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Insights

A PPP Holiday Stocking Stuffer

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Congress finally agreed on a new COVID relief package, passed the Consolidated Appropriations Act, 2021 (the "Act") after months of intense negotiations about scope and dollars, and has sent the Act to President Trump for his signature. The President has tweeted objections about some provisions of the Act, so while many expected the President to sign the Act when it hit his desk, some seeds of doubt have been strewn that eat away at this confidence.

The Act provides a comprehensive set of incentives and safeguards the continued efforts to protect the economic future while navigating the impact of the C-19 pandemic. One area of focus has been on providing support to America's small businesses, with all of the programs targeted at small businesses totaling about $325 billion. A major path of implementation runs through continuation and expansion of the Paycheck Protection Program ("PPP"). The Act includes an additional $284 billion in additional forgivable PPP loans (including for some entities, a change that allows a second bite at the PPP apple), answers open questions on the deductibility of PPP expenses, streamlines the forgiveness application for PPP loans less than $150,000, and expands forgivable expenses.

This alert highlights some of the key PPP provisions from the Act:

Second Round of PPP Loans

The Act allows new PPP loans to be drawn by previous PPP borrowers as well as new borrowers that did not receive a PPP loan in the first round. Eligible entities may borrow up to two and one-half times their average monthly payroll for 2019, up to a maximum amount of $2 million.

In order to be considered an eligible entity, borrowers must have 300 employees or less (which is down from the original 500 employee threshold), must have already used the original PPP funds if they had previously received a PPP loan under the original package, and must certify that the borrower had a loss of revenue of 25% or greater in any quarter in 2020 compared to the corresponding quarter in 2019.

In addition, the Act expands the pool of eligible borrowers under the PPP. Specifically, organizations described in Section 501(c)(6) of the Internal Revenue Code, like business leagues and chambers of commerce (but excluding professional sports leagues and organizations engaged in political campaign activity), as well as "destination marketing organizations" (which are defined in the Act as a nonprofit or governmental entity engaged in marketing and promoting communities and facilities to businesses and leisure travelers) are now eligible for PPP loans.

Other requirements of the PPP will continue, such as the need to expend at least 60% of the PPP loan proceeds on payroll costs. The nettlesome "necessity" certification also remains a gating element and is likely

to be a more realistic barrier to a PPP loan than at the beginning of the pandemic. A business that has survived may find it hard to certify now that it has determined in good faith that the funds are necessary to continue to survive.

Deductibility of PPP Expenses

In response to strong IRS resistance against permitting PPP loan recipients to deduct expenses paid for with PPP proceeds, Congress made clear in the Act that such expenses are deductible. This builds on the specific language of the CARES Act that excluded PPP loan forgiveness from being considered income, contrary to the longstanding tax policy mandating that debt cancellation results in income to the taxpayer.

The issue of expense deductibility has been contentious since the earliest days of the CARES Act. The IRS cited "fundamental tax policy principles" as its justification for disallowing federal tax deductions for expenses paid for with PPP loan proceeds (i.e., taxpayer funding). However, advocacy efforts from all corners – including many business and trade associations as well as many members of Congress - insisted that Congress never intended to deny the deductions. The fight culminated with the IRS, just last month, releasing additional guidance instructing business owners who "reasonably believe" their PPP loans will be forgiven to not deduct these costs (See our prior alert **here**).

Congress, in no uncertain terms, appears to have gotten the last word on the matter. The Act provides that no deduction shall be denied or reduced, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by the loan forgiveness provision of the CARES Act (that says forgiven PPP loans will not count as income).

While this is certainly welcome news for PPP loan recipients as they near the close of the calendar year, those recipients are likely to proceed cautiously as they meet with their return preparers in the coming weeks, anxious that they may see yet another round of clarifying guidance on exactly how (and to what extent) this deductibility may be enjoyed.

Additional Forgivable Expenses

For PPP borrowers who have not received forgiveness prior to the effective date of the Act, PPP funds can be spent on four new additional non-payroll categories and still allow the PPP loan to be eligible for forgiveness. Those categories are:

- Covered Property Damage Costs. These are expenses that businesses faced as a result of vandalism or looting in 2020.
- Covered Supplier Costs. These are expenses that a business made to a supplier of goods that are essential to the operations of the business or is made pursuant to a contract, order or purchase order that was either in effect at any time before the covered period or with respect to perishable goods, in effect before or at any time during the covered period.
- Covered Worker Protection. These are expenses that a business incurred due to the adaptation of business activities to comply with requirements established by government agencies.
- Covered Operations Expenditures. These types of expenses consist of payments for any business software or cloud computing services that facilitates business operations.

Loans of Less than $150K Simplified Forgiveness Application

The Act mandates that the SBA create a simplified forgiveness application for PPP loans that are less than $150,000. The new forgiveness application must fit onto one page and should include loan information and a

certification from the PPP borrower that the funds were used for proper forgivable expenses. It is likely that the simplified forgiveness application will be similar to the application used by PPP borrowers with loans less than $50,000.

Other Stocking Delights

The Act provides many others a nice holiday *amuse-bouche*. Some of the trinkets:

- An additional $20 billion made available for Economic Injury Disaster Loans (EIDL) grants.
- Payroll tax deferral extended to the end of 2021.
- Business meals now 100% deductible for 2021 and 2022.
- Employee Retention Tax Credit extended to July 31, 2021.

Krieg DeVault is committed to helping you and your business during these unprecedented times. With your needs in mind, we have established a COVID-19 Resource Center to assist you through this process. Look for additional alerts from Krieg DeVault as we review the more than 5,500 pages of the Act and consider its ramifications in the days ahead.

In the meantime, if you have any further questions, comments or concerns about the PPP provisions, or other sections of the Act, please feel free to contact Robert A. Greising, Kendall A. Schnurpel, Corben A. Lee or a member of the firm's Business, Acquisitions & Securities team.