

## Paycheck Protection Program Act Update: Consolidated Appropriations Act, 2021

The Consolidated Appropriations Act, 2021 (the "Act"), which was signed into law on December 27, 2020, includes several updates to the Paycheck Protection Program (the "PPP") originally established by the Coronavirus Aid, Relief, and Economic Security Act (as modified by the Paycheck Protection Program Flexibility Act of 2020, the "CARES Act"). The Act appropriates \$284,450,000,000 for PPP loans (including second draw PPP loans for prior recipients, as described below), allows for certain prior recipients of PPP loans to apply for and receive up to \$2,000,000 in new second draw PPP loans, expands the categories of eligible uses for PPP loans, establishes tax deductibility of expenses paid with PPP loan proceeds, adds flexibility in determining the covered period and streamlines the forgiveness process for PPP loans up to \$150,000. The PPP provides forgivable loans to small businesses administered by the U.S. Small Business Administration (the "SBA"). For background on the PPP, see our prior PPP alerts at our [Coronavirus \(COVID-19\) Resource Center](#).

### New Second Draw PPP Loans

The Act establishes a new "second draw" type of PPP loan available only to those who received PPP loans under the original program and who have or will use the full amount of the original PPP loan before the date the second draw PPP loan is disbursed. In addition, to be eligible for a second draw PPP loan, a recipient must have fewer than 300 employees, and must have suffered a 25% or more reduction in gross receipts for a 2020 quarter compared to the same quarter in 2019 (with certain exceptions for entities that were not in business for all of 2019).

Second draw PPP loans may not exceed the lesser of (i) the product of the recipient's average monthly payroll costs for 2019 or for the one-year period before the PPP loan is made, multiplied by 2.5 (or 3.5 for entities in the accommodations and food sector) and (ii) \$2,000,000. The act provides an alternative calculation for seasonal employers and entities that did not exist during the 1-year period preceding February 15, 2020. With certain exceptions, the waivers of affiliation rules set forth in the CARES Act apply in determining eligibility for second draw PPP loans. In order to receive forgiveness of a second draw PPP loan, a recipient must pay or incur qualified expenses during the applicable covered period in the amount of the forgiveness, and must incur at least 60% of the amount of forgiveness in payroll costs during such the covered period.

### Increase in Old PPP Loans

The Act provides for the SBA to establish rules allowing recipients of PPP loans that have not yet been forgiven to increase those PPP loans if they would have been eligible for higher amounts based on subsequently published regulations. Entities that have not yet received a PPP loan may apply for a first PPP loan under the original PPP program, as modified by the Act.

### Conflicts of Interest

Certain entities owned 20% or more by members of Congress, holders of certain other government positions or their families are not eligible for new PPP loans, and if they already have PPP loans, they must disclose such relationships in connection with any application for forgiveness.

### Additional Eligible Uses for PPP Loan Proceeds

The Act adds four new categories of expenses that PPP loan proceeds may be spent on, in addition to the categories provided in the CARES Act. Expenses in such new categories paid or incurred during the applicable covered period also count towards the amount of forgiveness for a PPP loan (subject to minimum expenditures on payroll costs).

Such new categories include:

- covered operations expenditures (certain expenditures for software or cloud computing services that facilitate business operations, product or service delivery, payroll and certain other functions);
- covered property damage costs (resulting from certain vandalism or looting in 2020);
- covered supplier costs (paid to suppliers for essential goods pursuant to certain contracts or orders); and
- covered worker protection expenditures (incurred to comply with governmental COVID requirement or guidance).

These additional categories apply as if set forth in the CARES Act, and thus apply to both existing and future PPP loans, including forgiveness thereof, except for PPP loans for which forgiveness has been received before enactment of the Act.

### Additional Eligible Payroll Costs

The Act expands the definition of payroll costs to include payments for group life, disability, vision and dental, insurance benefits. Originally, only healthcare benefits were included. Payroll costs are eligible uses for PPP loans, count towards the forgiveness amount of PPP loans and count towards the minimum payroll cost ratios for PPP loan forgiveness amounts. This expanded definition applies as if set forth in the CARES Act, and thus applies to both existing and future PPP loans.

### Tax Consequences of PPP Loan Forgiveness

The Act improves the tax treatment of forgiven PPP loans. The CARES Act provides that any amount which would otherwise be includible in gross income of a PPP loan recipient for tax purposes by reason of forgiveness of a PPP loan shall be excluded from gross income. Thus, the forgiveness of a PPP loan does not result in cancellation of indebtedness income for tax purposes, such that the economic benefit of loan forgiveness is not offset by an increase in taxable income. However, Internal Revenue Service (“IRS”) guidance provided that PPP loan borrowers could not deduct expenses paid with proceeds of PPP loans to the extent the loan was forgiven. As a result, many commentators criticized this IRS guidance as contrary to the CARES Act’s intent of providing PPP loan borrowers the benefit of PPP loan forgiveness on an after-tax basis. The Act overrides the aforementioned IRS guidance, stating that “no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied” by reason of PPP loan forgiveness being excluded from gross income.

### More Flexibility in Determining the Covered Period

The Act gives PPP loan borrowers more flexibility in determining their covered periods for purposes of calculating their forgiveness amounts. The PPP calculates the forgiveness amount for a PPP loan based on the sum of certain expenses paid and incurred during the applicable covered period. The covered period was originally eight weeks from PPP loan origination. Subsequent legislation provided for a covered period of 24 weeks from PPP loan origination, with certain PPP borrowers permitted to select either the eight-week or 24-week covered period. The Act now allows a PPP loan recipient to choose any covered period extending between eight and 24 weeks from origination of the PPP loan.

### Streamlined Forgiveness Process for PPP Loans up to \$150,000

In lieu of submitting one of the previously published forgiveness applications, the Act provides for PPP loans of not more than \$150,000 to be forgiven upon submission of a one-page certification, to be established by the SBA, certifying certain estimates of employee retention and expenditures, and attesting that the PPP loan recipient has complied with the PPP loan requirements (*e.g.*, use of proceeds for permitted expenses), and retains records to prove such compliance. Recipients of such PPP loans would not need to comply with the other requirements for forgiveness, such as incurring qualified expenditures in the amount to be forgiven. This alternative forgiveness process applies as if set forth in the CARES Act, and thus applies to both existing and future PPP loans.

### Regulation and Future Developments

The Act directs the SBA to establish various regulations to implement the Act's provisions, with the earliest regulations directed to be published within 10 days of the Act's enactment. Such regulations are to be established on an emergency basis exempt from customary notice requirements. We expect such regulations to provide further details and clarifications regarding the abovementioned PPP changes in the coming days and weeks.

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