

December 23, 2020

## **CORONAVIRUS RELIEF PACKAGE PASSED BY CONGRESS WOULD REVIVE PAYCHECK PROTECTION PROGRAM AND PROVIDE ADDITIONAL RELIEF TO ELIGIBLE BUSINESSES**

To Our Clients and Friends:

On December 21, 2020, Congress passed a massive \$2.3 trillion, 5,593-page, bicameral and bipartisan year-end legislation package to fund the government and provide long-delayed coronavirus relief. H.R. 133 includes \$1.4 trillion to fund the government and \$900 billion in coronavirus relief via the *Coronavirus Response and Relief Supplemental Appropriations Act, 2021* (the “Act”). Following the \$2.3 trillion coronavirus relief package signed into law last March, the current legislation is the second-largest economic stimulus in U.S. history. This is the fourth coronavirus relief package that Congress has passed this year, bringing the total sum that Congress has spent on coronavirus relief up to roughly \$3 trillion.

The Act passed Congress overwhelmingly, by a vote of 359-53 in the House and 92-6 in the Senate. President Trump has criticized the bill sharply, but the strong votes in both chambers may dissuade him from vetoing the measure. The passage of the massive legislation marks nearly nine months since Congress last provided coronavirus relief to a nation besieged by a pandemic and businesses on the brink of economic collapse in the absence of federal funding.

While the Act includes a wide variety of provisions, this alert will focus largely on language relating to the Paycheck Protection Program (“PPP”), which allows for second draw loans for the hardest-hit businesses. The Act also expands the list of expenses PPP funds may cover and clarifies that ordinarily tax deductible business expenses are still deductible even if PPP loans were used to cover those costs. Other provisions of the Act include PPP set-asides for businesses that traditionally have difficulty accessing mainstream banking services and expanded the types of organizations eligible for relief. The Act also provides funding for the SBA to conduct auditing and fraud-detection efforts over the administration of PPP loans.

Other COVID-19 relief provisions include billions in funding for “shuttered venue operators,” such as live venues, closed movie theaters, and museums. Moreover, any entity that received an Economic Disaster Injury Loan advance under the *Coronavirus Aid, Relief, and Economic Security Act* (“*CARES Act*”) no longer needs to deduct the amount of their advance from their PPP loan forgiveness amount. Below is a summary of the key provisions most relevant to our clients and friends.

## **Paycheck Protection Program Revival and Changes**

The Act revives and makes key changes to the *Paycheck Protection Program Flexibility Act of 2020* (“PPP Flexibility Act”) that Congress passed, and the President signed into law, in June of 2020.<sup>[i]</sup> As discussed in a previous Gibson Dunn client alert, *President Signs Paycheck Protection Program Flexibility Act*, the PPP Flexibility Act relaxed certain requirements of and restrictions on PPP loans, which were established by the *CARES Act* and clarified by subsequent guidance from the Small Business Administration (“SBA”) and the U.S. Department of the Treasury. If President Trump signs the legislation, the SBA is required to establish regulations on implementing the programs in the Act within 10 days of the signing.

Importantly, the Act revives the signature small-business relief effort that Congress established last spring, committing \$285 billion for additional PPP loans and extending the deadline to apply for PPP loans to March 31, 2021. The Act allows the hardest-hit businesses to receive a second draw PPP loan, with extra relief provided to food services and hotels; expands the list of eligible expenses that PPP funds may cover; and permits PPP recipients to deduct expenses covered with PPP funds. The Act also expands the types of programs eligible for first-time PPP loans, while prohibiting publicly-traded companies and companies affiliated with China or Hong Kong from receiving new loans.

The first round of PPP loans was largely viewed as a success. As of August 8, 2020—when the first round of PPP loans closed—the SBA had approved 5,212,128 PPP loans. More than 5,000 lenders participated in administering the program, and the average loan was approximately \$100,729. In total, the loans amounted to more than \$525 billion.<sup>[ii]</sup> As of November 22, 2020, the SBA had received 595,144 loan forgiveness applications, totaling approximately \$83 billion, of which the SBA had forgiven approximately \$38 billion.

