

PPP2, Real Estate, and Tax Highlights of Year-end COVID-Relief Act (The Consolidated Appropriations Act, 2021)

December 30, 2020

The massive Consolidated Appropriations Act, 2021 (the "Act"), providing year-end COVID-19 relief, was signed into law by President Trump on Sunday, December 27, 2020. Among other changes, the Act extends and makes clarifying amendments to certain relief provisions in the CARES Act that was passed in March 2020. This high-level advisory focuses primarily on the changes to the Paycheck Protection Program, key real estate provisions, and the federal income tax provisions directed at assistance for businesses, nonprofits, and their employees.

PPP Loan Program Extended and Expanded – Second Round Funding Available

The Act provides \$284 billion for loans under the Paycheck Protection Program to new and repeat borrowers who can certify need due to the effects of COVID-19. The covered period for obtaining loans under the program has been extended from the prior deadline of December 31, 2020, under the CARES Act to March 31, 2021.

Recipients who received a PPP loan under the CARES Act would be allowed to apply for a second loan ("PPP2 loan") equal to 2.5x their average monthly payroll (during calendar year 2019) or the one-year period prior to the date the loan was made, up to a maximum of \$2 million. Hotels, restaurants, and other businesses falling under NAICS code 72 (Accommodation and Food Services) may receive a PPP2 loan equal to **3.5x** average monthly payroll.

To be eligible for full loan forgiveness under PPP2, at least 60% of the loan must be spent on payroll over a covered period of eight to 24 weeks.

Who is Eligible for PPP2?

In general, businesses, nonprofits, veterans' organizations, tribal businesses, eligible self-employed individuals, sole proprietors, independent contractors, and small agricultural cooperatives are eligible, provided they satisfy other PPP requirements, such as those around employee headcount. The Act expands PPP eligibility to certain new recipients including 501(c)(6) entities (e.g., business leagues, and professional organizations), destination marketing organizations, certain news organizations, and housing cooperatives.

To be eligible for a PPP2 loan, a recipient must, in general, have not more than 300 employees (down from 500 employees in the CARES Act), have used or will use the full amount of its first PPP loan, and have suffered a 25% or greater decline in gross receipts in any quarter in 2020 as

compared to 2019 (with alternative guidelines for applicants not in operation in any quarter of 2019). Eligible recipients may receive only one PPP2 loan.

First-time borrowers must be eligible under the existing PPP eligibility rules (businesses with 500 or fewer employees or eligible under other SBA size standards, 501(c)(3) entities with 500 or fewer employees, sole proprietors, independent contractors or eligible self-employed individuals, tribal businesses and veterans' organizations) or the expanded categories of eligible recipients discussed above that have 300 or fewer employees. Accommodation and food services businesses with multiple locations applying for a PPP2 loan may employ not more than 300 employees per physical location.

Ineligible entities have been expanded to include the entities listed in 13 CFR 120.110 as ineligible under the CARES Act, including but not limited to lobbying firms or think tanks, and also to include businesses where significant (20% or greater) ownership stakes are held by entities organized in China or have significant China operations, or whose board of directors retains a member who is a resident of China. Publicly-traded entities are now also expressly excluded.

The Act clarifies that any business or organization that was not in operation on February 15, 2020, shall not be eligible for any PPP loan. Recipients of Shuttered Venue Operator Grants (see below) are prohibited from also obtaining a PPP loan.

What Expenses are Eligible for PPP2 Loan Proceeds?

The Act expands the original categories of expenses that may be forgivable (payroll, mortgage interest, rent, utilities, interest on certain other debt) to now include (i) operations expenditures (software, cloud computing, and other human resources and accounting needs), (ii) property damage costs related to public disturbances in 2020 that are not covered by insurance, (iii) supplier costs on expenditures essential to operations and (iv) worker protection expenditures (on personal protective equipment and adaptive investments to comply with federal, state and local COVID-19 health guidelines). Further, eligible expenses under "payroll costs" are clarified to include group life insurance, disability, vision, and dental insurance.

The Act provides that the SBA shall issue guidance within 17 days regarding how prior recipients of PPP1 loans who have yet to receive forgiveness can request an increase in loan amount due to the updated regulations.

Loan forgiveness applications for borrowers with existing PPP loans or second loans of \$150,000 or less will be simplified into a one-page application.

Shuttered Venue Operator Grants

A new section of the Act provides that eligible live venue operators or promoters, as well as other venues and productions, such as motion picture theatres, museums, and the like, will be eligible for \$15 billion in grants administered by the SBA. There are extensive requirements and restrictions, but a few highlights are that (i) the venue must have been fully operational on February 29, 2020, and (ii) as of the date of the grant, it must be, or intend to resume, hosting live future events.

Generally, an operator needs to charge for paid tickets or cover charges to be eligible. However, venues owned or operated by a non-profit entity that produces free events may also be eligible, provided these are managed and produced primarily by paid employees and not by volunteers.

