Congress Expected to Pass Phase 4 COVID-19 Stimulus Bill

After a tumultuous weekend of last-minute negotiations, Congressional Democrat and Republican leaders and the White House came to an agreement on the next round of COVID-19 relief legislation. Results of these negotiations are reflected in the *2021 Consolidated Appropriations Act*, which was introduced in Congress on December 21, 2020, and is expected to be quickly passed and signed into law.

The Consolidated Appropriations Act includes another round of COVID-19 stimulus funding and further relief for taxpayers affected by the COVID-19 pandemic. This emergency relief package is largely based on a $908 billion bipartisan legislative framework released earlier this month (read our previous summary of the proposed legislation) and is attached to a $1.4 trillion omnibus spending bill that will provide government funding through September 30, 2021.

Here's what businesses and individuals should know about what's included in the final legislation.

Paycheck Protection Program

The Consolidated Appropriations Act contains several provisions related to the Paycheck Protection Program (PPP), including a second round of PPP loans for certain eligible borrowers:

Deductibility of Expenses Paid with PPP Loan Proceeds – The deductibility of expenses paid with PPP proceeds has been a contentious matter between the U.S. Department of the Treasury (Treasury) and Congress. While the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) specifically excluded the forgiveness of PPP loans from taxable income, Treasury and the IRS took a position that expenses paid with forgiven PPP loan proceeds should not be deductible by the borrower. The stimulus bill fixes this. To align with congressional intent, in a very succinct one-sentence provision, the Consolidated Appropriations Act makes expenses paid with PPP loan proceeds 100 percent deductible. This applies to all PPP loans, even if the loans were already forgiven at the date this legislation is enacted. A subtle item in the provision will benefit owners of pass-through entities by not denying a basis step-up in their stock/partnership interest for any tax-exempt income from a forgiven PPP loan.

Additional Eligible Nonpayroll Uses of PPP Loan Proceeds – Four additional categories were added for nonpayroll costs eligible for use of the PPP loan proceeds (subject to overall limitation that 60 percent of loan must be used for payroll costs):

- Covered Operations Expenditures
- Covered Property Damage
- Covered Supplier Costs
- Covered Worker Protection Equipment

Definitions for these categories are covered in our previous **BKD Thoughtware**® alert.

Selection of Covered Period – This is a welcome clarification for those needing more than eight weeks but not the full 24 weeks to use the PPP loan proceeds. The stimulus bill allows borrowers to select the end date of their covered period. However, it must be greater than eight weeks from the date of disbursement of the PPP loan and not more than 24 weeks. This aligns certain full-time equivalent (FTE) and pay rate reduction provisions with the payroll periods that a borrower includes.

Simplified Forgiveness Application $150,000 and Less – For any loan up to $150,000, the covered loan amount will be forgiven if the borrower submits a one-page online or paper form listing the loan amount, the number of employees retained, and the amount of the loan spent on payroll. This will substantially reduce the burden on both borrowers and lenders. The U.S. Small Business Administration (SBA) is directed to release this form within seven days after enactment of the Consolidated Appropriations Act.

Lender Streamline Approval – Under the Consolidated Appropriations Act, lender review is limited to whether the lender received a complete application with all fields completed, initialed, or signed as applicable. If the submission is complete, the lender is required to accept it and forward to the SBA.

EIDL Advance Reduction to Forgiveness Amount Repealed – Under current law, a borrower was required to reduce the amount of the PPP loan otherwise forgiven by any Economic Injury Disaster Loan (EIDL) advance received. The Consolidated Appropriations Act repeals this provision.

Supplemental Funding Request Related to Initial PPP Loan – SBA issued an interim final rule in May that allowed a borrower to request a supplemental loan if, subsequent to the time of application, regulations were issued that would have increased the loan amount it could have received. This was especially applicable to partnerships. However, this only applied if the lender had not yet submitted what's known as Form 1502 for the original loan. The stimulus bill removes this restriction and allows supplemental requests in all cases where the loan amount would have changed due to the new rules. Partnerships will want to review this provision for supplemental loan opportunities.

Expanded Eligibility for PPP Loans – Most Section 501(c)(6) organizations, *i.e.*, trade groups, chamber of commerce groups, and certain destination marketing companies, would be eligible to apply for PPP loans, provided the organization doesn't receive more than 10 percent of receipts from lobbying activities, the lobbying activities of the organization do not comprise more than 10 percent of its total activities, and the organization has 150 employees or fewer. In addition, housing cooperatives, newspapers, broadcasters, and radio stations would now potentially qualify.

