permanently closed” are not eligible for a first or second PPP loan, an exclusion the SBA deemed necessary to “maintain program integrity” and “prevent abuse.” This exclusion does not apply to closed businesses that intend to reopen.

New Categories of Eligibility

The Supplemental Stimulus Act provides that several classes of previously-ineligible businesses may participate in the program, including: “Destination Marketing Organizations” (nonprofits or government instrumentalities that market and promote travel and tourism, like local tourism or visitor bureaus) that employ 300 or fewer employees and meet certain non-lobbying requirements; certain 501(c)(6) organizations (e.g., trade and professional associations, chambers of commerce, and real estate boards, but excluding sports leagues and political organizations) that, like with destination marketing organizations, employ 300 or fewer employees and meet certain non-lobbying requirements; housing cooperatives that employ not more than 300 persons; and certain news organizations (radio or television broadcasters, public broadcasting entities, or newspapers) with fewer than 500 employees per location (or fewer than their applicable SBA size standard), even if they are part of a larger, even public, entity. For the latter category, the Supplemental Stimulus Act waives the SBA affiliation rules that would otherwise exclude these entities, much the way the CARES Act had done for the hospitality industry. To qualify, however, an applicant must make a good-faith certification that the loan will be used for expenses related to the part of the business that produces or distributes “locally focused or emergency information.”

⁵ See, e.g., Press Release, U.S. Travel, *80-Plus House Members Urge Relief for Destination Marketing Organizations* (Apr. 16, 2020), https://www.ustravel.org/sites/default/files/media_root/letter-final-dmo.pdf; Jennifer Garvin, *Health Care Groups Urge Congress to Include 501(c)(6) Nonprofit Associations in the Paycheck Protection Program* (Dec. 16, 2020), <https://www.ada.org/en/publications/ada-news/2020-archive/december/groups-urge-congress-to-include-501c6-nonprofit-associations-in-the-paycheck-protection-program>.

Provision for Second Loans

As noted, the Supplemental Stimulus Act also makes provisions for “second draw” loans for those businesses that have suffered a revenue loss during the pandemic. Borrowers who received a first PPP loan are eligible for a second loan, provided that:

- Smaller Size Cutoff. As distinct from the 500-employee cutoff for first loans, second-time borrowers must generally meet a 300-employee cutoff. The Supplemental Stimulus Act retains for second-draw loans the CARES Act’s waiver of affiliations rules for certain businesses, including for accommodations and food service businesses.
- Revenue Declines. In a new requirement, businesses must show a 25% gross receipt decline in any quarter in 2020 compared to that same quarter in 2019, *i.e.* had gross receipts during the first, second, third, or fourth quarter in 2020 that are at least 25% reduced from the corresponding quarter during 2019.
- Exclusions. The Act excludes from second-draw eligibility businesses that are primarily engaged in political or lobbying activities, entities with certain ties to China or Hong Kong (including having directors that are residents of China),⁶ registrants under the Foreign Agents Registration Act, and businesses that received a grant under the Shuttered Venue Operator Grant program (section 24 of the Supplemental Stimulus Act).

The amounts available for second-draw loans are different as well. First, the maximum loan amount is \$2 million (compared to \$10 million for first-time PPP loans), and the aggregate maximum for businesses that are part of a single corporate group—*i.e.* businesses majority-owned by a common parent—is \$4 million (compared to \$20 million for first-time PPP loans). Second, although the amount a borrower is eligible to borrow is otherwise calculated in the same manner as for a first PPP loan for most borrowers (*i.e.* a borrower is generally eligible for 2.5 times its average monthly payroll), those in the accommodation and food services industries (NAICS Code 72) are eligible for an increased amount—they may receive up to 3.5 times their average monthly payroll.

The SBA also issued guidance addressing access to capital for minority, underserved, veteran, and women-owned businesses.⁷ This guidance provides that the SBA will take several steps intended to increase PPP access for these entities, including: opening the PPP application process two days early for only community financial institutions, directing Lender Match inquiries from borrowers to small lenders who can aid traditionally underserved communities, and continuing to set aside dedicated hours to process and assist smaller PPP lenders.

Other Eligibility Changes

The Supplemental Stimulus Act also makes other eligibility changes.

