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CLIENT ALERT

NEW LOANS AND OTHER CHANGES TO THE PAYCHECK PROTECTION PROGRAM

A new law that authorized an additional \$284 billion of loans under the Paycheck Protection Program (the “PPP”) and made other changes to the PPP became effective on December 27, 2020. The changes include a second round of loans for certain PPP borrowers and clarification that any loan forgiveness for a PPP loan is not taxable and that expenses that serve as the basis for forgiveness of a PPP loan are deductible for federal income tax purposes. New regulations with respect to these changes to the PPP should be issued by January 6, 2021 and we expect PPP lenders will begin to accept applications and/or open their PPP loan portals soon after those regulations are issued.

The purpose of this Client Alert is to provide a summary of the changes to the PPP that we believe are of most importance to existing and potential borrowers. At the end of this Alert, we also provide information about a new SBA grant program for event operators (e.g., live events or theaters), changes to tax credits for employment retention and paid leave to employees, and changes to the tax deductibility of business related meals at restaurants in 2021 and 2022.

Who is eligible for this new round of PPP loans?

As in the case of the first round of PPP loans (a “**First Round Loan**”), small businesses, certain nonprofits, sole proprietors, self-employed individuals and independent contractors are eligible to apply for the second round of PPP loans funded under the new law (a “**Second Round Loan**”). The scope of eligible non-profits has been extended to include 501(c)(6) entities such as chambers of commerce and real estate boards. However, almost all public companies are ineligible for a Second Round Loan as are businesses where the primary activity is lobbying, and businesses with at least 20% ownership by China.

If I received a First Round Loan, can I get a Second Round Loan?

Yes, if you otherwise qualify.

If I did not receive a First Round Loan, can I get a Second Round Loan?

Yes, if you otherwise qualify. You can also still apply for a First Round Loan which among other things does not carry the revenue reduction test and is available to borrowers with up to 500 employees.

What are the eligibility requirements for a Second Round Loan?

In addition to the size and other eligibility standards imposed by the original statute that authorized the PPP and the guidance published by the Treasury Department and the Small Business Administration (the “SBA”) (See <https://bswlaw.com/firm/client-alerts/covid-19-resources/> for additional information), a borrower will be eligible for a Second Round Loan only

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if the borrower (i) was in business no later than February 15, 2020, (ii) does not have more than 300 employees or, if it has more than one location and otherwise qualifies under SBA rules, not more than 300 employees at any one location, and (iii) can demonstrate at least a 25% reduction in gross revenues in at least one quarter of 2020 relative to the same quarter in 2019 (the “**Revenue Reduction Test**”). Note that if an otherwise eligible borrower was not in existence in 2019 but was operational on February 15, 2020, it can compare the second, third or fourth quarter of 2020 to the first quarter of 2020. To simplify the process for a Second Round Loan of less than \$150,000, a self-certification of meeting the Revenue Reduction Test can be made provided, however, the SBA can require documentation to support that self-certification in connection with any future application for loan forgiveness of the Second Round Loan. Please also note that it appears that the 300 employee count is based on the total number of full and part-time employees as of the date of the application for a Second Round Loan and is not based on the total number of full time equivalent employees.

How will the amount of a Second Round Loan be determined?

For most PPP borrowers, the maximum amount of a Second Round Loan will be 2.5 times either their average monthly payroll costs in (i) the trailing one year prior to that loan or (ii) the 2019 calendar year. A borrower can select which of the 2 applicable time periods will be used to measure its average monthly payroll costs. Borrowers that are in industries assigned to NAICS code 72 (e.g. hotels and restaurants) may receive loans of up to 3.5 times their applicable average monthly payroll costs. Under all circumstances, the maximum amount of a Second Round Loan to a borrower is \$2 million.

Will a Second Round Loan be forgivable?

Yes and generally under very similar rules that applied to a First Round Loan.

Have the rules on forgiveness of a Second Round Loan changed?

Generally, no. A Second Round Loan remains eligible for forgiveness if during the measuring period selected by the PPP borrower (i) the proceeds of the loan have been used for certain eligible expenses and (ii) at least 60% of the loan proceeds were used for payroll costs. The new law clarifies that eligible payroll costs include employer-provided group life, disability, vision and dental insurance benefits. Please note that the amount of the loan forgiveness may still be reduced by certain reductions to the number of full time equivalent employees or wages and salaries paid to employees unless a safe harbor or other exclusion applies.

Did the expenses eligible for loan forgiveness change?

In addition to the payroll costs, utility expenses, rent and interest expenses that were eligible for forgiveness under a First Round Loan, expenses qualifying for forgiveness for any PPP Loan (i.e., any First Round Loan that has not previously been forgiven or any Second Round Loan) have been expanded to include following expenses:

- *Covered operations expenditures* – payments for business software or cloud computing services that facilitate business operations such as product or service delivery, payroll processing, human resources, accounting functions and inventory control;
- *Covered property damage costs* – costs related to property damage due to public disturbances that occurred during 2020 and were not covered by insurance;

- *Covered supplier costs* – expenditures to a supplier pursuant to a contract or purchase order in effect prior to the origination of the PPP loan for goods that are essential to the borrower’s operations at the time the expenditure is made; and
- *Covered worker protection expenditures* – operating or capital expenditures to enable a loan recipient to comply with federal health and safety requirement or guidance, or any equivalent State or local requirements or guidance, related to COVID-19 during the period between March 1, 2020 and the end of the national emergency declaration, including costs of personal protective equipment.

