

# Current Federal Tax Developments

Week of December 21, 2020  
(Proposed PPP Revisions Edition)

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ACCOUNTING  
CONTINUING EDUCATION

CURRENT FEDERAL TAX DEVELOPMENTS  
WEEK OF DECEMBER 21, 2020  
(PROPOSED PPP REVISIONS EDITION)  
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Kaplan Financial Education

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# Proposed Revisions to PPP Loan Program and Creation of Second Draw Loan Program

The proposed Emergency Coronavirus Relief Act of 2020 (ECRA)<sup>1</sup> would make substantial modifications to the Paycheck Protection Program. Some of the changes include:

- Reopening the original program for those who did not initially obtain a loan, those who did not take the full amount they were entitled to on the loan or those who returned the funds;
- Allowing certain borrowers who had already taken out their full PPP loan and spent the funds to obtain a second PPP loan
- Expanding the list of items that qualify for reimbursable nonpayroll expenses
- Clarifying that amounts paid for with PPP funds will remain tax deductible even if PPP forgiveness of the loan is obtained for use of those funds and providing the same treatment for payments made on SBA loans by the SBA
- Adding new, simplified loan forgiveness application procedures for loans of less than \$2,000,000 and a one-page forgiveness application for loans of \$150,000 or less and
- Eliminating the reduction in PPP loan forgiveness amounts for those that received EIDL grants.

Note that as of the date this is being written this exists only as a proposal. While a PDF of the bill text is still available on Senator Cassidy's website, the link to the text is no longer active on the page announcing the proposal. Whether this is due to an oversight, or an indication that some major changes have been made to the bill text, remains to be seen.

In this article we look at some of the key items in the draft bill. But remember this is just a draft. It may never become law in any form, or any item may be significantly modified in final form.

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<sup>1</sup> Full text downloaded from <https://www.cassidy.senate.gov/imo/media/doc/BAI20965.pdf>, retrieved December 19, 2020.

## **MODIFICATIONS TO THE ORIGINAL PPP LOAN PROGRAM**

The law contains a number of modifications to the original PPP loan program, many of which apply retroactively to the start of the program.

### **Definition of a Seasonal Employer**

Although the PPP loan program made reference to a “seasonal employer,” the term as not defined in the CARES Act. ECRA now provides a definition of what it means to be a seasonal employer. A seasonal employer is one that:

- Does not operate for more than 7 months in any calendar year; or
- During the preceding calendar year, had gross receipts for any 6 months of that year that were not more than 33.33 percent of the gross receipts of the employer for the other 6 months of that year.<sup>2</sup>

### **Addition of Certain §501(c)(6) Organizations to List of Those Eligible for Loans**

§501(c)(6) organizations that meet certain criteria are added to the list of those eligible to obtain PPP loans by ECRA §1102(o). The law provides that §501(c)(6) organizations (excluding professional sports leagues and organizations with the purpose of promoting or participating in a political campaign or other activity) are eligible to receive a PPP loan if

- The organization does not receive more than 10 percent of its receipts from lobbying activities;
- The lobbying activities of the organization do not comprise more than 10 percent of the total activities of the organization; and
- The organization employs not more than 150 employees.<sup>3</sup>

A carve out from the lobbying limits are made for certain destination marketing organizations. Despite not qualifying under the above rules, such organizations nevertheless will be eligible if:

- The destination marketing organization does not receive more than 10 percent of its receipts from lobbying activities;
- The lobbying activities of the destination marketing organization do not comprise more than 10 percent of the total activities of the organization;
- The destination marketing organization employs not more than 150 employees; and

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<sup>2</sup> SBA Act §7(a)(36)(A)(xii) as amended by ECRA

<sup>3</sup> SBA Act §7(a)(36)(A)(vii)(I) as amended by ECRA

- The destination marketing organization —
  - is described in section 501(c) of the Internal Revenue Code and is exempt from taxation under section 501(a) of such Code; or
  - is a quasi-governmental entity or is a political subdivision of a State or local government, including any instrumentality of those entities.<sup>4</sup>

## **Additional Eligible Expenses**

ECRA adds the following items to the list of non-payroll funds on which PPP loan proceeds can be spent and which will qualify towards non-payroll forgivable costs.<sup>5</sup> These new expenses are detailed in the following paragraphs.

