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## DW-CHINA TRADE UPDATE (36TH EDITION)

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### CONGRESS RESTRICTS CHINESE-OWNED US COMPANIES IN SECOND PPP LOAN PROGRAM

美国国会第二轮薪资保障计划限制在美中资公司

Last spring, as COVID began to threaten U.S. businesses, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which authorized the U.S. Small Business Administration (the "SBA") to offer a Paycheck Protection Program (the "PPP") providing loans to help businesses keep their workforce employed during the COVID-19 crisis. While confusion caused many Chinese-owned U.S. subsidiaries to abandon this loan program, many others benefited from the PPP and continued to employ their U.S. workers.

去年春季, 随着新冠病毒疫情开始威胁美国企业, 美国国会颁布了《冠状病毒援助, 救济和经济安全法案》, 该法案授权美国小企业管理局提供薪资保障计划, 该计划提供贷款, 以帮助企业在新冠病毒疫情危机期间继续保持其雇员。虽然当时不少中资企业因为不了解法案的具体规定而放弃申请这一贷款计划, 但是仍有许多中资公司从该贷款计划中获益并继续雇佣其美国雇员。

On December 27, 2020, President Trump signed the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the "Economic Aid Act") into law providing continued assistance to individuals and businesses that have been financially impacted by the ongoing pandemic. Section 311 of the Economic Aid Act added a new temporary section 7(a)(37) to the Small Business Act (15 U.S.C. 636(a)(37)) authorizing the SBA to guarantee Paycheck Protection Program Second Draw Loans (the "Second Draw PPP Program") for qualifying businesses.

2020年12月27日, 美国总统特朗普签署了《对受重创小企业, 非营利组织和场所经济援助法案》(以下简称“《经济援助法案》”), 向因新冠病毒疫情遭受持续经济影响的个人和企业提供持续的援助。《经济援助法案》的第311条在《小企业法案》中添增加了临时的第7款 (a)(37)条, 授权美国小企业管理局继续为符合标准的企业提供薪资保障计划下的第二轮贷款。

On January 5, 2021, the SBA released initial guidance for the authorized Second Draw PPP Program. Interim Final Rule 2021-0002 details the terms of the Second Draw PPP Loans, as amended. In enacting the Economic Aid Act, Congress made the eligibility requirements for Second Draw PPP Loans **narrower** than the eligibility requirements for First Draw PPP Loans. The Economic Aid Act generally provides that a borrower is eligible for a Second Draw PPP Loan *only if* it has 300 or fewer employees (including employees of the applicant's foreign affiliates) and experienced a revenue reduction of 25 percent or more in 2020 relative to 2019. In addition, the Economic Aid Act provides that a Second Draw PPP Loan may only be made to an eligible borrower that (i) has received a First Draw PPP Loan, and (ii) has used, or will use, the full amount of the First Draw PPP Loan on or before the expected date on which the Second Draw PPP Loan is disbursed to the borrower.

2021年1月5日, 美国小企业局发布了其授权的第二轮薪资保障计划贷款的初步指南。《临时最终规则2021-0002》详细介绍了经修订的第二轮薪资保障计划贷款。在制定《经济援助法案》之时, 与第一轮薪资保障计划贷款的资格要求相比, 国会收紧了第二轮薪资保障计划贷款的资格要求。《经济援助法案》规定借款实体只有在满足以下条件之后才能有资格申请第二轮薪资保障计划贷款: 借款实体雇员人数少于300人(包括借款申请实体境外关联公司的雇员), 2020年收入相对于2019年减少幅度在百分之二十五或以上。此外, 《经济援助法案》规定, 第二轮薪资保障计划贷款只能提供给符合条件的贷款实体: (i) 已获得第一轮薪资保障计划贷款, (ii) 在第二轮薪资保障计划贷款发放之前, 已使用或将全部使用完毕第一轮薪资保障计划贷款下的全部贷款金额。

Even if an applicant meets the eligibility requirements, however, Congress included restrictions on this second loan program for Chinese-owned companies. Specifically, pursuant to Paragraph 7(a)(37)(A)(iv)(III)(cc), an applicant is **not eligible**<sup>1</sup> for a Second Draw PPP Loan, if the applicant is:

即使借款实体符合上述所有要求, 国会也在第二轮薪资保障计划贷款针对中资公司做出了限制。具体来说, 根据《小企业法案》第7条 (a)(37)(A)(iv)(III)(cc) 节规定, 如果借款实体符合以下条件, 则不具备获得第二轮薪资保障计划贷款的资格:

any business concern or entity:

任何企业或实体:

1. for which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or as capital or profit interest in a limited liability company or partnership; or

根据中华人民共和国或香港特别行政区的法律下成立或组织, 或在中华人民共和国或香港特别行政区有重要业务的实体, 直接或间接持有该企业或超过百分之二十的经济利益, 包括有限责任公司或合伙企业下的股权或资本或利润权益; 或

2. that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China.

有中国公民作为企业董事会的成员。

<sup>1</sup> A complete list of Excluded Entities can be found at section 7(a)(37)(A)(vi)(III) of the Small Business Act. 一份完整的不符合资格要求的实体清单可以在《小企业法案》第7条 (a)(37)(A)(vi)(III)节下找到。

Specifically, “equity interest” means:

具体来说, “权益” 指的是:

- A. a share in an entity, without regard to whether the share is transferable or classified as stock or anything similar;
- 实体中的股份, 无论该股份是否可以转让或归类为股票或类似股票;
- B. a capital or profit interest in a limited liability company or partnership; or
- 有限责任公司或合伙企业的资本或利润权益; 或
- C. a warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share or interest described in (A) or (B), respectively.
- 一个认股权证或权利, 但是不具有上述(A) 或 (B)中转换, 购买, 出售或认购股权或权益的权力

These restrictive and enhanced eligibility requirements were not part of the First Draw PPP Loan and neither Congress nor the President specifically excluded Chinese-owned companies from the First Draw PPP Loan. The First Draw PPP Loan application form instead only asked applicants to verify that the individuals on their payroll are U.S. citizens or permanent U.S. residents. While the First Draw PPP Loan also asked for the identities of significant shareholders of the borrower entity, this request appears largely aimed at ensuring that borrowers were eligible to participate in SBA-administered programs. With its new China-focused restrictions, the rules of the road are decidedly different in the Second Draw PPP Loan. While the legislation and rules are poorly written, it is reasonable to assume that otherwise eligible U.S. subsidiaries of a Chinese parent company are likely not eligible for the Second Draw PPP Program if its Chinese parent company owns more than 20 percent equity interest in the U.S. subsidiary or the board of directors of the U.S. subsidiary consists of a member who is a Chinese resident.

这些限制性和加强性的资格要求并不是第一轮薪资保障计划贷款的一部分。无论国会或总统都没有明确将中资公司排除在第一轮薪资保障计划贷款的资格之外。第一轮薪资保障计划贷款仅仅要求借款申请实体确认其工资表上的个人员工为美籍公民或美国永久居民。虽然第一轮薪资保障计划贷款也要求借款实体主要股东的身份, 但这个要求似乎主要是为了确保借款实体有资格参加美国小企业局所组织的项目。当前由于针对中国的新的限制, 第二轮薪资保障计划贷款的决策规定显然与先前有所不同。尽管立法和相关规定中的文字并不清晰, 但是我们可以合理的推定, 符合第一轮薪资保障计划贷款的中资公司, 如果其中国母公司拥有该中资公司超过百分之二十的股份或董事会中有中国籍的成员, 将没有资格获得第二轮薪资保障计划贷款。

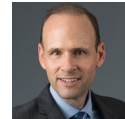
If you have any questions or would like us to look further into your company's eligibility of the Second Draw PPP Program, please do not hesitate to contact us. The last day to apply for a loan under the Second Draw PPP Program is **March 31, 2021**.

如果您有任何问题或希望我们进一步协助您研究您的公司是否符合获得第二轮薪资保障计划贷款的资格, 请随时与我们联系。第二轮薪资保障计划贷款的申请截止时间为**2021年3月31日**。

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