⁶ Prohibited ties include an entity organized under the laws of China or Hong Kong, or one having significant operations in China or Hong Kong, owning or holding more than a 20% economic interest in the borrower.

⁷ The new guidance is available on the SBA’s website [here](#).

First, borrowers that returned all or part of a PPP loan, or did not accept the full amount for which they were approved, may reapply or request an increase in their PPP loan amount. Guidance on the process for reapplying or requesting a loan increase is forthcoming.

Second, the Supplemental Stimulus Act imposes new conflict of interest provisions applicable to high-level governmental officials and their spouses. These conflict of interest provisions did not apply to the PPP under the CARES Act, leading to outcry after it was revealed that significant PPP loans were given to businesses connected to high-ranking government officials and members of Congress.⁸

The Supplemental Stimulus Act addresses these issues in different ways for new and existing borrowers. For new borrowers, the Supplemental Stimulus Act outright prohibits loans—either first or second—to a “covered entity,” *i.e.* an entity in which a covered individual (the President, Vice President, head of an Executive Department, member of Congress, or the spouses of such individuals) directly or indirectly holds a controlling interest (*i.e.* owns, controls, or holds not less than 20% of the outstanding amount of any class of equity interest). For borrowers that obtained PPP funds before the Supplemental Stimulus Act’s passage, they must disclose to the SBA that the entity is a covered entity within 30 days after enactment, whether they have previously submitted an application for forgiveness or submit a forgiveness application after enactment. Borrowers who submit a forgiveness application after enactment have 30 days after submission within which to make the required disclosure.

B. Loan Forgiveness

In addition to expanding the uses of loan proceeds for which a borrower may receive forgiveness, the Supplemental Stimulus Act makes other important changes to the forgiveness process, including making clear that a borrower may select a covered period for forgiveness that is between 8 and 24 weeks after loan origination.⁹

Simplified Forgiveness for Small Loans

The complexity of the PPP forgiveness process has been a topic of ongoing concern for borrowers, Congress, and consumer protection advocates. The initial forgiveness application was met with criticism for being overly complex and burdensome, leading to more streamlined versions being released for certain borrowers. The Supplemental Stimulus Act takes this a step further for borrowers with loans under \$150,000.

To apply for forgiveness, such a borrower need only submit to its lender a one-page certification describing the number of employees the borrower retained because of the loan, the estimated amount of the loan spent on payroll costs, and attesting that the borrower provided accurate information, complied with program requirements, and will retain relevant employment records for four years and other records for three years. The Supplemental Stimulus Act requires the SBA to establish such certifications, and prohibits the SBA from seeking any materials beyond the certification and

⁸ See, e.g., Sarah Ferris et al., *Members of Congress Took Small-business Loans – and the Full Extent is Unknown*, Politico (June 16, 2020), <https://www.politico.com/news/2020/06/16/congress-small-business-loan-320625>.

⁹ The initial extension to 24 weeks, made after the CARES Act, is described in a [prior alert](#).

“information required to substantiate forgiveness.” The Supplemental Stimulus Act also provides that loans eligible for the simplified forgiveness process remain subject to an SBA audit.

EIDL Advances

The CARES Act provided significant funding for the Economic Injury Disaster Loan (EIDL) program, which was administered by the SBA separately from the PPP. Part of the EIDL program gave borrowers an emergency grant of up to \$10,000, which functioned as an advance on a borrower’s EIDL loan and was to be disbursed within three days of a borrower’s application. The CARES Act initially required that any emergency EIDL grant award that a borrower received had to be subtracted from a borrower’s PPP forgiveness amount. The Supplemental Stimulus Act repeals this requirement, so it is now irrelevant whether a PPP borrower had previously received an EIDL grant. This repeal is effective retroactively, so borrowers who have not applied for forgiveness can benefit from this repeal; they can apply for the full amount of forgiveness they are eligible for without accounting for an EIDL grant received. Borrowers who have already received forgiveness will also receive payment from the SBA for the amount of any EIDL grant that reduced its forgiveness—new SBA guidance indicates that the SBA will remit this amount to the borrower’s lender, along with interest to the remittance date.

