

# CORONAVIRUS INFORMATION & UPDATES

January 27, 2021

## Bipartisan Proposal for Extension and Revision of Coronavirus Aid, Relief, and Economic Security Act (CARES Act) – Summary of Key Provisions

On December 21, 2020, a bipartisan majority in each house of Congress passed an omnibus Consolidated Appropriations Act for fiscal year 2021 (The Act). The Act included revisions and extensions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) that became law in late March in response to the economic impact of COVID-19. The Act, which was signed into law on December 27, 2020, contains key provisions addressing:

- Revisions and improvements to the Paycheck Protection Program (PPP), including new funding for initial PPP loans to businesses and second draw loans for a limited number of small businesses that can demonstrate significant loss of revenue during the first half of 2020, an expansion of the scope of eligible businesses, an expansion of categories for permissible uses of loan proceeds and loan forgiveness, and simplified forgiveness applications for businesses with loans under \$150,000.
- A number of tax issues (see separate client alert), including permission for PPP borrowers to deduct expenses paid with forgiven loan proceeds.
- Grants for Shuttered Venue Operators such as certain live venue operators, theatrical producers, live performing arts operators, museums, motion picture theater operators and talent representatives.

### Paycheck Protection Program

#### Initial Loans

Businesses that have not yet taken a PPP loan are eligible to apply for a loan through March 31, 2021, largely under the rules that applied in the two earlier tranches of the PPP program. Notable differences include that an otherwise eligible entity will be prevented from receiving a PPP loan if:

- The entity was not in existence prior to February 15, 2020.
- The entity received a grant under the Shuttered Venue Operator Grants program.
- The entity is a publicly traded company.

#### Second Draw Loans

Under the Act, second draw loans will be made available to a limited number of businesses that previously received a PPP loan. To qualify for a second PPP loan of 2.5x (or 3.5x for those in accommodation and food services industries) its average monthly payroll costs (which cannot exceed \$2 million), a business must:

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- Have 300 or fewer employees (if a business has multiple locations that are eligible entities under the requirements, the business must have 300 or fewer employees per physical location).
- Have used or will use the full amount of its first PPP loan.
- Have experienced decline in gross revenue of at least 25% in any 2020 quarter compared with the same quarter in 2019 (as demonstrated by quarterly statements of income or operations).

An otherwise eligible entity will be prevented from receiving a second draw loan under the PPP if:

- The entity was not in operation prior to February 15, 2020.
- The entity received a grant under the Shuttered Venue Operator Grants program.
- An entity created in the People's Republic of China (PRC) or the Special Administrative Region (SAR) of Hong Kong owns, either directly or indirectly, 20% or more of the applying entity.
- The applying entity has "significant operations" in either the PRC or the SAR of Hong Kong.
- A resident of the PRC (but not the SAR of Hong Kong) is a board member.

## Scope of Eligible Businesses

The Act expands the scope of businesses eligible for PPP loans. The Act has provisions specifically applicable to certain types of businesses, including for:

- 501(c)(6) organizations.
- Destination marketing organizations.
- Newspaper, television, and radio broadcasters.

## Borrowers That Repaid a Portion of Their PPP Loan

The Act provides that borrowers who repaid all or a portion of their loan may apply for a new loan in an amount equal to the difference between the amount retained and the maximum permitted loan amount. Additionally, borrowers who did not accept the full amount of their PPP loan may request a modification of their loan to the maximum permitted loan amount.

## Permissible Expenses

Under the CARES Act, permissible expenses were limited to payroll, rent, mortgages, utilities and debt obligations. Under the Act, permissible expenses have been expanded to include:

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- Covered worker protection and facility modification expenditures, including personal protective equipment, to comply with COVID-19 federal health and safety guidelines.
- Expenditures to suppliers of goods that are essential at the time of purchase to the borrower's current operations and are 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.
- Covered operating costs such as software and cloud computing services and accounting needs.
- Property damage costs related to vandalism or looting due to public disturbances that occurred during 2020 and were not covered by insurance or other compensation.

These expenses are both a **permissible use** of funds as well as **eligible for forgiveness**. For existing borrowers, these changes have been made retroactive to the original CARES Act for all loans that have not yet been forgiven – meaning that some borrowers might be eligible for increased forgiveness. Note, however, that the Act reaffirms the SBA regulations that provide that payroll expenses must comprise at least 60% of the forgiven amount of loans.