### ***Covered Operations Expenditures***

The first new category is a *covered operations expenditure* which is defined as:

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...<sup>6</sup>

### ***Covered Property Damage Costs***

*Covered property damage costs* are defined as:

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 other compensation...<sup>7</sup>

### ***Covered Supplier Costs***

A *covered supplier cost* is:

an expenditure made by an entity to a supplier of goods pursuant to a contract, order, or purchase order in effect before the date of disbursement of the covered loan for the supply of goods that are essential to the operations of the entity at the time at which the expenditure is made...<sup>8</sup>

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<sup>4</sup> SBA Act §7(a)(36)(A)(vii)(II) as amended by ECRA

<sup>5</sup> ECRA §1102(c)(1)

<sup>6</sup> ECRA §1102(c)(2)(v)

<sup>7</sup> ECRA §1102(c)(2)(vi)

<sup>8</sup> ECRA §1102(c)(2)(vii)

## **Covered Worker Protection Expenditures**

The final new category added is a *covered worker protection expenditure* which is defined as:

an operating or a capital expenditure that is required to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020 and ending on the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (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...<sup>9</sup>

The law then lists items that specifically are included in this category as including:

- The purchase, maintenance, or renovation of assets that create or expand —
  - A drive-through window facility;
  - An indoor, outdoor, or combined air or air pressure ventilation or filtration system;
  - A physical barrier such as a sneeze guard;
  - An indoor, outdoor, or combined commercial real property;
  - An onsite or offsite health screening capability; or
  - Other assets relating to the compliance with the requirements or guidance, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and
- The purchase of —
  - covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation. Such materials are listed in 44 CFR 328.103(a) as:
    - Surgical N95 Filtering Facepiece Respirators, including devices that are disposable half-face-piece non-powered air-purifying particulate respirators intended for use to cover the nose and mouth of the wearer to help reduce wearer exposure to pathogenic biological airborne particulates;
    - PPE surgical masks, including masks that cover the user's nose and mouth and provide a physical barrier to fluids and particulate materials;

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<sup>9</sup> ECRA §1102(c)(2)(viii)



- PPE nitrile gloves, including those defined at 21 CFR 880.6250 (exam gloves) and 878.4460 (surgical gloves) and such nitrile gloves intended for the same purposes; and
  - Level 3 and 4 Surgical Gowns and Surgical Isolation Gowns that meet all of the requirements in ANSI/AAMI PB70 and ASTM F2407-06 and are classified by Surgical Gown Barrier Performance based on AAMI PB70.
- Particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or
  - Other kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor.<sup>10</sup>

However, covered worker protective equipment does not include residential real property or intangible property.<sup>11</sup>

These changes do not have retroactive effect—they only apply with respect to loans for which forgiveness is granted after the effective date of ECRA.<sup>12</sup>

### **Group Insurance Payments**

The law clarifies that “group insurance payments” are to be considered an allowed payroll cost.<sup>13</sup>

### **Tax Impact Changes**

The IRS had taken the position in Notice 2020-32 that no deduction would be allowed for expenses to the extent they lead to forgiveness of the PPP loan. In Revenue Ruling 2020-27 the IRS extended this loss of deduction to cases where forgiveness had not been obtained by the taxpayer by year end, but for which the taxpayer had a reasonable expectation of forgiveness. So, although under CARES Act 1106(i) the cancellation of the loan would not lead to taxable income, the loss of a deduction for the expenses paid put taxpayers back in basically the same position they would have been in had the cancellation been taxable, but the expenses used to obtain that forgiveness been deductible.

Key members of the tax writing committees had made it well known that they did not agree with the IRS’s view on this point, eventually promising to enact legislation to reverse the IRS position.<sup>14</sup> In the ECRA Congress has made good on this threat.

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<sup>10</sup> ECRA §1102(c)(2)(viii)

<sup>11</sup> ECRA §1102(c)(2)(viii)

<sup>12</sup> ERCA §1102(c)

<sup>13</sup> ERCA §1102(g)

<sup>14</sup> See Ed Zollars, “Tax 101 Revisited: Three Key Taxwriters Protest IRS Position on Deduction of PPP Expenses, State the Ruling Is Contrary to Both Congressional Intent and Controlling Authorities,” *Current Federal Tax*

The law modifies CARES Act §1106(i) to add that “no deduction shall be denied or reduced, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income...”<sup>15</sup>

This change in the CARES Act §1106(i) is retroactively effective as if it was contained in the original CARES Act.