C. Audit Process

Considerable uncertainty has surrounded the PPP audit process since the passage of the CARES Act.¹⁰ Under the Supplemental Stimulus Act, the SBA is required to submit an audit plan to Congress within 45 days of the Supplemental Stimulus Act’s enactment detailing:

- the policies and procedures the SBA will use for conducting forgiveness reviews and audits of PPP loans; and
- the metrics that the SBA will use to determine which PPP loans will be audited.

The SBA is thereafter required to submit monthly audit reports that include:

- the number of active reviews and audits;
- the number of reviews and audits that have been ongoing for more than 60 days; and
- any substantial changes made to the audit plan submitted.

The Supplemental Stimulus Act allocates \$50 million to the SBA specifically for “the cost of carrying out reviews and audits of [PPP] loans” and other fraud prevention programs. The SBA is further required to comply with data or information requests from the US Government Accountability

¹⁰ See Bob Davis and Kate Davidson, *U.S. Audits of Small-Business Loans Face Daunting Challenges*, Wall St. J. (Apr. 28, 2020), <https://www.wsj.com/articles/sba-to-face-big-challenges-ensuring-coronavirus-loans-arent-misspent-11588094140>.

Office (GAO) within 15 days of a request or justify a delay to Congress, a prior area of tension cited in congressional hearings.¹¹

Notwithstanding the early reports of massive fraud,¹² the Supplemental Stimulus Act takes no further steps to address this problem.

D. Tax Treatment

The CARES Act specified that any PPP loan forgiveness a borrower receives is not to be included in the borrower's taxable income. The CARES Act did not specify, however, whether a borrower could deduct expenses that were paid with the forgiven or forgivable PPP amount (*i.e.*, used as part of a forgiveness application). Based on traditional income tax principals, the IRS subsequently concluded that a borrower could not deduct an otherwise deductible expense if that expense was reasonably going to result in PPP loan forgiveness.¹³ As a result, while a borrower would not have income as the result of the forgiveness of their PPP loan, the borrower would also not receive a deduction for an expense paid by a forgiven PPP loan. The borrower was in an economically neutral position.

Many viewed this result as presenting an adverse tax consequence to PPP loan recipients. For example, while payroll costs are normally deductible, a borrower that spent \$100,000 of its PPP loan on payroll expenses and later had that amount forgiven could not have income as the result of the forgiveness but also could not deduct the \$100,000 in calculating taxable income. At the time, Secretary Mnuchin explained that the IRS's position maintained the general principals of income tax and the Internal Revenue Code by preventing PPP recipients from obtaining a double-benefit: tax-free forgiveness of the proceeds of PPP loans that were used on certain expenses, and then a tax deduction for those same expenditures.¹⁴ The IRS's position met resistance from lawmakers and the broader business community.¹⁵

The COVID-related Tax Relief Act of 2020 overrules the IRS's position by providing that borrowers can deduct otherwise eligible expenditures that were paid with forgiven (or forgivable) PPP

¹¹ Press Release, House Committee on Oversight and Reform, House Chairs Demand that SBA Immediately Comply with GAO's Oversight of Taxpayer Funds for Coronavirus (June 17, 2020), <https://oversight.house.gov/news/press-releases/house-chairs-demand-that-sba-immediately-comply-with-gao-s-oversight-of-taxpayer>.

¹² See, e.g., Ryan Tracy, *Evidence of PPP Fraud Mounts, Officials Say*, Wall St. J. (Nov. 8, 2020), <https://www.wsj.com/articles/ppp-was-a-fraudster-free-for-all-investigators-say-11604832072>.

¹³ IRS Notice 2020-32, <https://www.irs.gov/pub/irs-drop/n-20-32.pdf>; IRS Revised Rule 2020-27, <https://www.irs.gov/pub/irs-drop/rr-20-27.pdf>.

¹⁴ Richard Rubin, *Tax Deductions Tied to Forgiven Small Business Loans Draw Support*, Wall St. J. (May 5, 2020), <https://www.wsj.com/articles/tax-deductions-tied-to-forgiven-small-business-loans-draw-support-11588718734>.