## **Second Draw Loans**

Significantly, the Act reopens the PPP to certain businesses that already received a PPP loan. The program’s expiration in August of this year left over \$130 billion in unused funds that will now be reallocated to the General Treasury, and the program’s rules initially prevented businesses who received loans from obtaining a second PPP loan. The Act offers a second PPP loan to companies who meet certain eligibility criteria. Specifically, businesses applying for a second draw loan must show that they—and their affiliates— “employ not more than 300 employees.” Additionally, businesses are eligible only if they have used or will use the full amount of their initial PPP loan and have lost at least 25 percent of their revenue in any quarter of 2020. Although initial press reports covering the Act indicated that eligible businesses must have at least a 30 percent reduction in their revenue, the finalized Act created a lower eligibility threshold. Specifically, eligible entities must have gross receipts that demonstrate a 25 percent or more reduction from the gross receipts of the entity during the same quarter in 2019. Entities that submit applications on or after January 1, 2021 are eligible to utilize their gross receipts from the fourth quarter of 2020. However, entities not in operation on or after February 15, 2020 are not eligible for initial PPP loans nor second draw loans.

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## Maximum Second Draw Loan Amount

While the loan amount for most borrowers will be the same as the amount of their initial PPP loans, second draw loans are capped at \$2 million per borrower. This is significantly lower than the \$10 million cap placed on initial PPP loans in the *CARES Act*. For borrowers who received a PPP loan within the last 90 days at the time of their second draw application, the proposed bill requires that the aggregate of the initial and second draw loan does not exceed \$10 million.

## Larger Second Draw Loan Amounts for Food and Hotel Industries

Second draw loan borrowers are generally allowed to receive a loan amount of up to two-and-one-half times their average monthly payroll. The Act, however, allows businesses within the accommodation and food services industries to receive second draw loans of up to three-and-one-half times their monthly average payroll costs. The maximum loan amount of \$2 million still applies.

## Restrictions on People's Republic of China and Hong Kong Affiliated Entities

Notably, the second draw loan provision also restricts businesses or entities affiliated with the People's Republic of China ("PRC") or the Special Administrative Region of Hong Kong ("Hong Kong") from receiving additional relief. The Act states that a borrower is ineligible for a second draw loan if: 1) an entity created in or organized under the laws of the PRC or Hong Kong or with significant operations in the PRC or Hong Kong holds 20 percent or more interest in the borrower; or 2) a member of the borrower's Board of Directors is a resident of the PRC.

## **Changes to PPP Eligibility**

The Act made changes and clarifications to what kinds of entities are eligible for PPP loans. Significantly, 501(c)(6) organizations—that were previously not eligible to receive PPP assistance—will now be eligible to receive a first-time loan under the PPP program. To be eligible, 501(c)(6) organizations must have no more than 300 employees and may not be primarily engaged in political or lobbying activities. Specifically, the lobbying activities of the organization cannot comprise more than 15 percent of the business's total activities and cannot exceed \$1 million in costs during the most recent tax year of the organization that ended prior to February 15, 2020. The Act defines lobbying activities to include any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public documents.

The Act also allows certain news organizations that were previously ineligible because of affiliation with other newspapers or other businesses to access PPP loans. Under the Act, any station that is licensed by the Federal Communications Commission ("FCC") under Title III of the *Communications Act of 1934* is eligible to receive a PPP loan if the entity either: 1) employs not more than 500 employees per physical location or otherwise meets the applicable SBA size standard; or 2) is a nonprofit organization designated as a public broadcasting entity by the *Communications Act of 1934*. The news outlet must be majority-owned or controlled by a business that is a newspaper publisher or in the radio and television broadcasting industry, as defined by the North American Industry Classification Code (the "Code"), unless it is a public broadcasting entity, in which case its trade or business must fall under the Code. All

news organizations must certify that proceeds of the loan will be used to support the component of the business that produces or distributes locally-focused or emergency information.

