COVID-19 Policy Update

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New Paycheck Protection Program Flexibilities and Funding

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Key Points

- On December 27, 2020, the new stimulus package appropriating an additional $284.45 billion for the PPP was signed into law.
- The categories of eligible uses for loan proceeds and forgiveness are substantially broadened from the original PPP.
- Expenses paid with PPP loan proceeds are 100% tax deductible, retroactively applied.
- ERTC can be used in conjunction with PPP.
- Certain hard-hit business concerns are eligible for a Second Draw of up to $2 million.

The Paycheck Protection Program: New Provisions in the Latest Relief Package

On December 27, 2020, the President signed a $908 billion COVID-19 relief package (the "Act") with several new provisions relating to the Paycheck Protection Program (PPP) including an additional $284.45 billion for new PPP loans through September 30, 2021.

Tax Deductibility of Expenses Paid with PPP Loan Proceeds

The Act addressed one large outstanding issue with PPP loans: the deductibility of expenses paid using the proceeds of a PPP loan. While the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) specifically excluded the forgiveness of PPP loans from taxable income, the Act makes expenses paid with PPP loan proceeds 100% deductible. This new provision applies to all PPP loans, even loans that have already been forgiven.

Employee Retention Tax Credit

The Act amends the language from the original CARES Act to allow for the use of the Employee Retention Tax Credit (ERTC) in conjunction with the PPP as long as the

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ERTC is used for wages not paid with PPP funds. This provision is effective retroactively to the enactment date of the CARES Act and eligible businesses may now take advantage of the ERTC through July 1, 2021.

New Allowable and Forgivable Expenses

The new relief package expands the PPP program by making several additional types of expenses eligible for payment using PPP proceeds and considered for forgiveness. These expenses include:

- **Covered Operations Expenditures**. Payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses.
- **Covered Worker Protection and Facility Modification Expenditures**. Operating or capital expenditures to facilitate the adaptation of business activities to comply with COVID-19 federal health and safety guidelines, such as expenses related to sanitation, social distancing, personal protective equipment and installation of drive-through windows or physical barriers such as sneeze guards.
- **Covered Property Damage Costs**. Costs related to property damage and vandalism that occurred during 2020 that were not covered by insurance or other compensation.
- **Covered Supplier Costs**. Expenditures made to a supplier that were a) essential to the operations of the entity at the time the expenditures was made, and b) made pursuant to a contract or purchase order in effect any time before the covered period or, for perishable goods, any time during the covered period.

As with the original PPP loans, 60 percent of a PPP loan must be spent on payroll. However, the Act now also allows for group life, disability, vision, and dental insurance to be included as payroll costs. The remaining 40 percent of the PPP loan can be used towards the above expenditures and still be considered for forgiveness.

Borrowers who returned all or part of their PPP loan because they were unable to use such loan proceeds for allowable expenses will be allowed to reapply for the maximum amount applicable, including if calculations have increased due to changes in interim final rules, so long as they have not received forgiveness.

PPP Reopens for Loans up to $10 million for Entities that Have Not Previously Applied

The Act appropriates a minimum of $35 billion towards loans up to $10 million for eligible recipients who have not previously applied for a PPP loan.

New Entities Eligible for PPP Loans

Newspapers, TV, and Radio

- Newspapers, news organizations, TV and radio stations operating in NAICS 51110, 515111, 515112 or 515120 that employ not more than 500 employees per physical location and certify that PPP loan proceeds will support locally focused or emergency information.

- Section 511 public colleges and universities that have a public broadcasting station are eligible if the entity certifies that the loan will support locally focused or emergency information.

501(c)(6) entities are now eligible if:

- The organization doesn't receive more than 15% of receipts from lobbying.
- The lobbying activities don't comprise more than 15% of activities.
- The cost of lobbying activities didn't exceed $1 million during the most recent tax year that ended prior to February 15, 2020.
- The organization has 300 or fewer employees.
- The organization is not a professional sports league or an organization with the purpose of promoting or participating in a political campaign or other political activities.