Similarly, the ECRA clarifies that payments made on SBA loans by the SBA under CARES Act §1102 are both:

- Not taxable income to the borrower when the loan payment is made for the borrower and
- The borrower will still be able to claim a full deduction for any expenses paid with the loan and will not need to reduce basis in any asset obtained with loan funds.<sup>16</sup>

SBA guidance issued to lenders prior to ECRA had indicated that these payments would be reported to borrowers on Form 1099MISC and be taxable to the borrower.<sup>17</sup>

## **Selection of Covered Period for Forgiveness**

The covered period has been modified before by Congress as part of the Paycheck Protection Program Flexibility Act and then the SBA indicated that borrowers who applied for forgiveness before the end of their statutory covered period would have a shorter covered period, ending on the date of forgiveness.

ECRA appears to modify the rules again, essentially moving the SBA rule for those who wish to apply early into the law. Now the covered period:

- Begins on the date the loan proceeds are received by the borrower and
- Ends on a date selected by the borrower that falls between
  - Eight weeks after the date the funds were received by the borrower and
  - Twenty-four weeks after the date the funds were received by the borrower.<sup>18</sup>

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*Developments* website, May 6, 2020, <https://www.currentfederaltaxdevelopments.com/blog/2020/5/6/tax-101-revisited-three-key-taxwriters-protest-irs-position-on-deduction-of-ppp-expenses-state-the-ruling-is-contrary-to-both-congressional-intent-and-controlling-authorities> (retrieved December 17, 2020)

<sup>15</sup> ECRA §1102(c)(4)

<sup>16</sup> CARES Act §1112(h) as amended by ECRA

<sup>17</sup> See Ed Zollars, CPA, “Guidance on Information Reporting Responsibilities for Payments Under CARES Act §1112 Made by SBA,” *Current Federal Tax Developments* website, December 12, 2020, <https://www.currentfederaltaxdevelopments.com/blog/2020/12/12/guidance-on-information-reporting-responsibilities-for-payments-under-cares-act-1112-made-by-sba> (retrieved December 17, 2020)

<sup>18</sup> CARES Act 1106(a)(4) as amended by ECRA

## **Modification to FTE Safe Harbor 2**

ECRA modifies FTE safe harbor 2 as it is called on the forgiveness application form, which was the only FTE safe harbor found in the CARES Act, moving back to September 30, 2021 the date by which a borrower must restore the reduction in the number of full time equivalent employees.<sup>19</sup>

So now the taxpayer must meet the following criteria for this FTE safe harbor:

- The borrower must have had a reduction in FTE in the period from February 15, 2020 to April 26, 2020 when compared to FTE at February 15, 2020 *and*
- The borrower has eliminated the reduction by September 30, 2021.<sup>20</sup>

The same change in the ending date for the restoration test to September 30, 2021 is made for a taxpayer who had a reduction in either the hourly wage rate or annualized salary for an employee in the period from February 15, 2020 to April 26, 2020 when compared to February 15, 2020.<sup>21</sup>

## **Modification for Exemption Based on Employee Availability**

As was true for the FTE Safe Harbor 2 ending date, the end date of the exemption based on employee availability found in CARES Act 1106(d)(7) is moved to September 30, 2021.

Now the law provides that during the period beginning on February 15, 2020 and ending on September 30, 2021, the amount of loan forgiveness under this section shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if an eligible recipient, in good faith is able to document

- An inability to rehire individuals who were employees on February 15, 2020 and
- An inability to hire similarly qualified employees for unfilled positions on or before September 30, 2021.<sup>22</sup>

## **Unable to Return to Same Level of Activity**

To complete the adjustments to the safe harbors, the time period during which a taxpayer is unable to return to the same level of activity is also extended to September 30, 2021 which qualifies a taxpayer for FTE safe harbor 1. The provision now reads that the amount of loan forgiveness shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if an eligible recipient, in good faith “is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health

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<sup>19</sup> CARES Act 1106(d)(5)(B) as amended by ECRA

<sup>20</sup> CARES Act 1106(d)(5)(B)(i) as amended by ECRA

<sup>21</sup> CARES Act 1106(d)(5)(B)(ii) as amended by ECRA

<sup>22</sup> CARES Act 1106(d)(7)(A) as amended by ECRA

and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending September 30, 2021, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.”<sup>23</sup>

## **Simplified Application for Forgiveness**

ECRA contains two provisions meant to simplify the process of applying for forgiveness for all borrowers who obtained loans of less than \$2,000,000. One covers those who received a loan of up to \$150,000, allowing for a one-page forgiveness application, while the second reduces the amount of information to be provided those who received more than \$150,000 but less than \$2,000,000 in loan proceeds.

