



Update on Second Draw of PPP and Employee Retention Tax Credit

By: Elisa Vélez-Pérez, Esq., CPA

On December 27, 2020, President Trump signed the Consolidated Appropriations Act, 2021 (the "Act"). This is a very comprehensive legislation but in this Tax Newsletter we will provide a summary of two of the most important provisions of the Act: (1) the second draw of the Paycheck Protection Program ("PPP"), and (2) the expansion of the Employee Retention Tax Credit ("ERTC"). Also, this summary will include some PPP guidelines issued during the last few weeks by the U.S. Small Business Administration ("SBA").

PPP SECOND DRAW LOANS

The Act provides, among other things, a second draw of loans similar to the one provided under the PPP of the CARES Act of March 27, 2020 (only one additional loan allowed). It modifies the term "eligible entity" to include only entities with 300 or less employees and that had a reduction in gross receipts in any calendar quarter for 2020 of 25% or more than in the same calendar quarter in 2019. Alternatively, the PPP loan applicant may compare annual gross receipts in 2020 with annual gross receipts in 2019 to analyze if it meets the 25% reduction threshold. In the case of an affiliated group, the gross receipts must be aggregated for purposes of the 25% reduction threshold, excluding intercompany transactions. The loan can only be made to eligible entities that received loans under the original PPP and that on the date of disbursement of the new loan the applicant has used all funds provided under the original PPP.

The Act adds additional eligible categories of businesses to receive the PPP, including Section 501(c)(6) organizations (such as chambers of commerce, real estate boards, boards of trade) with some exceptions, broadcast news organizations, housing cooperatives

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(with 300 employees or less), destination marketing organizations (with 300 employees or less), businesses in bankruptcy and employers that claimed the ERTC (but cannot claim credit on wages paid with forgiven PPP loan money).

On the other hand, the Act excludes certain PPP borrowers from the eligibility to take a PPP Second Draw Loan: certain businesses that are ineligible for a loan under existing regulations of the SBA; businesses primarily engaged in lobbying or political activities; businesses owned by an entity created in or with significant operations in China that owns or holds, directly or indirectly, not less than 20% of the economic interest of the business or with a director that is a resident of China; and recipients of a shuttered venue operator grant under Section 24 of the Act.

The Act also modifies the term “payroll costs” to include group life, disability, vision, and dental insurance benefits so that such expenditures are considered when determining loan proceeds and forgiveness. Recipients of the first round of the PPP may request an increase in the loan amount to consider these additional expenditures, as long as the loan has not been forgiven when requesting the loan increase.

The maximum loan amount under the PPP Second Draw, except for entities with a NAICS code starting with the code “72” (i.e., hospitality and restaurant industry), is the average monthly payroll cost incurred during the one-year period before the date on which the loan is made or calendar year 2019, at the election of the recipient (the “Average Payroll”), multiplied by 2.5. Flexible rules are provided for those businesses that commenced operations between January 1, 2019 and February 15, 2020, and for seasonal employers. The loan amount cannot exceed \$2 million.

In the case of entities with a NAICS code starting with the code “72” (hospitality and restaurant industry), the Average Payroll is instead multiplied by 3.5, subject to the maximum loan amount of \$2 million. Also,

a single business entity that is assigned a NAICS code beginning with 72 is eligible to receive a Second Draw PPP Loan if it employs no more than 300 employees per physical location and meets the revenue reduction requirements and otherwise satisfies all other eligibility criteria. There is also a waiver of the affiliated group rules for these entities if they meet certain requirements.

In any case, the maximum loan amount of a group of affiliated entities cannot exceed \$4 million in the aggregate.

For loans of \$150,000 or less, the eligible entity may submit only a certification that it meets the 25% gross receipts loss requirement. However, before submitting the loan forgiveness application the entity must produce adequate documentation to this effect. Furthermore, the Act provides that loans under the PPP (whether the first or second draw) not in excess of \$150,000 shall be forgiven if within 24 days after the enactment of the Act (i.e. January 20, 2021) the borrower provides a one-page certification to the lender stating the number of employees retained, estimated amount of the loan spent on payroll costs, the total loan value, an attestation stating that the borrower has met all requirements under the PPP and that all records will be retained to prove compliance with the PPP for four years. No other documentation will be required to substantiate forgiveness.

Loan forgiveness is basically subject to the same parameters as under the first draw of the PPP, including forgiveness amount, reductions to forgiveness amount due to reduction on employees or salaries and the requirement to use 60% of the loan proceeds for payroll costs. As with the first draw of the PPP, the eligible entity may elect a covered period that is between eight (8) and twenty-four (24) weeks. The covered period for all PPP loans (for first and second draws) extends through March 31, 2021.

