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Langley & Banack Alert

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Paycheck Protection Program Round 2 (or is it 3?)

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On Sunday evening, December 27, 2020, after a great deal of posturing about a possible veto, President Trump signed the Consolidated Appropriations Act, 2021, which contained, among other things, the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (which we will refer to as the “**PPP Continuation Act**” because “EAHHSBNV Act” is harder to remember than the name of the bill itself). For small businesses struggling to keep their doors open, the PPP Continuation Act provides much awaited relief in the form of a second round of funding available under the Paycheck Protection Program (“**PPP**”). (The PPP Continuation Act also contains a number of other provisions applicable to financial institutions—such as continued relief from the troubled debt restructuring rules under GAAP through January 1, 2022—though the focus of this Alert is the extension of PPP.)

The PPP Continuation Act appropriated \$284.5 billion for PPP loans (first time and “**Second Draw**”), of which \$15 billion was ear-marked for community financial institutions, and another \$15 billion was ear-marked for certain small depository institutions. First-time borrowers were allocated \$35 billion, \$15 billion of which is for smaller businesses with 10 or fewer employees, or loans under \$250,000 in low-income areas. These smaller businesses and businesses in low-income areas were allocated \$25 billion for PPP Second Draw loans.

PPP CONTINUATION ACT PROVISIONS

Specifically, the PPP Continuation Act provides that:

- Certain additional expenses are eligible for forgiveness, including:
 - Expenses related to software, cloud computing and other accounting and human resources needs;
 - Expenses related to property damage due to public disturbances occurring in 2020 and not covered by insurance;
 - Payments to a supplier under a contract, purchase order or order for goods in effect prior to the borrower’s receiving the loan that were essential to the borrower’s operations at the time the payments were made; expenditures for perishable goods are eligible before and during the life of the loan;

- PPP and adaptive investments to comply with federal and state health and safety guidelines related to COVID-19 between March 1, 2020 and the end of the national emergency declaration;
- Expanded eligible expenses apply to PPP loans made before or after enactment of the PPP Continuation Act, except to the extent that PPP loans have already been forgiven;
- Lenders may rely on certification by borrowers with respect to eligibility and forgiveness if lender acted in good faith and otherwise complied with all applicable federal, state and local laws and regulations;
- Borrowers may elect a covered period between eight and 24 weeks;
- Simplified forgiveness application process that allows for borrowers with loans under \$150,000 to submit a one-page certification to the lender;
- Covered period for first time PPP loans extended to March 31, 2021;
- PPP Second Draw loan eligibility:
 - Publicly traded companies are ineligible;
 - Businesses not in operation on or before February 15, 2020 are not eligible;
 - Businesses that receive Shuttered Venue Operator grants are not eligible;
 - Business may not have more than 300 employees (or 300 employees per physical location if the business has multiple locations);
 - Business must have used full amount of first PPP loan;
 - At least 25% reduction in gross receipts in first, second or third quarter of 2020 relative to same quarter in 2019; applications submitted after January 1, 2021 are able to utilize fourth quarter 2020 gross receipts;
- PPP Second Draw loan terms:
 - Maximum loan amount is \$2,000,000;
 - Business may receive loan of up to 2.5 times average monthly payroll costs in the 12 months prior to the loan or the calendar year; seasonal employers may calculate loan amount based on a 12-week period beginning February 15, 2019 through February 15, 2020; entities not in operation for a full year as of February 15, 2020 may use the sum of their average monthly payroll costs;
 - Businesses assigned NAICS code 72 (accommodations and food services) may receive loans up to 3.5x average monthly payroll costs;
 - Waiver of affiliation rules continue to apply;
- PPP Second Draw loans are eligible for forgiveness in amount equal to sum of payroll costs, covered mortgage, rent, utility payments, covered operations expenditures (described above), covered property damage costs (described above), covered supplier costs (described above) and covered worker protection expenditures (described above) incurred during the covered period;

- 60/40 allocation between payroll and non-payroll costs continues to apply;
- Tiered lender compensation for PPP Second Draw loans:
 - Loans up to \$50,000, lender processing fee is lesser of 50% of loan or \$2,500;
 - Loans between \$50,000 and \$350,000, lender processing fee is 5%;
 - Loans between \$350,000 and \$2,000,000, lender processing fee is \$3,000,000;
- Lenders are to be paid for processing fees within five days of disbursement of PPP Second Draw loan;
- Amount of loans to farmers and ranchers who operate as sole proprietors, independent contractors or self-employed individuals to be calculated using specific loan calculations utilizing gross income in 2019, as reported on Schedule F of federal income tax returns; PPP loans made prior to enactment of PPP Continuation Act may be adjusted to reflect new calculation methodology;
- On a case-by-case basis, SBA may allow businesses in bankruptcy to receive loans if bankruptcy court approves and the loan is given a superpriority claim in bankruptcy; and
- Forgiven amounts of first time PPP loans and PPP Second Draw loans that were used to pay otherwise deductible expenses for federal income tax purposes are not included in the calculation of the borrower's gross income; for S corporations and partnerships, the amount excluded from gross income described in the foregoing clause is treated as tax exempt income.

As before when PPP was initially introduced, we anticipate it will be a number of days before the Treasury Department issues formal guidance implementing these new provisions, and possibly further delays until the SBA begins accepting loan applications. In the meantime, we recommend that banks immediately begin marshalling resources to manage this new round of PPP lending.

We will continue to update our Alerts as and to the extent additional guidance becomes available. For any questions regarding the Paycheck Protection Program or other provisions of the PPP Continuation Act, please contact Bruce Toppin by e-mail at btoppin@langleybanack.com or by telephone at (210) 253-7102.