### ***One Page Forgiveness Application for Loans of Up to \$150,000***

ECRA removes entirely the need for applicants who received loans of \$150,000 or less to comply with the detailed documentation requirements found at CARES Act §1106(e). While the SBA carved out some administrative relief for borrowers with loans of \$50,000 or less, or those that could meet certain safe harbors, the Act now puts into the law a much simplified forgiveness application process for borrowers with loans up to \$150,000.

For loans up to \$150,000, the loan shall be forgiven if the borrower “submits to the lender a one-page online or paper form, to be established by the Administrator not later than 7 days after the date of enactment of the Continuing the Paycheck Protection Program Act, that attests that the eligible recipient complied with the requirements under section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)).”<sup>24</sup>

While the law does not explicitly state that the form would not require submission of supporting documents, which are required with the Form 3508S, it would appear that the intent of the law is to not require that data be submitted, given the explicit exclusions provided for the loans outside this range but less than \$2,000,000.

Note that the law only discusses full forgiveness. It would appear that if a borrower had determined he/she was not eligible for full forgiveness, the use of this form would not be allowed.

### ***Loans Over \$150,000 But Less Than \$2,000,000***

Again, ECRA carves out an exception from the detailed CARES Act documentation rules for forgiveness applications to apply to those with loans over \$150,000 but less than \$2,000,000. For borrowers who choose to apply under this provision:

- The borrower is not required to submit:

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<sup>23</sup> CARES Act 1106(d)(7)(B) as amended by ECRA

<sup>24</sup> CARES Act 1106(l) as amended by ECRA

- Documentation verifying the number of full-time equivalent employees on payroll and pay rates (which included payroll tax filings reported to the Internal Revenue Service; and State income, payroll, and unemployment insurance filings);
  - Documentation, including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, payments on covered operations expenditures, payments on covered property damage costs, payments on covered supplier costs, payments on covered worker protection expenditures, and covered utility payments;
  - A certification that the documentation presented is true and correct.
- The borrower will be required to retain
    - All employment records relevant to the application for loan forgiveness for the 4-year period following submission of the application; and
    - All other supporting documentation relevant to the application for loan forgiveness for the 3-year period following submission of the application; and
    - May complete and submit any form related to borrower demographic information.<sup>25</sup>

When a submission is made under this program, the lender conducts a limited review where

- Review by the lender of an application submitted by the eligible recipient for loan forgiveness under this section shall be limited to whether the lender received a complete application, with all fields completed, initialed, or signed, as applicable; and
- The lender shall
  - Accept the application submitted by the eligible recipient for loan forgiveness under this section; and
  - Submit the application to the Administrator.<sup>26</sup>

The SBA may perform a review or audit of loans under this program. If the agency uncovers fraud, ineligibility, or other material noncompliance with applicable loan or loan forgiveness requirements modify:

- The amount of the covered loan or

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<sup>25</sup> CARES Act §1106(l)(2)(A) as amended by ECRA

<sup>26</sup> CARES Act §1106(l)(2)(A) as amended by ECRA

- the loan forgiveness amount.<sup>27</sup>

### **Limits on Enforcement Actions for Covered Loans Up to \$150,000**

ECRA has a provision that limits enforcement actions the SBA can take against a borrower related to loan origination, forgiveness or guaranteed of a loan of up to \$150,000. Action can only be taken for

- Commission of fraud or
- Expenditure of loan proceeds on expenses not allowable<sup>28</sup>

The new law also provides for special rules related to the use of the funds for ordinary and necessary business expenses. The law provides:

For purposes of an enforcement action or penalty relating to the expenditure of the proceeds on a covered loan that is not more than \$150,000 for the other allowable uses of a loan under section 7(a) of the Small Business Act (15 U.S.C. 636(a)) that are not specified in subclauses (I) through (XI) of paragraph (36)(F), as authorized under the matter preceding subclause (I) in such paragraph (36)(F), the Administrator may apply the standards and procedures that the Administrator would apply with respect to a loan under another paragraph of such section 7(a).<sup>29</sup>