¹⁵ See, e.g., Sally P. Schreiber, *AICPA and Trade Associations Ask Congress to Fix PPP Loan Deductibility*, J. of Acct. (Dec. 3, 2020), <https://www.journalofaccountancy.com/news/2020/dec/national-trade-associations-ask-congress-to-fix-ppp-loan-deductibility.html>.

loan funds in calculating taxable income.¹⁶ This applies to both first and second PPP loan amounts. Now, for example, a borrower can deduct the \$100,000 spent on payroll costs even if the \$100,000 is part of a forgiven (or forgivable) PPP loan. Reporting has estimated the reduction to federal revenue at around \$200 billion from this change.¹⁷

E. Support for Underserved Communities

Whether the PPP reached the communities that needed it the most has been a continuous debate since the program's rollout. In response to these concerns, Congress set aside funds for smaller banks and credit unions, community financial development institutions (CDFIs), and minority-owned depository institutions in the PPP and Health Care Enhancement Act, under the theory that such lenders are more likely to lend to diverse borrowers, as described in a [prior alert](#). Congress continued and expanded this trend in the Supplemental Stimulus Act. It reserves certain funds for smaller and diverse lenders, including \$15 billion for loans made by community financial institutions (e.g., CDFIs and minority-owned depository institutions) and \$15 billion for banks and credit unions with fewer than \$10 billion in consolidated assets. The Supplemental Stimulus Act further earmarks loans specifically for typically underserved businesses; it reserves \$40 billion for loans to borrowers with 10 or fewer employees or borrowers receiving loans of less than \$250,000 in low- or moderate-income neighborhoods. Finally, the Act incentivizes lenders to loan to the smallest of businesses by ensuring that lenders will receive at least \$2,500, so long as the loan is \$5,000 or more.

In addition, one area of prior concern was that there was no mechanism to track whether the PPP was reaching its intended targets—small businesses struggling as a result of the pandemic, and especially those in underserved communities. The SBA initially refused to require that lenders provide a means for borrowers to submit demographic information, such as race, gender, ethnicity, and veteran status, leading to criticism from the SBA Inspector General and others.¹⁸ This led to a dearth of data, with some lenders saying that they were scared off from collecting demographic information because they were worried that they might inadvertently violate fair lending laws.¹⁹ The SBA subsequently required that forgiveness applications have a means for a borrower to voluntarily submit demographic information, and the Supplemental Stimulus Act codifies this requirement for loan applications, requiring that any PPP application include a means for a borrower to provide optional demographic information.

¹⁶ As a result of the new legislation, the IRS obsoleted both Notice 2020-32 and Revenue Ruling 2020-27 [note 14 *infra*] via Revenue Ruling 2021-2, <https://www.irs.gov/pub/irs-drop/rr-21-02.pdf>.

¹⁷ Richard Rubin, *PPP Borrowers Stand to Gain Tax Deductions*, Wall St. J. (Dec. 20, 2020), <https://www.wsj.com/articles/ppp-borrowers-stand-to-gain-tax-deductions-11608373801>.

¹⁸ SBA Inspector General, Flash Report SBA's Implementation of the Paycheck Protection Program Requirements 4 (May 8, 2020), https://www.sba.gov/sites/default/files/2020-05/SBA_OIG_Report_20-14_508.pdf; Jason Richardson and Jad Edlebi, *Government Data on PPP Loans is Mostly Worthless, But It's Not Too Late To Fix It*, Nat'l Cmty. Reinvestment Coal. (July 15, 2020), <https://ncrc.org/government-data-on-ppp-loans-is-mostly-worthless-but-its-not-too-late-to-fix-it/>.

¹⁹ See, e.g., Tyler Scott, *Did "Underserved Communities" Get a Fair Share of Forgivable COVID-19 Loans? Hard to Tell*, Mich. Radio (July 8, 2020), <https://www.michiganradio.org/post/did-underserved-communities-get-fair-share-forgivable-covid-19-loans-hard-tell>.

The SBA has included an optional borrower demographic information form on the new PPP applications.