The Act includes certain other additional eligible expenses for the use of the loan under the PPP, whether the first or second draw. The expanded definition of “eligible expenses” may be applied to the forgiveness of the first draw of the PPP, as long as such loan has not yet been forgiven by the SBA. It is important to note that the expanded definition of the eligible expenses is only applicable to the allowable

ABOUT THE AUTHOR

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Elisa is a Senior Manager at Alvarado Tax & Business Advisors LLC and has more than ten years of individual and corporate tax consulting experience. She had a two-year license to work at the Puerto Rico Department of Treasury where she initially held the position of First Advisor to the Secretary and subsequently was appointed Deputy Secretary for Tax Policy from which she worked with the needs of several individual taxpayers and local and multinational entities. She also dealt with numerous tax consultations for the Department and for other agencies of the Commonwealth of Puerto Rico and the Federal Government. In addition, during her stay she drafted and reviewed the administrative documents issued by the Department of Treasury, and drafted several tax related bills and regulations.

Elisa has extensive experience in handling clients' tax issues including planning and fiscal structuring; dealing with government agencies, providing the tax valuation over proposed or completed transactions, tax compliance and handling requests to oversee agencies, such as petitions for resolutions, closing agreements, exemptions and tax credits, among others.

Elisa has a Bachelor Degree in Business Administration, a Master's in Business Administration and a Juris Doctor from the University of Puerto Rico. She is admitted to practice law in Puerto Rico and in the United States Court for the District of Puerto Rico. She is a member of the Puerto Rico Certified Public Accountants Society.

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use of the funds and not to the actual loan amount.

ERTC

The Act allows recipients of the PPP, under the first or second draw, to claim the ERTC. However, wages subject to the loan forgiveness under the PPP cannot be considered for the ERTC to prevent “double dipping”. That is, the PPP recipients that once were ineligible to claim the ERTC for the year 2020 are now eligible to claim the credit if their operations were fully or partially suspended during such year due to a governmental order due to the COVID-19, or if their gross receipts during any calendar quarter in 2020 were reduced below 50% of gross receipts of the same calendar quarter in 2019. The credit may be claimed in 2020 until gross receipts reach, at least, 80% of the gross receipts of the same calendar quarter in 2019.

The Act extends the final date to claim the ERTC from December 31, 2020, to July 1, 2021. The ERTC is also increased to consider 70% of the qualified wages (instead of the 50% applicable to the year 2020); and a \$10,000 quarterly threshold (instead of the \$10,000 annual threshold applicable for 2020). Also, to calculate the credit for 2021, employers with 500 or less employees may claim the ERC over all wages paid during the eligible period. In the case of all other employers, qualified wages subject to the credit are only those paid to employees that did not work during the eligible period. This 500-employee threshold was increased from the 100-employee threshold applicable to the year 2020.

For 2021, the employer may claim the ERTC if its operations were fully or partially suspended due to a governmental order due to the COVID-19, or if the gross receipts for the calendar quarter in 2021 is less than 80% of the gross receipts for the same calendar quarter in 2019. The employer may claim the credit until the following calendar quarter that the gross receipts reach, at least, 80% of the gross receipts for the same calendar quarter in 2019, or June 30, 2021, whichever is earlier. The reduction in gross receipts is also calculated considering the gross receipts of all entities that are treated as a single

employer under the U.S. Internal Revenue Code, which considers controlled group of entities.

Governmental not-for-profit entities, colleges and hospitals may qualify for the ERTC.

ATBA's COMMENTS:

It is important to remember that PPP Funds are limited and are first come, first serve. This may cause difficulties and anxiety to lenders and borrowers. If you are applying for a PPP Second Draw, we recommend that you first contact the financial institution that processed the PPP First Draw. If that financial institution cannot process the application for the PPP Second Draw, you should try with another provider.

With regards to the new provisions of the ERTC, we are still waiting for guidelines to be issued by the U.S. Internal Revenue Service (“IRS”). There are some issues related to the retroactive calculation of wages for the ERTC and the PPP. In addition, the IRS must clarify the procedure to amend the Employer’s Quarterly Federal Tax Return (Form 941) and the retroactive claim of the ERTC.

Nevertheless, we encourage businesses to assess whether they qualify under the published rules for the PPP Second Draw, or first draw for the ones that have not requested it yet, and/or for the ERTC for the years 2020 and/or 2021. Alvarado Tax & Business Advisors can assist you with these assessments and with the request process.

If you have questions or need assistance with the application for the benefits of the Act, please do not hesitate to contact us.



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