The Act prohibits the use of loan proceeds for lobbying activities.

The Act also amends the CARES Act to provide that group life, disability, vision and dental benefits are included within payroll costs.

Additionally, the Act no longer requires that proceeds from any Economic Injury Disaster Loan be deducted from loan forgiveness amounts.

## Covered Period

For all PPP loans made on or after December 27, 2020, the “covered period” during which the loan can be used – and during which forgiveness is calculated – is now, at the borrower's election, a period between 8 and 24 weeks from the date of origination of the loan. Despite discussion of extending the period, no such change was included in the legislation.

## Streamlined Loan Forgiveness

The Act creates a streamlined forgiveness process for loans under \$150,000. Borrowers need only submit a form (to be “no more than one page in length”) with very limited information, including:

- A description of the number of employees the borrower was able to retain because of the covered loan.
- The estimated amount of the loan spent by the borrower on payroll costs.
- The total loan value.

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## Tax Deductibility

The Act reaffirms that forgiven PPP loans do not have to be taken into the gross income of borrowers. The Act also provides that expenses paid with forgiven PPP loans are tax-deductible, superseding IRS guidance that such expenses would not be deductible by taxpayers (“no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income”).

The Act permits a business that previously received or receives a PPP loan to claim the Employee Retention Credit, unless the credit is sought for wages paid with forgiven PPP loan proceeds.

A separate Ropes & Gray client alert ([Phase 4 Stimulus Package – Highlight of Certain Key Tax-Related Provisions in the Phase 4 Stimulus Package](#)) provides a summary of other key tax provisions related to the Act.

## Debtors in Bankruptcy

The Act provides that debtors in a Chapter 11, 12 or 13 case are eligible for PPP loans and the loans will be treated as administrative expenses.

## **Other Small Business Support**

### Eligible Performing Entities and Motion Picture Theater Operators

Live venue operators, theatrical producers, live performing arts operators, museums, motion picture theater operators and talent representatives are eligible to receive grants equal to the lesser of 45% of their 2019 gross revenue or \$10 million. Entities are eligible to receive additional grants equal to 50% of the initial grant so long as no entity would receive more than \$10 million.

Each form of eligible business has specific qualifications. The common requirements are that the business must have been “fully operational” on February 29, 2020 and now be open (or intend to reopen) and must show a decline in gross revenue of at least 25% in any 2020 quarter compared with the same quarter in 2019.

Those businesses that receive a grant under the Shuttered Venue Operators program are prohibited from obtaining a loan under the PPP. Likewise, a business that receives a PPP loan after December 27, 2020, is prohibited from receiving a loan under the Shuttered Venue Operators program.

An otherwise eligible business will be prevented from participating in the Shuttered Venue Operators program if any of the following apply:

- It is majority owned or controlled by a publicly traded company.
- The business received greater than 10% of its gross revenue from federal funding during 2019 (excluding any amounts received under the Robert T. Stafford Disaster Relief and Emergency Assistance Act).



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- It is a business that is majority owned or controlled by an entity meeting two or more of the following characteristics: (i) owns or operates venues, theatres or agencies in more than one country, (ii) owns or operates venues, theatres or agencies in more than 10 States, or (iii) employs more than 500 employees on a full-time equivalent basis.

Grant funds may be used for costs incurred between March 1, 2020 and December 31, 2021. Allowed costs include:

- Payroll costs, mortgage and rent obligations, utility payments, and worker protection expenditures all as defined under the PPP.
- Payments of principal or interest (excluding pre-payment of principal) incurred before February 15, 2020.
- “Other ordinary and necessary business expenses” including maintenance, administrative costs, licensing fees, state and local taxes, advertising, and capital expenditures related to production. However, grant funds may not be used primarily for “other ordinary and necessary business expenses.”

Grant funds may not be used to purchase real estate or pay principal or interest on loans incurred after February 15, 2020. Additionally, grant funds may not be used for investment or for political contributions.

Grants will be awarded in phases, with businesses that suffered the greatest revenue decline from the period of April 1, 2020 through December 31, 2020 receiving priority. The SBA is currently in the process of setting up the grant program and is not yet accepting applications.

## Healthcare Facilities

Healthcare facilities that have exhausted all other forms of assistance and were financially sound immediately prior to the President’s March 13, 2020, National Emergency Proclamation are eligible to have the Secretary of Housing and Urban Development insure up to one years worth of that facility’s expenses.