PPP "Second Draw" Loans

Some harder-hit small businesses may be eligible for a second PPP loan, called "Second Draw" loans. For most businesses, the following eligibility requirements all apply to the Second Draw:

- Have used or will use the full amount of their first PPP loan.
- Demonstrate a 25 percent or greater reduction in revenue in the first, second, third or fourth quarter of 2020 relative to the same quarter in 2019.
- Employ 300 or fewer people.

Second Draw loans have a maximum amount of $2 million. The amount of the loan is based on two-and-a-half months of average annual payroll, or three-and-a-half months of average annual payroll for NAICS Code 72 entities (generally hotels and restaurants). The measurement period for the payroll can either be 2019 or the one-year period before the date the Second Draw loan is made.

The Second Draw loan provision also prohibits persons required to submit a registration statement under the Foreign Agents Registration Act and businesses or entities affiliated with the People's Republic of China or the Special Administrative Region of Hong Kong ("Hong Kong") from receiving additional relief. The Act states that a borrower is ineligible for a Second Draw loan if a business concern "for which an entity created in or organized under the laws of the People's Republic of China or Special Administrative Region of Hong Kong or that has significant operations in the People's Republic of China or 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 a capital or profit interest in a limited liability company or partnership; or . . . retains as a member of the board of directors of the business concern, a person who is resident of the People's Republic of China."

To be eligible for full loan forgiveness, PPP borrowers will have to spend no less than 60 percent of the funds on payroll over a covered period of either eight or 24 weeks; these are the same parameters as in the first PPP loans.

New Provisions for Public Officials

The Act bans the award of a new PPP loan to entities controlled directly or indirectly by the President, Vice President, head of an executive agency, Member of Congress or one of their spouses. The Act also requires current PPP borrowers that are directly or indirectly controlled by the President, Vice President, head of an executive agency, Member of Congress or one of their spouses to disclose the borrower's status as a "covered entities" to the Administrator of the Small Business Administration (SBA) by January 27, 2021.

Hold Harmless Provisions for Lenders

The Act expands the hold harmless provision for lenders contained in the CARES Act, permitting lenders to rely on any certification or documentation submitted by a PPP loan applicant. If a lender relies on an applicant's certification or other documents related to an initial or second draw PPP loan, an enforcement action may not be taken against the lender, and the lender shall not be subject to any penalties relating to loan origination or forgiveness of the initial or second draw PPP loan, if:

(A) The lender acts in good faith relating to loan origination or forgiveness of the initial or second draw PPP loan based on that reliance.

(B) All other relevant federal, state, local and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the initial or second draw PPP loan.

Set-Asides for Community Development Financial Institutions and Minority Depository Institutions

The Act includes PPP set-asides for minority-owned and other underserved businesses through community-based lenders like Community Development Financial Institutions (CDFIs) and Minority Depository Institutions (MDIs). Subtitle B of the Act provides $9 billion in funding that will provide low-cost long-term capital investments to CDFIs and MDIs and $3 billion to the CDFI Fund to provide grants to other financial institutions to support consumers, small businesses and non-profits in their communities.

Simplified Loan Forgiveness for Loans under $150,000

The Act also creates a simplified loan forgiveness application process for loans not greater than $150,000. Borrowers will receive forgiveness if they provide their lender with a one-page certification that includes a description of the number of employees the borrower was able to retain because of the covered loan, the estimated total amount of the loan spent on payroll costs, and the total loan value. As part of the certification, borrowers are also required to sign an attestation that they accurately provided information, complied with the applicable requirements, and plan to retain records for the required period. Records related to employment must be retained for four years and other records for three years, as the SBA may review and audit these loans to check for fraud, ineligibility, or other material noncompliance with applicable loan or loan forgiveness requirements. The SBA must create this certification form within 24 days of enactment of the Act. The SBA may not require additional materials beyond the certification form, unless necessary to substantiate revenue loss requirements or to satisfy relevant statutory or regulatory requirements.

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