Change in Calculation of Loan Amount for Certain Farmers and Ranchers – The loan amount for certain farmers and ranchers is now based on gross income, not net profit shown on the 2019 Schedule F, but is still limited to two and a half months with a $100,000 annual gross income cap. In other words, a farmer or rancher with no employees could receive a $20,833 loan if the gross receipts on Schedule F for 2019 were $100,000 or greater, regardless of amount of expenses. If the farmer had employees, the loan amount would be increased by the same two and a half months of the average monthly payroll for 2019. The Consolidated Appropriations Act specifically allows a supplemental application for these borrowers.

PPP Second Draw Loans – These "second draw" loans are targeted at hard-hit businesses that employ 300 or fewer employees and that have used or will use the full amount of their first PPP loan. The maximum loan under this program is $2 million, based on two and a half months of average annual payroll (three and a half months for NAICS Code 72 entities—generally hotels and restaurants). The measurement period for the payroll can either be calendar-year 2019 or the one-year period before the date the second draw loan is made.

Borrowers must show a 25 percent decline in revenue in the first, second, or third quarter in 2020 as compared to the same quarter in 2019 (if the loan application is after December 31, 2020, then a fourth quarter comparison may be used as well). There are special comparison rules for entities not in existence for all of 2019. The same waiver of affiliation rules that applied to the initial PPP loans will apply to the second draw PPP loans. Similarly, the rule covering more than one physical location that applied for the first PPP loans applies to the second draw loans, except the employee limit per location is 300 employees.

The forgiveness of the second draw loans follows the rules in the first round of loans, including the various reduction provisions. The revised covered period definition as noted above also applies to the second draw loans. The covered period would, therefore, be any time period selected by the borrower that is more than eight weeks from the date of deposit but not greater than 24 weeks from such time.

There are set-asides for the following:

- First-time PPP borrowers with 10 or fewer employees
- Second-time PPP borrowers with 10 or fewer employees
- First-time PPP borrowers that have been made newly eligible by the Consolidated Appropriations Act
- Second-time returning PPP borrowers

Grants for Shuttered Venue Operators

The bill sets aside $15 billion to provide grants to shuttered live event venues, independent theaters, museums, and zoos that have experienced revenue losses due to the pandemic. The grants are based on a three-tier priority system. The first two priorities are based on revenue decline for the period April 1, 2020, to December 31, 2020, as compared to the same period in 2019. Those entities whose revenue during the 2020 period is 10 percent or less of the 2019 period receive first priority, and those between 10 percent and 30 percent receive second priority. Each of the first two priorities runs for 14 days. At the end of the 28 days, all eligible entities may apply for the grants. No more than 80 percent of the $15 billion may be allocated to the first two priorities. There is a provision for supplemental grants as well once the three tiers above are completed. The initial priority grants are generally the lesser of 45 percent of the gross earned revenue for 2019 or $10 million. Supplemental grants are limited to 50 percent of the grant amount received under the priority grant provisions.

COVID-19 Payroll Tax Credits

The Consolidated Appropriations Act also extends and expands the Employee Retention Credit (ERC) under the CARES Act and the paid leave credits under the *Families First Coronavirus Response Act* (FFCRA).

ERC – Eligible businesses may now take advantage of the ERC through July 1, 2021. However, the ERC has been expanded and modified for calendar quarters beginning after December 31, 2020, as follows:

- The ERC is expanded from a 50 percent refundable tax credit to 70 percent, and the $10,000 eligible wage limit per employee will be a quarterly limit (previously, this was an annual limit). So instead of a $5,000 credit per employee credit per year, it will be a credit of up to $7,000 per employee per quarter.
- To be eligible for the expanded ERC in 2021, an employer must show that gross receipts for such calendar quarter are less than 80 percent of the gross receipts for the same calendar quarter in 2019 or it experienced a full or partial suspension of operations during the quarter due to a governmental order. There's also a safe harbor allowing employers to use prior quarter gross receipts to determine eligibility.
- The definition of a large employer for purposes of the ERC is modified to mean more than 500 employees (currently, this threshold is 100 employees). As such, for eligible small to midsize employers (those who averaged 500 full-time employees or fewer in 2019), qualified wages for purposes of the ERC will be wages paid to *any employee* during the quarter where the employer meets the gross receipts test or experienced a full or partial suspension of operations due to a governmental order. These employers also will be able to receive advances on the ERC at any point during the quarter based on wages paid in the same quarter in a previous year.

