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New Year, New PPP Loans

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EXECUTIVE SUMMARY

On December 27, 2020 President Trump signed the Consolidated Appropriations Act, 2021 (the “Act”) into law, which provides \$900 billion in additional COVID relief funds. Specifically, as part of the Act, the “Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act” (the “Economic Aid Act”) reopened the Paycheck Protection Program (“PPP”) as administered by the Small Business Administration (“SBA”), expanded the types of expenses that are eligible for loan forgiveness, and established a second draw of PPP loans. The following are the highlights of the new provisions. The SBA is expected to issue regulations and further guidance that implement the new provisions soon.

In addition, Congress overruled the Internal Revenue Service (“IRS”) and tax deductions are available for expenses paid with PPP loan funds even if the borrower received full forgiveness of the PPP loan.

On December 27, 2020 the President signed the Act into law, which among other items, included the Economic Aid Act. The Economic Aid Act allocates a total of \$325 billion to the PPP, providing \$284.5 billion funding for a second round of PPP loans, and made significant expansions to the restarted PPP. In addition, the Economic Aid Act expressly overturned Revenue Rule 2020-27 that had been issued by the Internal Revenue Service (the “IRS”) on November 18, 2020 (“Rev. Rule”). More information regarding Rev. Rule can be found [here](#).

CLARIFICATION ON TAX CONSIDERATIONS

The Rev. Rule prohibited companies that received or were reasonably expected to receive forgiveness for PPP loans to deduct expenses for payroll costs, interest on covered mortgage obligations, rent or utilities (“CARES Act Expenses”) for which they used PPP loan funds. The Economic Aid Act reversed this rule, stating that no deduction for business expenses funded with the proceeds of a forgiven PPP loan may be denied by reason of excluding forgiven PPP loan amounts from gross income.

Additionally, the Economic Aid Act extended the Employee Retention and Rehiring Tax Credit (“ERTC”) to July 1, 2021. The ERTC is a refundable tax credit against certain employment taxes. The Economic Aid Act increased the credit percentage from 50 percent to 70 percent of the qualified wages an eligible employer pays to employees, allowing employers to reduce employment tax deposits they are otherwise required to make. Moreover, the Economic Aid Act increased the amount of qualified wages from \$10,000 per employee for “all calendar quarters” to \$10,000 per employee for “any calendar quarter.” Thus, qualified employers may

now receive a tax credit of 70% for qualified wages paid to an employee up to \$10,000, including health care costs, *per* calendar quarter. Further, eligibility is expanded by reducing the “significant decline in gross receipts” from 50% to only 20% thresholds. Lastly, the Economic Aid Act allows employers that obtained PPP loans to claim the ERTC on eligible wages not used to support PPP loan forgiveness.

Finally, the Economic Aid Act extended the payroll tax deferral periods to December 31, 2021. Previously, the IRS permitted employers to defer withholding of the 6.2 percent employees’ portion of social security payroll taxes until December 31, 2020 and to withhold and deposit the deferred withholding amounts from January 1, 2021 to April 30, 2021. This deadline has now been extended to December 31, 2021.

CHANGES TO EXISTING PPP

While the Economic Aid Act still requires borrowers to spend at least 60% of their PPP loan proceeds on eligible “payroll costs,” it made certain expansions of allowable use of PPP loan proceeds and added additional eligible expenses. Specifically, the Economic Aid Act includes the following additional eligible expenses:

- **Additional Group Insurance Expenditures** - Payroll costs are expanded to include group insurance expenditures; specifically, group life disability, vision, or dental insurance. Notably these expanded payroll costs may be included for purposes of reapplying for an increased loan amount.
- **“Covered Operations Expenditure”** - Payment 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 Property Damage Cost”** - Cost related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation;
- **“Covered Supplier Cost”** - an expenditure made by an entity to a supplier of goods for the supply of goods that (1) are essential to the operations of the entity at the time at which the expenditure is made; and (2) is made pursuant to a contract, order, or purchase order in effect at any time before the covered period with respect to the applicable covered loan; or with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan.
- **“Covered Worker Protection Expenditure”** - an operating or a capital expenditure to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19. Examples include the creation of a drive-through window facility, an indoor, outdoor, or combined air or air pressure ventilation or filtration system, or a physical barrier, such as a sneeze guard.

Moreover, the Economic Aid Act provides for a simplified loan forgiveness process for PPP loans up to \$150,000. Specifically, the covered loan should be forgiven if the borrower (1) signs and submits to the lender a certification that describes the number of employees the borrower was able to retain because of the loan, the estimated amount of the loan that was spent on payroll costs, and the total loan amount; (2) attests that the

borrower has complied with all SBA loan requirements; and (3) retains records that prove compliance with these requirements. Notably, the Economic Aid Act requires the SBA to issue the previously described certification.

Furthermore, the Economic Aid Act requires the SBA within 45 days of enactment to submit an audit plan that details the policies and procedures of the SBA for conducting forgiveness reviews and audits of covered loans, and the metrics that the SBA will use to determine which covered loans will be audited. This will hopefully provide much needed clarity and answers to questions regarding audits.

The Economic Aid Act also amended the “covered period” for loan forgiveness and allows borrowers to choose a covered period: beginning with the date of the origination of the PPP loan and ending *any* time between 8 or 24 weeks from the loan origination date, as opposed to previously having to choose between either 8-week or 24-week periods. While borrowers must still use the full amount of PPP loan proceeds on eligible expenses during its selected covered period in order to receive loan forgiveness, there now is more flexibility that will potentially avoid reductions in loan forgiveness. For example, if a borrower has used all of its PPP loan proceeds on eligible expenses after 12 weeks, the borrower may choose a 12-week covered period and submit its forgiveness application after 12 weeks, as opposed to waiting 24 weeks and possibly facing loan reductions in forgiveness due to workforce reductions that occurred after the 12 weeks.

Lastly, under the Economic Aid Act PPP loan recipients who also received an Economic Injury Disaster Loans Advances (EIDLA) are no longer required to subtract the EIDLA from their PPP loan forgiveness amount.

SECOND DRAW PPP LOANS

In order to be eligible for a second draw PPP loan, a borrower must be:

- A “business concern, nonprofit organization, housing cooperative, veterans organization, Tribal business concern, eligible self-employed individual, sole proprietor, independent contractor, or small agricultural cooperative,”
- With no more than 300 employees (including affiliates), and
- Suffered 25% or more reduction in gross revenues between comparable quarters in 2019 and 2020.

Further, businesses with NAISC code 72 (Accommodations and Food Services) that have multiple locations, qualify if they employ no more than 300 employees and suffered 25% or more reduction in gross revenue. Further, the Economic Aid Act expressly provides that existing affiliation rules apply to second draw PPP Loans. Both first time PPP-loan borrowers and previous loan recipients may be eligible to receive a second draw PPP loan.

The maximum loan amount of a second draw PPP loan is equal to the lesser of (a) 2.5x of the borrower’s average monthly payroll costs, as measured during either (i) the one-year period before the date the PPP Second Round loan is disbursed or (ii) calendar year 2019, or (b) \$2 million. In addition, for businesses with NAISC codes beginning with 72 the maximum loan amount is equal to lesser of (a) 3.5x of the borrower’s average monthly payroll costs, as measured during either (i) the one-year period before the date the PPP Second Round loan is disbursed or (ii) calendar year 2019, or (b) \$2 million.

Please contact Jennifer R. Watson or a member of the Corporate, Finance or Acquisition Group with any questions regarding PPP loans.