The law also makes it clear that the rule does not restrict the SBA's ability to pursue ineligible recipients:

Nothing in this subsection shall be construed to limit the authority of the Administrator to pursue an enforcement action or penalty with respect to the recipient of a covered loan that was not eligible to receive a covered loan under the requirements under section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)).<sup>30</sup>

## **PPP SECOND DRAW LOANS**

ECRA creates a new class of SBA §7(a) loans,<sup>31</sup> found at SBA §7(a)(37), just after the original PPP loan provision. The new loan is meant to provide a second loan for those who have exhausted their original PPP loan but have been impacted by a significant decrease in revenue. Thus, this program has very explicit need qualifications, not just a good faith belief that the loan is necessary.

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<sup>27</sup> CARES Act §1106(l)(2)(B) as amended by ECRA

<sup>28</sup> CARES Act §1106(m)(1) as amended by ECRA

<sup>29</sup> CARES Act §1106(m)(2) as amended by ECRA

<sup>30</sup> CARES Act §1106(m)(3) as amended by ECRA

<sup>31</sup> ECRA §1102(i)

For simplicity in this manual, we'll refer to the Paycheck Protection Program Second Draw loans as PPP2 loans. We will continue to refer to loans under the original provision (SBA §7(a)(36)) as PPP loans.

## Definitions

Unfortunately, the new loans use terms identical to those used under the first program—including ones such as “covered period”. The terms, and the way we will refer to them, are listed below.

- *Covered loan* (PPP2 covered loan) means a loan made under this program.<sup>32</sup>
- *Covered mortgage obligation, covered operating expenditure, covered property damage cost, covered rent obligation, covered supplier cost, covered utility payment, and covered worker protection* have the same meaning as they do under the original PPP program.<sup>33</sup>
- *Covered period* (PPP2 covered period) means the period beginning on the date of origination of the PPP2 loan and ending on March 31, 2021<sup>34</sup>

## Eligible Entity

The entities that may obtain a PPP2 loan are defined at SBA §7(a)(37)(A)(v). It begins with the following set of basic criteria. The entity means any

- Business concern,
- Nonprofit organization,
- Veterans organization,
- Tribal business concern,
- Eligible self-employed individual,
- Sole proprietor, independent contractor, or
- Small agricultural cooperative

that attests that it has used or will use on or before the expected date of the disbursement of the PPP2 loan, the full amount of the original loan. But this is just the starting point.

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<sup>32</sup> SBA §7(a)(37)(A)(ii)

<sup>33</sup> SBA §7(a)(37)(A)(iii)

<sup>34</sup> SBA §7(a)(37)(A)(iv)

The entity must also attest that it:

- Meets the entity size standards of either
  - If a business concern, the entity would qualify as a small business concern by the annual receipts size standard (if applicable) established by section 121.201 of title 13, Code of Federal Regulations or its successor<sup>35</sup> or
  - Meets the alternative size requirements of SBA Act §3(a)(5).
- Employs not more than 300 employees<sup>36</sup> and
- Meets one of the following reduction in gross receipts tests:
  - Had gross receipts during the first, second, third, or, only with respect to an application submitted on or after January 1, 2021, fourth quarter in 2020, that demonstrate not less than a 30 percent reduction from the gross receipts of the entity during the same quarter in 2019;
  - If the entity was not in business during the first or second quarter of 2019, but was in business during the third and fourth quarter of 2019, had gross receipts during the first, second, or third quarter of 2020 that demonstrate not less than a 30 percent reduction from the gross receipts of the entity during the third or fourth quarter of 2019;
  - If the entity was not in business during the first, second, or third quarter of 2019, but was in business during the fourth quarter of 2019, had gross receipts during the first, second, or third quarter of 2020 that demonstrate not less than a 30 percent reduction from the gross receipts of the entity during the fourth quarter of 2019; or
  - If the entity was not in business during 2019, but was in operation on February 15, 2020, had gross receipts during the second or third quarter of 2020 that demonstrate not less than a 30 percent reduction from the gross receipts of the entity during the first quarter of 2020.<sup>37</sup>

As well, §501(c)(6) organizations that were first made eligible for the original PPP loans under ECRA will be eligible to qualify for the second loan (except the 150 employee limitation will still apply).<sup>38</sup>

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<sup>35</sup> The regulation contains a detailed table of business sizes by six-digit NAICS code. You can find it at <https://www.law.cornell.edu/cfr/text/13/121.201>

<sup>36</sup> Note this is down from the 500 for the original PPP program.