In addition, employers who receive PPP loans may still qualify for the ERC with respect to wages that are not paid for with forgiven PPP proceeds. This provision is effective retroactively to the enactment date of the CARES Act.

FFCRA Paid Leave Credits – The FFCRA mandated paid sick leave and expanded FMLA leave provision is extended through March 31, 2021. As such, eligible employers are required to keep providing such leave to eligible employees, and the corresponding payroll tax credits for paid sick leave and expanded FMLA leave also are available through March 31, 2021.

Business Meal Deductions

For 2021 and 2022, businesses can deduct the full cost of business meals. Currently, taxpayers generally may deduct only 50 percent of client-related business meals if certain requirements are met. However, at the urging of the White House, the Consolidated Appropriations Act includes a provision for full deductibility of business meals. Note, this provision isn't retroactive to the 2020 tax year and only applies to food or beverages provided by a restaurant.

Other Tax Provisions

In addition to the COVID-19 stimulus legislation and omnibus spending provisions, the legislative package also includes the extension of several tax provisions that either previously expired or were set to expire on December 31, 2020. These provisions include:

- Permanent extension of the energy-efficient commercial building deduction and the reduced excise tax rate on beer, wine, and spirit makers
- New Markets Tax Credit, employer credit for paid family and medical leave, exclusion for certain employer payments of student loans, and the carbon dioxide sequestration credit are all extended through 2025
- Ability for individual taxpayers who don't itemize to take a charitable deduction of up to $300 is extended to the 2021 tax year, and joint filers may deduct up to $600 in 2021
- Suspension of limitations on qualifying charitable contributions extended through 2021
- Extension of various energy-related tax credits (generally through December 31, 2021)
- Enhancements to the low-income housing tax credit
- Depreciation of certain residential rental property over a 30-year period for taxpayers who made the real property trade or business election for purposes of the interest expense limitation under Internal Revenue Code §163(j)

In addition, for the 2020 tax year, lower-income individuals may use their earned income from 2019 to calculate the Earned Income Tax Credit and the refundable portion of the Child Tax Credit. This will help those who had lower earned income in 2020 due to the COVID-19 pandemic to potentially receive a larger refund for 2020.

Other Stimulus Provisions

The Consolidated Appropriations Act also includes additional funding and assistance to taxpayers affected by COVID-19, including:

- **Direct payments** – A second round of Economic Impact Payments of $600 for individuals making up to $75,000 per year and $1,200 for couples making up $150,000 per year, as well as a $600 payment for each dependent child. This means a family of four could receive $2,400 in direct payments. Treasury Secretary Steven Mnuchin has indicated these payments will start going out to families as early as next week. Note, similar to the CARES Act, this provision doesn't provide payments for adult dependents, *e.g.*, dependents above the age of 17, which includes college students.
- **Unemployment insurance** – The federal unemployment insurance benefits provided by the CARES Act, which expired in July, are renewed to provide an additional $300 per week for all workers receiving unemployment benefits through March 14, 2021.
- **Funding for schools** – $82 billion has been allotted to providing funding for states, K-12 schools, and higher education institutions significantly affected by the coronavirus pandemic.
- **Rental assistance** – This legislation establishes an emergency federal rental assistance program to be distributed by state and local governments and directed to assist those affected by COVID-19 who are struggling to make rent. Assistance under this program applies to past-due rent and future rent payment, as well as to pay utility and energy bills and prevent shutoffs.
- **Vaccine research and distribution** – Funding is earmarked for vaccine testing and distribution, with a portion of funding sent directly to states for testing, tracing, and COVID-19 mitigation programs.
- **Coronavirus Relief Fund extension** – This bill extends the spending deadline to December 31, 2021, for funds previously appropriated to states and localities by the Coronavirus Relief Fund in the CARES Act.

While this round of stimulus legislation didn't include specific provisions for state and local funding or liability protections for employers, it's likely these issues—and other relief measures—will be taken up under the next Congress and the Biden administration. BKD will host a webinar on December 28 to provide more insights into this round of stimulus legislation. An invitation to this webinar is coming soon.

As with most topics related to COVID-19, changes are being made rapidly. Please note that this information is current as of the date of publication. For more information, contact your **BKD Trusted Advisor**™.

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