II. FEDERAL RESERVE LENDING PROGRAMS

The CARES Act authorized up to \$500 billion in lending to the Federal Reserve to seed lending programs that it and Treasury subsequently pledged to expend up to \$2.6 trillion. An important part of the new legislation is its zeroing out of funds previously allocated to the Federal Reserve under the CARES Act. Left untouched by the legislation is its ability to tap the Exchange Stabilization Fund, which was funded prior to the CARES Act and continues to support certain Federal Reserve lending programs. The CARES Act programs, however, have now been terminated, and the new legislation prohibits the Federal Reserve and Treasury from resurrecting them, at least in the exact form in which they previously existed and with untapped CARES Act funds.

A. CARES Act Provisions

As described in our [prior alert](#), in Subtitle A of Title IV of the CARES Act, Congress passed the “Coronavirus Economic Stabilization Act of 2020,” which allocated \$500 billion for loans, loan guarantees, and other investments to businesses, states, and municipalities by the Federal Reserve. This included \$46 billion in direct lending to air carriers, air cargo, and national security-related businesses, and \$454 billion to be used to backstop Federal Reserve lending programs that would supply credit to businesses and state and local governments. Patterned off of TARP programs following the 2008 financial crisis, the \$454 billion in funds were intended to insure against possible losses sustained by emergency lending facilities set up during the pandemic response by the Federal Reserve. In the months following the passage of the CARES Act, the Federal Reserve relied on these lending programs to inject financial support into the US economy, and the very announcement of the programs as a fail-safe brought stability to various debt markets over the early months of the pandemic. Under the CARES Act, however, the Federal Reserve’s authority to make new loans, loan guarantees, or other investments pursuant to the CARES Act was scheduled to terminate on December 31, 2020, although it permitted whatever programs the Federal Reserve and Treasury had already established by the end of 2020 to continue into 2021.

The Federal Reserve created several different lending programs pursuant to the CARES Act. We described these lending facilities generally in a [prior alert](#), including the eligible recipients for each program, the program’s requirements, and the features of the loans.

These CARES Act funded programs included the [Main Street Lending Program](#), the [Corporate Credit Facilities](#), the Municipal Liquidity Facility, and the Term Asset-Backed Securities Loan Facility. Other facilities were created prior to the CARES Act or funded separately out of the Treasury’s Exchange Stabilization Fund pursuant to the Federal Reserve’s preexisting authority under Section 13(3) of the Federal Reserve Act, including the Commercial Paper Funding Facility, the Money Market Mutual Fund Liquidity Facility, the Primary Dealer Credit Facility, and the Paycheck Protection Program Liquidity Facility. The outstanding and maximum loan amounts of these various lending facilities is set forth in the following table.

Outstanding Federal Reserve Loans by Lending Facility²⁰

Federal Reserve Lending Facility	Funded by the CARES Act?	Outstanding Loans as of January 7, 2021	Maximum Amount Available
Primary Dealer Credit Facility	No	\$485 million	N/A
Money Market Mutual Fund Liquidity Facility	No	\$3.7 billion	N/A
Commercial Paper Funding Facility	No	\$0 ²¹	N/A
Corporate Credit Facilities (Primary and Secondary Market)	Yes	\$14.2 billion	\$750 billion
Term Asset-Backed Securities Loan Facility	Yes	\$3.7 billion	\$100 billion
Municipal Liquidity Facility	Yes	\$6.4 billion	\$500 billion
Paycheck Protection Program Liquidity Facility	No ²²	\$50 billion	N/A
Main Street Facilities ²³	Yes	\$16.5 billion	\$600 billion

²⁰ See *Periodic Report: Update on Outstanding Lending Facilities Authorized by the Board under Section 13(3) of the Federal Reserve Act*, Federal Reserve (Dec. 10, 2020), <https://www.federalreserve.gov/monetarypolicy/files/pdcf-mmlf-cpff-pmccf-smccf-talf-mlf-ppplf-msnlf-mself-msplf-nonlf-noelf-12-11-20.pdf>.

²¹ Although the Commercial Paper Funding Facility lists a \$0 balance of outstanding loans as of November 30, 2020, it has been utilized by the Federal Reserve during the COVID-19 pandemic. For example, as of May 31, 2020, it had a balance of over \$4.2 billion in outstanding loans.

²² Although the Paycheck Protection Program Liquidity Facility (PPPLF) supports a CARES Act program—the Paycheck Protection Program—by purchasing the loan obligations of banks engaging in PPP lending, the PPPLF itself was not created pursuant to Title IV of the CARES Act.

