

LEGAL UPDATES

PUBLISHED: DECEMBER 29, 2020

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KIRSTIN P. SALZMAN
KANSAS CITY:
816.983.8316
KIRSTIN.SALZMAN@
HUSCHBLACKWELL.COM

CHRISTOPHER W.
PETERSON
SPRINGFIELD:
417.268.4057
CHRIS.PETERSON@
HUSCHBLACKWELL.COM

The New Stimulus Bill's Sweeping Changes to the Paycheck Protection Program

The Paycheck Protection Program (PPP), originally part of the March 27, 2020, CARES Act, has undergone several changes since its inception, including June's PPP Flexibility Act, a myriad of Interim Final Rules and other guidance issued by the Small Business Administration (SBA). On December 27, 2020, a new stimulus bill (the Consolidated Appropriations Act, 2021) was signed into law, comprehensively changing the PPP and associated small-business provisions of the CARES Act.

Tax treatment of PPP loans

The new stimulus bill provides businesses with additional relief by clarifying that deductions are allowed for otherwise deductible expenses paid with the proceeds of a PPP loan that is subsequently forgiven. Additionally, the forgiven portion of a PPP loan or Second Draw Loan (discussed below) shall not be included in the gross income of the borrower, no tax attribute shall be reduced, and no basis increase shall be denied by reason of the exclusion from gross income of such forgiven loan.

PPP second draw loans

Certain smaller businesses that have been hit the hardest during the pandemic may be eligible for an additional PPP loan (a Second Draw Loan) if, among other things, they employ no more than 300 employees, have expended the full amount of their first PPP loan, and can demonstrate at least a 25% reduction in gross receipts in the first, second, or third quarter of 2020 as compared to the same quarter in 2019. Second Draw Loan applications submitted on or after January 1, 2021, may also use the gross receipts from the fourth quarter of 2020. The PPP's prior waiver of affiliation rules for certain

businesses in the food services and accommodation industries, certain franchises, and entities receiving funds from licensed small business investment company lenders also applies to these Second Draw Loans. Businesses not in operation on February 15, 2020, are not eligible. Additionally, entities that receive a grant under the new Shuttered Venue Operator Grant program (discussed below) are not eligible for a Second Draw Loan.

In general, eligible borrowers may receive a Second Draw Loan in an amount equal to 2.5 times (3.5 times for entities in certain accommodations and food service industries) their average monthly payroll costs, with a maximum loan amount of \$2 million. Like the PPP, amounts spent on eligible payroll costs – as well as covered mortgage interest, rent, and utility payments – are eligible for forgiveness. In addition, the stimulus bill provides that the following non-payroll expenses are also eligible for forgiveness:

Covered operations expenditures (which include expenditures for software, cloud computing, and other human resources and accounting needs);

Covered property damage costs (which include expenditures related to property damage due to public disturbances that occurred during 2020 that are not covered by insurance);

Covered supplier costs (which include expenditures to a supplier pursuant to a contract, purchase order, or order for goods in effect prior to taking out the loan that are essential to the borrower's operations at the time at which the expenditure was made; supplier costs of perishable goods can be made before or during the life of the loan); and

Covered worker protection expenditures (which include expenditures for PPE and other adaptive investments to help the borrower comply with health and safety guidelines – at the federal, state, and local level – related to COVID-19 during the period between March 1, 2020, and the end of the national emergency declaration).

Companies that received an initial PPP loan (and have not already had that loan forgiven) may also request forgiveness for amounts spent on these additional expenditures.

The PPP's requirement that 60% of loan proceeds be spent on payroll costs, and the PPP's existing safe harbors on restoring full-time equivalent employees and salaries and wages, continue to apply.

Simplified forgiveness application (PPP loans under \$150,000)

Previously, the SBA established a simplified forgiveness application process for certain borrowers with PPP loans under \$50,000. The new stimulus bill establishes a similar simplified forgiveness

application process for borrowers with PPP loans under \$150,000. This new process requires eligible borrowers to sign and submit a 1-page certification providing the number of employees retained because of the covered loan, the estimated amount of the loan spent on payroll costs, and the total loan amount. Borrowers with PPP loans under \$150,000 will also be required to: (1) attest that they accurately provided the required certification and complied with the requirements of the PPP; and (2) retain relevant employment records for four years and other records for three years. This new application process applies to PPP loans under \$150,000 that have not yet been forgiven. While this new forgiveness application is not yet available, the SBA is required to establish this form application within 24 days of enactment of the bill.

Additional changes

In addition to the above changes, the new stimulus bill provides the following:

Borrowers can choose any covered period beginning on the date such borrower receives the loan and ending on a date selected by the borrower between 8 and 24 weeks after loan origination.

The original PPP loan program has reopened and is available from now until March 31, 2021, for those who have not yet participated.

\$20 billion has been allocated to a Targeted Economic Injury Disaster Loan (EIDL) Advance program for eligible entities located in low-income communities.

The covered period for Emergency EIDL grants has been extended through December 31, 2021.

Borrowers are no longer required to deduct the amount of an EIDL advance from their PPP forgiveness amount. The SBA will issue rules to address borrowers that already received forgiveness and had their EIDL advance deducted from that amount.

Clarifies that employer-provided group insurance benefits, such as group life, disability, vision and dental insurance, are included in payroll costs eligible for forgiveness.

Requires the SBA to develop an audit plan within 45 days of the bill's enactment, that details the policies and procedures for conducting forgiveness reviews and audits of covered loans and the metrics that the SBA will use to determine which loans will be audited.

Clarifies that, after the date of the bill's enactment, public companies listed on a national securities exchange are not eligible for PPP loans or Second Draw Loans.

Confirms that churches and religious organizations are eligible borrowers.

Expands PPP eligibility to certain housing cooperatives, news organizations, public colleges and universities that have a public broadcasting station, 501(c)(6) organizations, Destination Marketing Organizations, and EIDL recipients that meet the eligibility criteria.

Authorizes \$15 billion in grants for “shuttered venue operators” including eligible live venue operators or promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theatre operators, and talent representatives who – among other things – demonstrate a 25% reduction in revenues and have not received, on or after the date of the new stimulus bill, a PPP loan or Second Draw Loan. The SBA may make an initial grant of up to \$10 million to an eligible person or entity, and a supplemental grant that is equal to 50% of the initial grant. There will be staggered access to these grants and, in the initial 14-day period of implementation of this program, grants shall only be awarded to eligible entities that have faced 90% or greater revenue loss.

For SBA 7(a), 504, and microloans that were made prior to the enactment of the CARES Act, the SBA will resume its payments of principal and interest for an additional 3 months (8 months for certain small businesses hardest hit by the pandemic), capped at \$9,000 per borrower per month. For SBA 7(a), 504, and microloans made within 6 months of enactment of the CARES Act or approved between February 1 and September 30, 2021, the SBA will pay the first 6 months of principal and interest, capped at \$9,000 per month.

Contact us

The new stimulus bill contemplates that the SBA will issue additional forms, regulations and guidance in connection with this sweeping change to the CARES Act. We continue to monitor these rapid developments and will provide updates accordingly. Should you have any questions, please do not hesitate to contact Kirstin Salzman, Jessica Zeratsky, Christopher W. Peterson, or your Husch Blackwell attorney to provide more detailed discussions of these changes as applicable to the PPP.

CARES Act, COVID-19 & Return-to-Work Guidance

Husch Blackwell provides guidance regarding COVID-19 updates, the CARES Act, and rapidly changing state-by-state orders, including those that impact stay-at-home and return-to-work protocols. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.