PPP Loan Amounts Which are Forgiven NOW Generate Deductible Expenses for Federal Tax Income Purposes

The Bill overrules IRS **Notice 2020-32** which provided that, to the extent that PPP loan amounts are forgiven, any expenses funded from such loan proceeds would not be deductible.

As background, under the CARES Act, PPP loan amounts can be forgiven if they are spent on qualifying payroll costs, mortgage interest expense, rent, and utilities during the eight-week period following the disbursement of the loan. The CARES Act also provides that any PPP loan amounts forgiven are excluded from the gross income of the PPP borrower. This is a change from the usual tax rules that would otherwise have treated such amounts as income from the discharge of indebtedness. However, because the PPP loan amounts that were forgiven would also have been spent on items that would typically generate income tax deductions for the PPP borrower, taxpayers potentially stood to get a meaningful tax benefit from the PPP, which was the original Congressional intent. The forgiveness of the PPP loan would not be included in income, and the deductions from the expenses funded by the loan proceeds now further reduce the PPP borrower's income.

Payroll and Benefit Changes, Tax Deferrals and Credits

The Act extends several forms of employee wage-related relief provided by the CARES Act that otherwise would have expired in 2020:

Unemployment Boosters – The Act extends the eligibility, duration, and pay relief provided under the CARES Act. The period of unemployment benefits under the Pandemic Emergency Unemployment Compensation program has been extended through April 5, 2021, to a 50-week period (up from 39 weeks under the CARES Act). In addition, the Act keeps in force the unemployment eligibility provisions of the CARES Act (which extended coverage to certain traditionally excluded workers). The federal unemployment “booster” payment to state and federal unemployment benefits also has been extended until March 14, 2021, but at a reduced rate of \$300 per week (down from \$600 per week under the CARES Act).

FFCRA Pay Credits Extended – The Act does not include an extension of paid leave under the Families First Coronavirus Relief Act (FFCRA). However, if an employer voluntarily elects to offer such leave after December 31, they can claim tax credits for wages paid through March 31, 2021, for such FFCRA-like leave.

Flexible Spending Account Relief – The Act provides significant relief for flexible spending accounts (FSAs) ordinarily subject to a “use it or lose it” rule at year-end. The Act lifts the carryover dollar limit for 2020 and 2021 and includes dependent care accounts in that relief. In addition, the grace period to use carried-over amounts has been extended to the 12-month period following the close

of the plan year. Plan amendments to take advantage of this relief must be adopted by December 31, 2021.

Deferred Payroll Taxes – The Act extends the deferral of employee-side Social Security payroll taxes provided for in IRS Notice 2020-65. The Notice allowed employers to defer payment of payroll tax obligations on applicable wages until April 30, 2021. The Act further extended the deadline for repaying those deferred payroll taxes to December 31, 2021.

Employee Retention Tax Credit (ERC) – The Act extends to July 1, 2021, the tax credit available to employers for certain “qualified wages” and makes those tax credits available to a vastly larger pool of employers. Under the CARES Act, employers who did not take PPP loans and suffered a mandatory closure or 50% reduction in gross receipts for a calendar quarter in 2020 were eligible for a tax credit for 50% of “qualified wages” paid to employees, up to \$10,000 total per employee (for a maximum credit of \$5,000 per employee). For larger employers with more than 100 employees, only wages paid to employees who are not working were eligible for the credit. The Act also increases the credit to 70% of qualified wages, and qualified wages are increased to \$10,000 per employee per quarter. The Act also reduced the gross receipts reduction threshold to 20% of gross quarterly receipts (down from 50% under the CARES Act). In addition, the Act raises the threshold for a business to be treated as a “small employer” eligible to claim the credit for wages paid to employees who are still working to employers with no more than 500 employees (rather than 100 employees as was originally the case under the CARES Act).

CARES Act and Other Extenders

The following are highlights of the provisions of the CARES Act that the Act extends:

Individuals:

1. The **medical expense deduction** floor is reduced from 10% to 7.5% and applies to taxable years beginning after December 31, 2020. (Section 101)
2. **Exclusion from Gross Income of Discharge of Qualified Principal Residence Indebtedness** is extended from January 1, 2021, to January 1, 2026, and is applicable to discharges of indebtedness after December 31, 2020. The maximum applicable amount is \$750,000 (\$350,000 for separate filers). (Section 114)
3. The CARES Act expansion of the **charitable deduction** has been extended to cash gifts made in 2021. For cash contributions made during 2020 or 2021, individuals who itemize deductions can deduct up to 100% of adjusted gross income. In addition, in 2020 or 2021, taxpayers who do not itemize their deductions may deduct cash gifts to public charities of up to \$300 (\$600 for joint filers).

Real Estate Provisions:

Rental Assistance Program

The emergency federal rental assistance program allocates \$25 billion to provide financial assistance and housing stability services to eligible households. Of this pool, \$800 million will go to

tribal communities, \$400 million to U.S. territories, \$15 million to the Secretary of the Treasury to administer this rental assistance program, and the remainder will be distributed to states and units of local government (including the District of Columbia) with populations of 200,000 or more. The funds will be allocated based on the state or locality's proportionate share of the total U.S. population; however, the bill does not differentiate between states with a greater proportion of tenants. Each state will receive a minimum of \$200 million. The bill establishes a deadline of September 30, 2021 by which states must use the allocation and also extends the deadline for the federal funding from the CARES Act to December 31, 2021.