<sup>37</sup> SBA §7(a)(37)(A)(v) as amended by ECRA

<sup>38</sup> SBA §7(a)(37)(A)(v) as amended by ECRA



However, certain organizations that otherwise would seem to qualify for the PPP2 loan are barred from receiving such loans. Banned entities include:

- An issuer, the securities of which are listed on an exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f)—that is a public company;<sup>39</sup>
- Any entities that are:
  - Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);
  - Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111);
  - Life insurance companies;
  - Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);
  - Pyramid sale distribution plans;
  - Businesses deriving more than one-third of gross annual revenue from legal gambling activities;
  - Businesses engaged in any illegal activity;
  - Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;
  - Businesses which:
    - Present live performances of a prurient sexual nature; or
    - Derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;
  - Unless waived by SBA for good cause, businesses that have previously defaulted on a Federal loan or Federally assisted financing, resulting in the Federal government or any of its agencies or Departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its Associates which previously owned, operated, or controlled a business which defaulted on a Federal loan (or guaranteed a loan which was defaulted) and caused the Federal government or any of its agencies or Departments to

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<sup>39</sup> SBA §7(a)(37)(A)(v)(III)(aa) as amended by ECRA

sustain a loss in any of its programs. For purposes of this section, a compromise agreement shall also be considered a loss;<sup>40</sup>

- Businesses deriving more than one-third of gross annual revenue from legal gambling activities except as otherwise provided in the interim final rule of the Administration entitled 'Business Loan Program Temporary Changes; Paycheck Protection Program — Additional Eligibility Criteria and Requirements for Certain Pledges of Loans' (85 Fed. Reg. 21747 (April 20, 2020));<sup>41</sup>
- Private clubs and businesses which limit the number of memberships for reasons other than capacity except if the business concern is an organization described in paragraph (36)(D)(vii) (certain §501(c)(6) organizations that now qualify for PPP loans);<sup>42</sup>
- Government-owned entities (except for businesses owned or controlled by a Native American tribe) except as otherwise provided in the interim final rules of the Administration entitled 'Business Loan Program Temporary Changes; Paycheck Protection Program — Eligibility of Certain Electric Cooperatives' (85 Fed. Reg. 29847 (May 19, 2020)) and 'Business Loan Program Temporary Changes; Paycheck Protection Program — Eligibility of Certain Telephone Cooperatives' (85 Fed. Reg. 35550 (June 11, 2020)) or any other guidance or rule issued or that may be issued by the Administrator;<sup>43</sup>
- Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude except as otherwise provided in the interim final rule of the Administration entitled 'Business Loan Program Temporary Changes; Paycheck Protection Program — Additional Eligibility Revisions to First Interim Final Rule' (85 Fed. Reg. 38301 (June 26, 2020)) or any other guidance or rule issued or that may be issued by the Administrator;<sup>44</sup>
- Businesses in which the Lender or CDC, or any of its Associates owns an equity interest except as otherwise provided in any guidance or rule issued or that may be issued by the Administrator;<sup>45</sup> or
- Is an entity that would be described in the above list of banned entities if the entity were a business concern;<sup>46</sup> or

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<sup>40</sup> SBA §7(a)(37)(A)(v)(III)(bb)(AA) as amended by ECRA

<sup>41</sup> SBA §7(a)(37)(A)(v)(III)(bb)(BB) as amended by ECRA

<sup>42</sup> SBA §7(a)(37)(A)(v)(III)(bb)(CC) as amended by ECRA

<sup>43</sup> SBA §7(a)(37)(A)(v)(III)(bb)(DD) as amended by ECRA

<sup>44</sup> SBA §7(a)(37)(A)(v)(III)(bb)(EE) as amended by ECRA

<sup>45</sup> SBA §7(a)(37)(A)(v)(III)(bb)(FF) as amended by ECRA

<sup>46</sup> SBA §7(a)(37)(A)(v)(III)(bb)(GG) as amended by ECRA

- Is assigned, or was approved for standard PPP loan with, a North American Industry Classification System code beginning with 52 (Finance and Insurance).<sup>47</sup>
- Any business concern or entity primarily engaged in political or lobbying activities, which shall include any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public documents;<sup>48</sup>
- Any business concern or entity:
  - for which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or a capital or profit interest in a limited liability company or partnership; or
  - that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China; or
  - any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612).<sup>49</sup>

