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If Your PPP Loan Has Not Been Forgiven, You Now Have New Options

As a part of the year-end “omnibus” legislation and COVID-19 relief package adopted by Congress and signed into law on December 27, 2020, a host of new rules now apply to Paycheck Protection Program (“PPP”) loans that are outstanding but have not received a determination of forgiveness. The PPP program was originally adopted as part of the Coronavirus Aid Relief and Economic Security Act (“CARES Act”). In general, the changes are designed to facilitate the forgiveness of the loans for most borrowers.

Title III of the new law (“Title III”) – which constitutes the loquaciously named “Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act”– also adopts a “second-dip” PPP for qualifying businesses and a grant program for operators of certain venues that have faced economic hardship from the COVID-19 pandemic. Those new programs are described in other articles.

For those businesses who received the original PPP loans but not have obtained final forgiveness, there are a number of relevant changes that can affect the forgiveness process or permit new or increased loans even without qualification for the second-round PPP.

1. **You Can Deduct Expenses Paid with PPP**. Expenses paid from PPP loan proceeds will be deductible on federal income tax returns due to the legislative override of previous Internal Revenue Service guidance that such expenses could not be deducted. More detail on said issue can be found here.

2. **You Do Not Need to Subtract an EIDL Advance**. The original CARES Act required that the amount of any emergency advance Economic Injury Disaster Loan (“EIDL”) amount (purportedly $10,000, but frequently less) would be deducted from any PPP forgiveness. That requirement has now been repealed. There are also changes to the EIDL program that will be described in another article.

3. **You Can Count a Wider Range of Expenses as Non-Payroll Costs**. The revised PPP rules settled on a 60-40 split between payroll costs and non-payroll costs in order to be eligible for forgiveness. Under Title III, the 60-40 split remains, but several new categories are added to allowable non-payroll costs:

    a. **Certain Operating Costs**. Expenses for business software or cloud computing services that facilitate operations, product or service delivery, accounting, billing, human resources and related functions.

    b. **Certain Property Damage**. Expenses not covered by insurance from vandalism or looting due to public disturbances in 2020.

    c. **Certain Supplier Costs**. Expenses for supply of goods that are essential to operations that were made pursuant to a contract or order in effect prior to the PPP “covered period” or, in the case of perishable goods, any time prior to or during the covered period.

    d. **Certain Employee or Customer Protection Costs**. Expenses related to compliance with federal, state or local requirements related to sanitation, social distancing or related employee or customer protection. Examples include drive-through windows, ventilation improvements, physical barriers, personal protective equipment and the like.

4. **You Can Include More Types of Group Insurance as Payroll Costs**. The CARES Act permitted only insurance costs for group health as an allowable "payroll cost." Title III adds group life, disability, vision and dental insurance expenses as allowable under the "payroll cost" category. Such expenses can now be counted toward the 60-percent payroll cost requirement.

5. **You Can Choose Your Own "Covered Period**." The CARES Act and the subsequent amendments required borrowers to choose either an eight-week or 24-week "covered period" within which the allowable expenses must be incurred. Title III will permit a borrower to designate any "covered period" that is at least eight weeks and no more than 24 weeks. Essentially, the "covered period" will be the time from the origination of the loan to the time that the PPP funds are completely spent for allowable expenses. The requirement that all "covered periods" end on December 31, 2020 is also repealed.

6. **Loans Under $150,000 Will Have Simplified Forgiveness**. Title III requires that PPP loans under $150,000 must be provided with a simplified forgiveness application that entails a one-page certification as to allowable use of funds and no additional supporting materials. Loans over $150,000 will remain subject to the prior rules.

7. **Certain First-Round Loans Can be Recalculated**. Some borrowers may be eligible for additional loan proceeds without applying for a second-round loan.

    a. If a borrower returned funds or requested a reduced amount for a first-round PPP loan due to guidance that has since been changed or overturned, such borrower can apply for additional loan proceeds to reflect the increased amount.

    b. Farmers and ranchers may be able to recalculate the amount of eligible loan proceeds under revised formulations.

8. **There is a New Definition of "Seasonal Employer."** Certain PPP options only apply to "seasonal employers." Title III adopts a refined definition of "seasonal employer" to include any business operating less than seven months of the year and any business that obtains more than two-thirds of is gross receipts during any six-month period during the calendar year.

9. **Local News Organizations Have Expanded Eligibility**. Newspaper and broadcasting outlets that produce or distribute locally focused or emergency information will be eligible for PPP loans based on each physical location without regard the otherwise-applicable affiliation rules. The same standard was applied in the original CARES Act with respect to chain restaurants and hospitality businesses. The news organization must certify in good faith that it will use the proceeds to support expenses at the given location for local news and information.

10. **Business-Oriented Nonprofits Are Eligible**. Nonprofit entities under Section 501(c)(6) – typically chambers of commerce and related business organizations – will be eligible for PPP loans.

11. **Bankruptcy Trustees May Seek PPP Loans**. A bankruptcy court may permit a debtor in possession or bankruptcy trustee to apply for a PPP loan for a creditor that is in bankruptcy notwithstanding other laws or requirements as to prohibitions on additional debt. Notice and a hearing is required.

As noted, there are also a number of new programs and related rules adopted by the new law. These additional programs will be covered in additional articles. If you require guidance on any of the new provisions, Vandenack Weaver attorneys can assist at 402-504-1300 or info@vwattys.com.