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## UPDATE ON PROPOSED EXTENSION OF THE PPP LOAN PROGRAM—Gotta Read That Fine Print!

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“All animals are equal, but some animals are more equal than others.”

George Orwell,  
*Animal Farm* (1945)

With a change in administration likely within the next two months, and Congress scrambling to agree on another rescue package for millions of Americans facing yet more pandemic related economic hardship as many of the government subsidies and stimulus plans are set to expire the end of December, Senators Rubio and Collins have revamped **S. 4321** initially introduced on July 27, 2020 (“**Initial Proposed PPP III Legislation**”),<sup>1</sup> which would (finally) make the Payroll Protection Program loans (“**PPP Loans**”) available to debtors in bankruptcy. The PPP expired in early August 2020, and S. 4321 became bogged down in neverending partisan politics, and, ultimately, put on the back burner by the *Götterdämmerung* that was the presidential election. The Initial Proposed PPP III Legislation still had issues, but was, at least, a step in the right direction. [See Salerno, “Proposed Extension of the PPP Loan Program: A Nice First Step...”, *ABI Journal* (September 2020) (the “**Nice Step Article**”).]

On October 1, 2020, Senators Rubio and Collins apparently reintroduced a different version of the Initial Proposed PPP III Legislation, **S. 4773** (the “**Amended PPP III Legislation**”).<sup>2</sup> One of the first lessons all lawyers learn (some the hard way) is that the devil is always in the details, and you gotta read the fine print! In nearly 40 years as a bankruptcy practitioner, one would think it’s a lesson I had mastered. And one would be wrong.

<sup>1</sup> S. 4321, titled “A Bill to Establish the Paycheck Protection Program Second Draw Loan and Amend the 7(a) Loan Guaranty Program For Recovery Sector Business Concerns, and For Other Purposes” introduced July 27, 2020.

<sup>2</sup> S. 4773, titled “A Bill To Establish the Paycheck Protection Program Second Draw Loan, and For Other Purposes”, introduced October 1, 2020

When looking at the Amended PPP III Legislation and discussing it with my colleagues who have been following this process,<sup>3</sup> the Amended PPP III Legislation contains the following language:

“(a) IN GENERAL.—Section 364 of title 11, United States Code, is amended by adding at the end the following:

“(g)(1) The court, after notice and a hearing, may authorize a debtor in possession or a trustee that is authorized to operate the business of the debtor under **section 1183, 1184, 1203, 1204, or 1304 of this title** to obtain a loan under paragraph (36) or (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), and such loan shall be treated as a debt to the extent the loan is not forgiven under section 1106 of the CARES Act (15 U.S.C. 9005) or subparagraph (II) of such paragraph (37), as applicable, with priority equal to a claim of the kind specified in subsection (c)(1) of this section.”

Amended Proposed PPP Legislation at p. 53 (emphasis added).

What this language does, of course, is make the PPP loans available to Subchapter V, Chapter 12 and Chapter 13 debtors — but excludes by omission all other Chapter 11 debtors (who are authorized to act under Bankruptcy Code §§ 1106 and 1107).

Certainly, this must be a typographical error!<sup>4</sup> Dealing with all those Bankruptcy Code section numbers, certainly some erstwhile senate aide simply missed a section or two (hey, we’ve all been there!). Returning to S. 4321 to see if this limiting language was added after the Initial Proposed PPP III Legislation, it was discovered (to my surprise and chagrin) that the same limitation is contained in Section 116 of S. 4321. Accordingly, a critical issue regarding the Initial Proposed PPP III Legislation that I analyzed in the Nice Step Article was completely missed! *Mea culpa!*

Hence, to add to the list of serious issues already existing regarding the proposed PPP extension legislative efforts, this exclusion certainly should go to the very top of the list.

Even assuming, *arguendo*, that the stated rationale of the Small Business Administration (“SBA”) for excluding debtors in the original (and now expired) PPP provisions of the CARES Act has some basis in fact (*i.e.* as defended in the now infamous April 24, 2020 administrative rule that categorically denied debtors in bankruptcy from accessing the PPP Loans on the basis that debtors “present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans”), how does the latest Amended Proposed PPP Legislation make any sense whatsoever? How does Congress justify allowing some debtors to access the PPP Loans (*i.e.* Subchapter V, Chapter 12 and Chapter 13 debtors), while denying the same loans to a business or individual who happen to have more than \$7.5 million of debt (thereby putting them outside the debt limits of Subchapter V)?

<sup>3</sup> Thanks to Andrew Helman and Tiffany Payne Geyer in particular.

<sup>4</sup> While the reader may be inclined to scoff at the author’s naiveté, and in my own defense, I also still believe in unicorns (although rare, I am convinced they still exist in the wild).

As the loans max out at a certain level, and assuming all other criteria are met (need for funds, appropriate use of the funds, etc.), why is a debtor with \$7.5 million in debt somehow qualify, yet one with \$7,500,001 does not? Perhaps the SBA believes that all debtors are deadbeats, but debtors owing more than \$7.5 million in debt are riskier deadbeats. The result of this latest Congressional gambit should it be enacted is stunningly obvious and foreseeable—more litigation related to discriminatory treatment!

Why, one is tempted to ask. Perhaps it is as simple as Orwell's prophetic statement in 1945 — all debtors are equal but some are more equal than others.