²³ These include the Main Street New Loan Facility, the Main Street Expanded Loan Facility, the Main Street Priority Loan Facility, the Nonprofit Organization New Loan Facility, and the Nonprofit Organization Expanded Loan Facility.

B. The Supplemental Stimulus Act's Changes

In the newly-passed relief bill, Congress rescinded unused funds that were previously allocated to the CARES Act lending programs, and prohibited the Federal Reserve from continuing to extend loans through any of the emergency lending facilities that were established pursuant to the CARES Act. The amount rescinded is at least \$429 billion, but will also include any additional unused funds that are not necessary to support outstanding loan commitments. The remaining funds will be retained by the Federal Reserve to secure its outstanding lending under the CARES Act programs against future losses. Any funds left over in the facilities at the time of their termination will be remitted back to the Treasury Department.

The Act's prohibition on new facilities funded from the Exchange Stabilization Fund is a narrow one, stating that the Federal Reserve "shall not make any loan, purchase any obligation, asset, security, or other interest, or make any extension of credit through any program or facility established under section 13(3) of the Federal Reserve Act in which the Secretary made a loan, loan guarantee, or other investment pursuant to section 4003(b)(4)" of the CARES Act. It would appear that programs that strive to achieve similar goals (such as providing liquidity for municipalities or medium-sized businesses) would still be permissible, so long as they are not carbon copies of the original, now terminated programs. Although this means that the incoming Treasury Secretary likely cannot reverse the decision of her predecessor by refunding the prior programs with CARES Act funds, it would not appear to prohibit her from launching similar programs seeded by the approximately \$84 billion left in the Exchange Stabilization Fund, although they would be limited in size because of the relatively low balance of available funds.

The preexisting Exchange Stabilization Fund programs described above are unaffected by the Act, and the Federal Reserve announced that several of those pre-existing facilities would continue through at least March 31, 2020.²⁴ Federal Reserve Chair Jerome Powell, who previously objected to Treasury's early termination of the CARES Act programs, has indicated that he does not believe "it is time yet, to end the emergency lending programs, nor will it be "very soon."²⁵

C. Oversight

Although the Act rescinded all of the CARES Act funding for Federal Reserve lending programs, it retained the funding appropriated in the CARES Act for their oversight, including \$25 million made available to the Special Inspector General for Pandemic Recovery (SIGPR) and \$5 million made available to the Congressional Oversight Commission. With the CARES Act lending programs terminated, the scope of the activities of these oversight entities will necessarily be curtailed.

²⁴ See *Federal Reserve Board Announces Extension through March 31, 2021, for Several of its Lending Facilities that Were Generally Scheduled to Expire on or around December 31*, Board of Governors of the Federal Reserve (Nov. 30, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20201130a.htm>.

²⁵ See Howard Schneider and Ann Saphir, *Fed's Powell Signals Emergency Credit Programs Should Be Extended*, Reuters (Nov. 17, 2020), <https://www.reuters.com/article/us-usa-fed-powell/feds-powell-signals-emergency-credit-programs-should-be-extended-idUSKBN27X2LT>.

As described in our [prior alert](#), among other things, SIGPR is responsible for auditing and investigating the loans, loan guarantees, and investments made to businesses by Treasury and the Federal Reserve under the CARES Act. The Congressional Oversight Commission was intended to be a five-member commission responsible for oversight of the loan relief under Title IV of the CARES Act. On June 2, 2020, Brian Miller was confirmed as the SIGPR,²⁶ but the Congressional Oversight Commission has fewer than the five members set by the CARES Act, and still lacks a chairperson.²⁷ Both entities have issued reports, and the Congressional Oversight Committee has held a series of hearings.

Based on SIGPR's definition of its own jurisdiction, it is likely to still have some role even with the CARES Act Federal Reserve lending programs terminated. For example, SIGPR will still be able to investigate any fraud, waste, or abuse in connection with the loans and purchases already made in connection with the programs or their administration. SIGPR has also asserted jurisdiction over other CARES Act programs that are still active, such as the Coronavirus Relief Program under Title V of the CARES Act; and loans by the Treasury Secretary to the United States Postal Services under Title VI of the CARES Act.²⁸

The Congressional Oversight Commission's jurisdiction under the CARES Act is limited to the Title IV lending programs.²⁹ Because the Act terminates the Title IV lending programs and rescinds most of the \$500 billion it originally allocated, the Commission's scope of work will be limited to look-back reviews of the programs, as well as oversight of any outstanding lending.