The Act also excludes entities that are not otherwise eligible under the SBA's traditional eligibility rules codified under 13 C.F.R. § 120.110.<sup>[iii]</sup> Additionally, publicly traded companies are not eligible for PPP loans under the Act, codifying what was previously understood through guidance from the Department of the Treasury, but unclear on the face of *CARES Act*.

## **PPP Loan Forgiveness – Covered Period and Range of Eligible Expenses**

The covered period is the time allotted for borrowers to spend PPP loan proceeds on qualified expenses for purposes of forgiveness. The legislation allows borrowers to choose a “covered period” of 8 or 24 months.

Congress also voted to expand the number of forgivable expenses under the Act. Forgivable expenses, which were previously limited to payroll costs and certain mortgage, rent, and utility expenses, now include supplier costs, investments in facility modifications, and personal protective equipment that businesses require to operate safely. Business software and cloud computing services that help facilitate business operations are also included.

## **Repeal of Emergency Injury Disaster Loan Advance Deduction Prohibition**

The Act repeals a provision in the *CARES Act* requiring PPP borrowers to deduct the amount of their Economic Injury Disaster Loan (“EIDL”) advance—up to \$10,000—from their PPP forgiveness amount. The Act reflects Congress's view that those that received EIDL advances should be afforded additional relief.

## **Permitted Tax Deductions for PPP Borrowers**

The Act clarifies that organizations receiving PPP loans will be allowed to deduct from taxable income expenses paid for by funds received under the loan. Secretary of the Treasury, Steven Mnuchin, previously prohibited corporations from making such tax deductions, citing the Administration's view that allowing the deductions would amount to “double-dipping” because the loan forgiveness amount is already excluded from income for tax purposes. However, the Act clarifies that it was Congress's intent that the *CARES Act* allow for such tax deductions. Thus, businesses receiving PPP funds will be allowed to deduct business expenses as if they used non-PPP funds to cover those costs.

## **Simplified Forgiveness Applications for Small PPP Loans**

The Act simplifies the loan forgiveness process for recipients of a PPP loan of \$150,000 or less. To begin the loan forgiveness process, recipients must sign and submit a letter of certification, which will be provided by the SBA Administrator no later than 24 days after the Act's enactment. The certification letter will be no more than one page in length and will verify the loan recipient's eligibility to their lender. The letter must provide specific information relating to the entity's loan including: 1) the number of employees the eligible recipient was able to retain because of the covered loan; 2) the estimated

amount of the covered loan amount spent by the eligible recipient on payroll costs; and 3) the total loan value.

## **No Enforcement Action Against Lenders**

The Act makes clear that an enforcement action may not be brought against lenders that rely on an applicant's certification for an initial PPP loan or second draw PPP loan as long as the lender: 1) acts in good faith relating to loan origination or forgiveness of the PPP loan; and 2) all other relevant Federal, State, local, and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the PPP loan.

## **Funds for Community Development Financial Institutions**

The Act includes PPP set-asides for very small businesses with ten employees or fewer through community-based lenders like Community Development Financial Institutions and Minority Depository Institutions. In total, the Act provides \$12 billion in capital investments to support these institutions, which makes loans and grants to businesses that are often unable to get traditional banks to do business with them.

## **Conflicts of Interest for Government Officials**

As a nod to public concerns about PPP forgiveness, the Act places disclosure requirements on high-level government officials who receive a PPP loan. This provision applies to the President, Vice President, heads of executive agencies, and Members of Congress, including their spouses. The public disclosure must be made within 30 days of forgiveness of the PPP loan.

## **Additional Notable Provisions of the Act**

The Act also includes various other COVID-19 relief provisions, including:

- **Grants for Shuttered Venue Operators.** The Act authorizes \$15 billion in relief to eligible live venues, closed movie theaters, zoos, and museums, which were particularly hard-hit by the pandemic. Of the allocation, \$2 billion goes toward eligible entities that have no more than 50 full-time employees. The bill takes an incremental approach to disbursing funds. Only eligible entities that saw a 90 percent or more loss in revenue during the period beginning on April 1, 2020 and ending on December 31, 2020 when compared to the same period in 2019 are eligible to receive funds within the initial 14 days during which the SBA allocates funds. Entities with a 70 percent or more loss in revenue are eligible to receive funds after the initial 14-day period ends. After the first 28 days of issuing grants, the SBA may award a grant to any eligible entity.
- **SBA Fraud and Prevention Programs.** Congress allocated \$50 million to the Small Business Administration for audits and other fraud prevention programs to monitor the agency's administration of PPP loans.