What is the measuring period for paying eligible expenses that support loan forgiveness?

The measuring period can be anytime between 8 and 24 weeks that is selected by the borrower. That means the measuring period will start on the date such loan was received and the borrower can choose to end that period anytime between 8 and 24 weeks after the start date. A borrower’s selection of the time period is made at the time of the application for loan forgiveness. This measuring period is available for a First Round Loan or a Second Round Loan. A borrower appears to be able to select different measuring periods for a First Round Loan and a Second Round Loan.

How is PPP Loan forgiveness and the expenses paid with a PPP loan treated for federal income tax purposes?

Borrowers will not pay any federal income tax on any PPP loan forgiveness and any otherwise deductible expenses that served as the basis for PPP loan forgiveness remain deductible for income tax purposes. This tax treatment applies to both First Round Loans and Second Round Loans and overrides prior IRS rulings that disallowed a tax deduction for otherwise deductible expenses that were the basis for PPP loan forgiveness. Further, the tax basis and other attributes of the borrower’s assets will not be reduced or affected by or as a result of such loan forgiveness.

Is there a simplified loan forgiveness application process for smaller PPP loans?

A borrower whose PPP loan (whether a First Round Loan or a Second Round Loan) is not more than \$150,000 can now apply for forgiveness based on a one-page certification providing a description of the number of employees the borrower was able to retain because of the PPP loan, the estimated amount of the PPP loan spent on payroll costs, and the total PPP loan amount. The borrower must also certify that it complied with the PPP loan requirements. No other application or documentation is required to be submitted by such a borrower at the time of the application for forgiveness, but the SBA retains its right to later request confirmation or documentation with respect to such certifications.

If I repaid some of my First Round Loan or did not accept the full amount of a First Round Loan, can I reapply to recapture those amounts?

A PPP borrower that returned all or a portion of its First Round Loan may reapply for a loan in an amount equal to the difference between the amount, if any, of such First Round Loan retained by the borrower, and for which it has not received forgiveness, and the maximum applicable amount. Further, a borrower that did not accept the full amount of a First Round Loan may request a modification to increase the amount of its First Round Loan to the maximum applicable amount.

What happens to any balance of the Second Round Loan that is not forgiven?

It bears interest at 1% and is repayable in monthly installments during the time period when the amount of your loan forgiveness is determined and ending 5 years after Second Round Loan was received.

What other provisions of the new bill might be of interest to a business?

Shuttered Venue Operators

Certain live venue operators or promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theater operators, or talent representatives (“**Shuttered Venue Operators**”) that were fully operational on February 29, 2020, and can satisfy the Revenue Reduction Test can apply for grants from the SBA under a \$15 Billion program that is separate from the PPP. The proceeds of a grant must be used for payroll costs and other specified eligible expenses. A Shuttered Venue Operator must, as of the date of its grant, have resumed or intend to resume its operations and the venues for such operations must meet a number of specified criteria. The amount of the grant to a Shuttered Venue Operator that was in operation on January 1, 2019 will be equal to 45% of the gross earned revenue of such operator during 2019. For a Shuttered Venue Operator that began operations after January 1, 2019, the grant amount will be equal to 6 times the average monthly gross earned revenue for each full month of operation during 2019. In any case, the maximum grant amount is \$10 million. Allocation of grants will include exclusive windows for operators with a 90% or 70% revenue reduction and a set aside for operators with less than 50 staff members. A Shuttered Venue Operator that receives a grant will not be eligible to apply for a First or Second Round Loan. We believe that if a Shuttered Venue Operator previously received a First Round Loan it will not be precluded from applying for a grant.

Employee retention credit

The employee retention tax credit against payroll taxes that was originally enacted in March 2020 has been significantly enhanced. That tax credit now is (a) available for wages up to \$10,000 per quarter per employee (previously it was limited to \$10,000 per year); (b) based on 70% of qualified wages (previously it was 50%); (c) available to employers whose gross receipts decline by 20% or more (previously it was 50% reduction); and (d) extended for wages paid through June 30, 2021 (previously the cutoff date was December 31, 2020). PPP borrowers are no longer prohibited from claiming this credit on wages that were not the basis on which PPP loan forgiveness is based.

Business meals

For 2021 and 2022, all businesses, regardless of size or industry, will be permitted a 100% income deduction for business-related meals provided by a restaurant. Currently that deduction is only 50%.

Credits for paid sick and family leave

The refundable payroll tax credits for certain paid sick and family leave are extended through March 31, 2021.