Neither entity has jurisdiction over the Federal Reserve's non-CARES Act lending facilities described above.

III. AVIATION INDUSTRY RELIEF

Like the CARES Act, the Supplemental Stimulus Act authorizes additional funds that can be granted to the airlines and their contractors. In particular, the Supplemental Stimulus Act earmarks \$15 billion in financial assistance to passenger air carriers, and \$1 billion to airline industry contractors, to be used to pay employee wages, salaries, and benefits. In addition to payroll support, Congress also authorized Treasury to make up to \$2 billion in grants to help support airports as they prevent, prepare for, and respond to the coronavirus.

²⁶ See Special Inspector General for Pandemic Recovery, Initial Report to Congress (Aug. 2020) at 27, <https://www.oversight.gov/sites/default/files/oig-reports/SIGPR-Initial-Report-to-Congress-August-3-2020.pdf>.

²⁷ See The Seventh Report of the Congressional Oversight Commission, Nov. 30, 2020, <https://coc.senate.gov/sites/default/files/2020-12/COC%20November%20Report%20with%20Appendix.pdf>.

²⁸ See Office of the Special Inspector General for Pandemic Recovery, *Quarterly Report to the United States Congress* (Sept. 30, 2020), at 6.

²⁹ See The Seventh Report of the Congressional Oversight Commission, Nov. 30, 2020 at 4, <https://coc.senate.gov/sites/default/files/2020-12/COC%20November%20Report%20with%20Appendix.pdf>.

A. Direct Payment of Payroll Support

The Supplemental Stimulus Act directs Treasury to provide grants of up to \$15 billion to air carriers and \$1 billion for their contractors. In return for this financial assistance, Treasury may receive equity or other financial instruments issued by the recipient.

An airline that obtained CARES Act grants can request the same amount it previously received. Alternatively, such an airline, or any airline seeking a loan from this program for the first time, can request an amount equal to the benefits and salary it paid its employees from October 1, 2019, through March 31, 2020.

The Supplemental Stimulus Act separately directs \$1 billion in payroll support to contractors that support certified air carriers, such as businesses involved in catering, aircraft loading/unloading, security, ground handling, and other assistive functions.

Recipients of these federal funds must agree to a number of conditions on acceptance of the funds; principally:

- They must recall all employees that were involuntarily furloughed between October 1, 2020, and the date the carrier or contractor enters into an agreement with Treasury with respect to the federal assistance.
- Once the employees are recalled, recipients must compensate those employees for lost pay and benefits. Employees of airlines must be retroactively compensated for the period beginning December 1, 2020, through the date the carrier enters into its loan agreement. Employees of contractors must be retroactively compensated for the period beginning December 27, 2020, through the date the carrier enters into its agreement.
- Airlines may not lay off or furlough any employees until March 31, 2021. Contractors may not do so until the later of March 31, 2021, or the date in which they fully expend the borrowed funds.
- Airlines similarly may not engage in stock buybacks (for those that are a public company, or certain subsidiaries of a public company) or pay dividends or capital distributions until March 31, 2022. Contractors may not engage in those same activities until the later of March 31, 2022, or the date on which they fully expend the loan proceeds.

On December 29, 2020, the Secretary published [initial guidance](#) that was “intended to enable potential applicants to begin preparing information that will be required to apply.” Similar to the CARES Act payroll support program, applicants will be able to apply for funds through a web-based portal.

B. Other Airline-Related Provisions

The bill also directs the Secretary to provide airports with \$2 billion in grants-in-aid to help airports respond to the pandemic. These funds must be used to cover costs related to operations, staffing, cleaning, custodial services, and debt payments. The vast majority of these funds, \$1.75 billion, will go to “primary” airports (*i.e.*, airports that have more than 10,000 passenger flights each

year), although the Supplemental Stimulus Act directs that some of the remaining funds be granted to smaller, “non-primary” airports as well.

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