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- Rental Assistance. The Act extends the Centers for Disease Control and Prevention’s September 4, 2020 eviction moratorium through January 31, 2021.
- Transportation Relief. The Act extends the Payroll Support Program included in the *CARES Act*, to support the airline industry and airline industry workers. Specifically, the Act allocates \$15 billion for airline payroll support, \$1 billion for airline contractor payrolls, and \$2 billion for airports and airport concessionaires.
- Business Meal Expense Deduction. The Trump Administration secured a provision within the Act that allows all corporations to temporarily deduct meal expenses. Advocates of the provision believe that it will provide a significant boost to the restaurant industry, encouraging corporations to cover meal expenses. The business meal deduction will be available until January 1, 2023.
- Affirming Federal Reserve Emergency Loan Powers. Title VI of the Act re-allocates \$429 billion in unused Treasury direct loans and excess funds from Federal Reserve facilities authorized by the *CARES Act* back into the general Treasury Fund. Although ending the Federal Reserve’s emergency loan authority was a source of contention for lawmakers, the Act struck a compromise, requiring Congress to authorize any future emergency loans issued by the Federal Reserve, rather than ending the Federal Reserve’s ability to lend altogether.
- No Corporate Immunity Provision. Although discussed during negotiations, lawmakers declined to include within the Act a corporate immunity provision, which would have granted corporate employers immunity from COVID-19 related lawsuits brought by employees.

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[i] For additional details about the PPP please refer to Gibson Dunn’s Frequently Asked Questions to Assist Small Businesses and Nonprofits in Navigating the COVID-19 Pandemic and prior Client Alerts about the Program: Federal Reserve Modifies Main Street Lending Programs to Expand Eligibility and Attractiveness; President Signs Paycheck Protection Program Flexibility Act; SBA “Paycheck Protection” Loan Program Under the CARES Act; Small Business Administration and Department of Treasury Publish Paycheck Protection Program Loan Application Form and Instructions to Help Businesses Keep Workforce Employed; Small Business Administration Issues Interim Final Rule and Final Application Form for Paycheck Protection Program; Small Business Administration Issues Interim Final Rule on Affiliation, Summary of Affiliation Tests, Lender Application Form and Agreement, and FAQs for Paycheck Protection Program; Analysis of Small Business Administration Memorandum on Affiliation Rules and FAQs on Paycheck Protection Program; Small Business Administration Publishes Additional Interim Final Rules and New Guidance Related to PPP Loan Eligibility and Accessibility; and Small Business Administration Publishes Loan Forgiveness Application.

[ii] This data was collected from the U.S. Small Business Administration website and may be reviewed [here](#). The data does not reflect any changes or cancellations to PPP loans made after August 8, 2020.



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[iii] Excluded businesses also include financial business primarily engaged in the business of lending; passive businesses owned by developers or landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds; life insurance companies; business organizations located in a foreign country; pyramid sale distribution plans; businesses deriving more than one-third of gross annual revenue from legal gambling activities; businesses engaged in any illegal activity; private clubs and businesses which limit the number of memberships for reasons other than capacity; government-owned entities (except for businesses owned or controlled by a Native American tribe); loan packagers earning more than one third of their gross annual revenue from packaging SBA loans; businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude; businesses in which the lender or CDC, or any of its Associates owns an equity interest; businesses primarily engaged in political or lobbying activities; speculative businesses; and unless waived by the SBA, businesses that have previously defaulted on a Federal loan or Federally assisted financing. 13 C.F.R. § 120.110 (What businesses are ineligible for SBA business loans?).



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