Funds are available for "eligible households," which are those with 1 or more individuals who are obligated to pay rent on a residential dwelling and with respect to which the applicable state or local governmental grantee makes a determination that:

- (1) one or more individuals within the household has qualified for unemployment benefits or experienced a reduction in household income, incurred significant costs, or experienced other financial hardship due directly or indirectly to COVID-19;
- (2) one or more individuals within the household can demonstrate risk of housing instability or homelessness, which may include a past due utility or rent notice, or eviction notice, unsafe or unhealthy living conditions, or any other evidence of such risk as determined by the applicable state or local government involved; and
- (3) the household has a household income that is not more than 80% of the area median income for the household.

To the extent feasible, states and localities shall ensure that any rental assistance under this program is not duplicative of other Federally funded rental assistance provided to the household. In addition, states and localities must prioritize households earning less than 50% of area median income or with at least one individual having been unemployed for three or more months as of the date of the application.

At least 90% of the funds must be used to provide financial assistance to eligible households, including payment of rent, utilities, and other housing expenses incurred due to COVID-19. The assistance shall be provided for 12 months with an additional 3 months available if necessary to ensure housing stability for the household. The funds are meant to cover rental arrears and are only available to cover rent prospectively for 3 months; however, households may reapply for assistance. States may not provide prospective rent payments unless the subject household has received assistance to reduce rental arrears. Not more than 10% of the funds may be used to provide eligible households with case management, and other services related to the COVID-19 outbreak, intended to keep the household stably housed.

Funds will be made directly to property owners and utility providers; however, if a lessor or utility provider does not agree to accept payment, the state or locality may make payments directly to the eligible household. Property owners can also apply for the funds on behalf of tenants so long as tenants sign the application.

Eviction Moratorium

The bill also extends the existing CDC eviction moratorium through January 31, 2021. Eligible renters and homeowners protected by the moratorium include those that have experienced a “substantial” loss of income or “extraordinary” out-of-pocket medical expenses, are not expected to earn more than \$99,000 in 2020 or \$198,000 for joint tax returns, have used “best efforts” to obtain any and all forms of government rental assistance and to make “timely” partial payments, and for whom eviction would likely lead to homelessness, or having to move somewhere more expensive or that increases the risk of exposure.

Depreciation of Residential Real Property

Real estate owners eligible to elect out of the Code section 163(j) interest expense limitation are required to use an alternative depreciation system (“ADS”) for their real estate assets. The Tax Cuts and Jobs Act reduced the recovery period for residential real property from 40 years to 30 years to make it easier for residential real estate owners to take advantage of the election out of section 163(j) (since the normal recovery period for such property not under the ADS regime would be 27.5 years). However, the TCJA’s reduction of the ADS recovery period was effective only for property placed in service after January 1, 2018. The Act clarifies that residential real property acquired before January 1, 2018, is also eligible for a 30-year ADS recovery period. As such, taxpayers electing out of the interest limitations under section 163(j) are able to depreciate residential real property that was placed in service before 2018 using a 30-year depreciable life.

Low-Income Housing Tax Credits

The Act provides for a permanent 4 percent minimum low-income housing tax credit rate for subsidized housing for both acquisition credits and tax-exempt private activity bond-financed developments, which should expand the viability of many projects. In addition, the Act increases the Low-Income Housing Credit allocations to states located in any qualified disaster zone in years 2021 and 2022. (Sections 201 and 305)

New Markets Tax Credit (NMTC) has been extended for an additional 5 years, through the end of 2030. (Section 112)

Other Business Provisions:

1. The look-through rule for related controlled foreign corporation (CFC) payments has been extended from January 1, 2021 to January 1, 2026. (Section 111)
2. Empowerment Zone incentives are extended through 2025.
3. Certain energy credits are extended through 2023.
4. Extension of section 48 energy credit for offshore wind facilities are extended to January 1, 2026.
5. Business Meals purchased from a restaurant between December 31, 2020 and January 1, 2023, are now fully deductible.

- i. "Covered operations expenditure" means a payment for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses.
- ii. "Covered property damage cost" means a cost related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or compensation.
- iii. "Covered supplier cost" means an expenditure made by an entity to a supplier of goods for the supply of goods that (i) are essential to the operations of that entity at the time at which the expenditure is made; and (ii) is made pursuant to a contract, order or purchase order (a) in effect at any time before the covered period with respect to the applicable covered loan; or (b) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered period."
- iv. "Covered worker protection expenditure" means an operating or a capital expenditure to facilitate the adaption of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, and Centers for Disease Control, or the Occupational Safety and Health Administration or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the President under the National Emergencies Act with respect to COVID-19 expires related to the maintenance of standards for sanitation social distancing or any other worker or customer safety requirement related to COVID-19 (examples: drive-through window facility, ventilation or filtration system, sneeze guards).