LEGISLATIVE ALERT--PPP UPDATE

On December 27, 2020, the new stimulus package -- formally called the Consolidated Appropriations Act of 2021 (the CAA) -- became law. That's good news for small business owners and lenders: one section of the CAA resurrects the Paycheck Protection Program (PPP) with better terms for borrowers.

The original PPP

The PPP was originally established by the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) to make loans to small businesses affected by COVID-19-related economic fallout. That was a noble goal, but the original PPP deal expired on August 8, 2020.

The new-and-improved PPP

The CAA resurrects the PPP with $284 billion in new funding, liberalized rules, and most importantly, a new second-draw loan program explained below. New PPP loans, including second-draw loans, can be taken out through March 31, 2021 or until the money runs out.

Second-draw loans

The CAA ups the PPP game to allow eligible businesses to take out so-called second-draw PPP loans. These are targeted at smaller and harder-hit businesses with 300 or fewer employees that have used up, or have plans to use up, the full amount of their initial PPP loans. The maximum second-draw loan amount is $2 million. Only one second-draw loan per business entity can be taken out.

To be eligible, a business (including an eligible sole proprietorship) must demonstrate at least a 25% decline in gross receipts in the first, second, or third quarter of 2020, compared with the corresponding 2019 quarter. For loan applications submitted this year, a business can use gross receipts for the fourth quarter of 2020, compared with gross receipts for the fourth quarter of 2019.

An eligible business can generally borrow up to 2.5 times its average monthly payroll costs in the year prior to the loan or 3.5 times payroll costs for businesses in the especially-hard-hit accommodations and food service industries.

Expanded list of expenses that qualify borrower for loan forgiveness

The CAA adds the following expenses to the list of qualifying expenses that can result in PPP loan forgiveness. This expanded list is generally retroactive to day one of the original PPP.

- Eligible operations expenditures, which include payments for software, cloud computing, and human resource and accounting needs.
- Eligible uninsured property damage costs resulting from public disturbances that occurred in 2020.
- Eligible supplier costs.
- Eligible expenditures for worker personal protective equipment (PPE) and eligible expenditures to help the borrower comply with COVID-19 federal health and safety guidelines or equivalent state and local guidelines issued between March 1, 2020 and the end of the national COVID-19 emergency declaration.

60/40 rule still applies

As before, the 60/40 rule still applies. That means that to be eligible for full PPP loan forgiveness, a business must spend at least 60% of the loan proceeds on qualifying payroll costs (including certain healthcare plan costs) and the remainder on other qualifying expenses (such as mortgage interest, rent, utilities, and the other expense categories listed above).

If a business doesn't clear the 60% payroll cost hurdle, it may still be eligible for partial forgiveness of its PPP loan.

Covered period

In calculating the amount of eligible expenses for purposes of qualifying for PPP loan forgiveness, borrowers that received their first loan before June 5, 2020 could choose between: (1) the eight-week covered period established by the CARES Act for incurring eligible expenses or (2) the 24-week covered period established by later legislation for incurring eligible expenses. The CAA allows borrowers to choose between an eight-week covered period and a 24-week covered period. For now, however, it's not clear if this option will apply retroactively to loans made before the December 27, 2020 date of enactment of the CAA.

Tax impact of forgiven PPP loans: more good news

Another piece of the CAA is called the COVID-Related Tax Relief Act of 2020 (the COVIDTRA). While PPP loan forgiveness was always a federal-income-tax-free event, the COVIDTRA clarifies that a business can deduct expenses that it pays for with proceeds from a forgiven PPP loan. And a partnership can obtain tax basis relief in assets that it pays for with proceeds from a forgiven PPP loan. Finally, a business doesn't have to reduce so-called tax attributes (such as a net operating loss carryover or a capital loss carryover) when its PPP loan is forgiven. These favorable changes are all retroactively effective to day one of the PPP.

Simplified forgiveness application for small loans

Lastly, the CAA mandates a simplified one-page application to apply to the Small Business Administration (SBA) for forgiveness of a PPP loan that does not exceed $150,000. The simplified application will only require the borrower to state the number of employees the borrower was able to retain because of the PPP loan and the estimated total amount of PPP loan proceeds that were spent on payroll costs. No other documentation need be provided to the SBA with the simplified application. However, a business must attest that it met applicable guidelines when the PPP loan was taken out.