An entity may not receive more than one covered PPP2 loan.<sup>50</sup>

For purposes of computing gross receipts for nonprofit and veterans organizations, gross receipts

- Shall include proceeds from program services, fundraising events, federated campaigns, gifts, donor-advised funds, and funds from similar sources; and
- Shall not include —
  - Federal grants (excluding any loan forgiveness on loans received for PPP or PPP2 loans);
  - Revenues from a supporting organization;
  - Grants from private foundations that are disbursed over the course of more than 1 calendar year;
  - Any contribution of property other than money, stocks, bonds, and other securities, provided that the non-cash contribution is not sold by the

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<sup>47</sup> SBA §7(a)(37)(A)(v)(III)(bb)(HH) as amended by ECRA

<sup>48</sup> SBA §7(a)(37)(A)(v)(III)(cc) as amended by ECRA

<sup>49</sup> SBA §7(a)(37)(A)(v)(III)(dd) as amended by ECRA

<sup>50</sup> SBA §7(a)(37)(C)(v) as amended by ECRA

organization in a transaction unrelated to the tax-exempt purpose of the organization; or

- Any loan proceeds from a PPP loan.<sup>51</sup>

## **Requirement to Have First Received a PPP Loan to Get a PPP2 Loan**

The PPP2 loans are meant to be a second loan to entities that have received and exhausted the funds from the original PPP loans under SBA §7(a)(36). Specifically, a PPP2 loan can only be made to an entity that:

- Received a loan under the original PPP loan program and
- On or before the expected date on which the covered loan under this paragraph is disbursed to the eligible entity, has used, or will use, the full amount of the entity's original PPP loan funds.<sup>52</sup>

## **Maximum Loan Amount**

PPP2 loans are subject to similar maximum loan amounts as the original PPP loans except that they are capped at \$2 million rather than \$10 million.<sup>53</sup>

### ***General Rule***

Most borrowers are covered by the general rule, which sets the maximum loan for the borrower at the lesser of:

- the product obtained by multiplying —
  - At the election of the eligible entity, the average total monthly payment for payroll costs incurred or paid by the eligible entity during —
    - The 1-year period before the date on which the loan is made; or
    - Calendar year 2019; by
  - 2.5; or
- \$2,000,000.<sup>54</sup>

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<sup>51</sup> SBA §7(a)(37)(G) as amended by ECRA

<sup>52</sup> SBA §7(a)(37)(P) as amended by ECRA

<sup>53</sup> SBA §7(a)(37)(C) as amended by ECRA

<sup>54</sup> SBA §7(a)(37)(C)(i) as amended by ECRA

## **Seasonal Employers**

Seasonal employers have a maximum loan that consists of the lesser of:

- the product obtained by multiplying —
  - at the election of the eligible entity,
    - the average total monthly payments for payroll costs incurred or paid by the eligible entity for a 12-week period beginning February 15, 2019, or March 1, 2019, and ending June 30, 2019,
    - or any consecutive 12-week period during the period beginning on February 15, 2020 and ending on December 31, 2020; by
  - 2.5; or
- \$2,000,000.<sup>55</sup>

## **New Entities**

Another special rule applies to new entities that did not exist during the 1 year period preceding February 15, 2020. For such entities, the maximum loan is the lesser of:

- the product obtained by multiplying —
  - the quotient obtained by dividing —
    - the sum of the total monthly payments by the eligible entity for payroll costs paid or incurred by the eligible entity as of the date on which the eligible entity applies for the covered loan; by
    - the number of months in which those payroll costs were paid or incurred; by
  - 2.5; or
- \$2,000,000.<sup>56</sup>

## **Business Concerns with More than One Location**

Business entities with more than one location are subject to two special rules.

- The total amount of all PPP2 covered loans shall be not more than \$2,000,000; and

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<sup>55</sup> SBA §7(a)(37)(C)(ii)

<sup>56</sup> SBA §7(a)(37)(C)(iii)

- For purposes of PPP2 loans, such entities may not have more than 300 employees *per location* (rather than 300 employees total).<sup>57</sup>

## **Loan Forgiveness for PPP2 Loans**

Generally, except as provided for below, PPP2 loan borrowers are eligible for forgiveness of a PPP2 loan in the same manner as was true for the original PPP loans.<sup>58</sup>

An entity with a PPP2 loan is eligible for forgiveness in an amount equal to the total of the following costs incurred or expenditures made during the PPP2 covered period:

- Payroll costs.
- Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).
- Any covered operations expenditure.
- Any covered property damage cost.
- Any payment on any covered rent obligation.
- Any covered utility payment.
- Any covered supplier cost.
- Any covered worker protection expenditure.<sup>59</sup>

However, the amount forgiven can be no more than the lesser of

- The total of the above expenses or
- The amount equal to the quotient obtained by dividing —
  - The amount of the covered loan used for payroll costs during the covered period; by
  - 0.60.<sup>60</sup>

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<sup>57</sup> SBA §7(a)(37)(C)(iv)

<sup>58</sup> SBA §7(a)(37)(H)(i)

<sup>59</sup> SBA §7(a)(37)(H)(ii)

<sup>60</sup> SBA §7(a)(37)(H)(iii)

## **Bar on Use of PPP2 Loan Funds for Lobbying**

The ECRA adds SBA §7(a)(37)(O) which bars the use of proceeds of a PPP2 loan for:

- Lobbying activities, as defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602);
- Lobbying expenditures related to a State or local election; or
- Expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before Congress or any State government, State legislature, or local legislature or legislative body.<sup>61</sup>

## **REOPENING ORIGINAL PPP LOAN PROGRAM**

ECRA reopens access to the original Paycheck Protection Program loans, but with some changes to the program.

First, the maximum total loan under this “second chance” original PPP loan program is reduced from \$10 million to \$2 million.<sup>62</sup> This reduction in the maximum amount only applies to a PPP loan applied for after the date of enactment of ECRA.<sup>63</sup>

ERCA also allows a borrower to apply for an increased loan amount if an Interim Final Rule issued by the SBA qualified the borrower for a larger loan amount. This is true even if:

- The initial covered loan amount has been fully disbursed; or
- The lender of the initial covered loan has submitted to the Administration a Form 1502 report related to the covered loan.<sup>64</sup>

Finally, ECRA provides that the SBA is to issue guidance within 7 days after enactment that will enable a borrower who:

- Returns amounts disbursed under the covered loan or
- Does not accept the full amount of the covered loan for which the eligible recipient was approved

to be able to again gain access to the PPP loan program. The provision provides:

- In the case of an eligible recipient that returned all or part of a covered loan, the eligible recipient may reapply for a covered loan for an amount equal to the difference between the amount retained and the maximum amount applicable; and

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<sup>61</sup> SBA §7(a)(37)(O) as amended by ECRA

<sup>62</sup> ECRA §1102(j)

<sup>63</sup> ERCA §1102(j)(2)(B)

<sup>64</sup> ERCA §1102(k)(2)

- In the case of an eligible recipient that did not accept the full amount of a covered loan, the eligible recipient may request a modification to increase the amount of the covered loan to the maximum amount applicable, subject to the requirements of the PPP loan program.<sup>65</sup>

## **TIME PERIOD TO APPLY FOR LOANS**

The law provides that both the PPP and PPP2 loans will be funded through March 31, 2021.<sup>66</sup>

## **REPEAL OF EIDL ADVANCE DEDUCTION**

Under the original CARES Act, §1106(e) provided that a borrower's PPP loan forgiveness would be reduced by any EIDL advance (often referred to as a grant) received by the borrower. The EIDL grant was meant to provide a quick infusion of up to \$10,000 to affected businesses, an amount that was not required to be repaid.

That provision reducing the PPP forgiveness by the amount of the EIDL advance is repealed by ECRA §1102(aa).

## **CHANGES ARE LIKELY—AND EXPECTED**

As was noted in the beginning of this section, this analysis is based on the initial draft of this bill. There is no guarantee this will become law or, if it does, that any provision will be included or be exactly as it is in this draft. But given the proximity to year end, obtaining a basic understanding of the bill is likely necessary to advise clients about actions they want or need to take should this bill, or a close approximation, become law.

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<sup>65</sup> ECRA §1102(kk)

<sup>66</sup> ECRA §1102(u)(1)(A)