

THE THURSDAY REPORT

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Friday, January 15, 2020 - Issue 297

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Celebrating Freedom and the Emergency Coronavirus Relief Act of 2020

Upcoming Events

**Updates to PPP Reapplication Procedures Following 01/13/21 SBA
Procedural Notice**

**THE 10 BIGGEST QUESTIONS FOLLOWING THE ECONOMIC AID ACT AND
SUBSEQUENT GUIDANCE**

**COVID-19 LEGISLATION IMPACTING CHARITIES AND NOT-FOR-PROFITS
(PART 1 OF 4)**

For Finkel's Followers

Humor

Celebrating Freedom and the Emergency Coronavirus Relief Act of 2020

While Americans celebrate and demonstrate their dedication to our democracy this week we celebrate the opportunity to help others by understanding and explaining the new Emergency Coronavirus Relief Act of 2020 which became law on December 14, 2020.

This Act provides Second Draw PPP loans, significant wage credits for many businesses that were not expecting them, and interesting new loans, such as the SBA Shuttered Venue Grant and a new \$20,000,000,000 EIDL program for low income communities.

One significant aspect of the Second Draw PPP program is that the borrower must attest that the loan is “necessary to support the ongoing operations of the business.”

We have discussed this at length in our LISI articles that can be viewed by using the links below.

[Alan Gassman & Brandon Ketron on the Necessity of Determining Necessity by May 14: The SBA's Recent Change in Position Throws Thousands of Struggling Businesses into a Short-Fused Quandary - Partially Forgivable Government Loan to Avoid Layoffs or Possible Fines and Even Jail Time](#)

[Alan Gassman, Brandon Ketron & John Beck: PPP Loans Must Be Necessary to Avoid Fines and/or Imprisonment, but What Does Necessary Mean](#)

Please keep in mind that the position of the SBA is that publically traded companies and hedge funds do not have “necessity” because they can go into the capital markets to raise more money to pay their ongoing expenses.

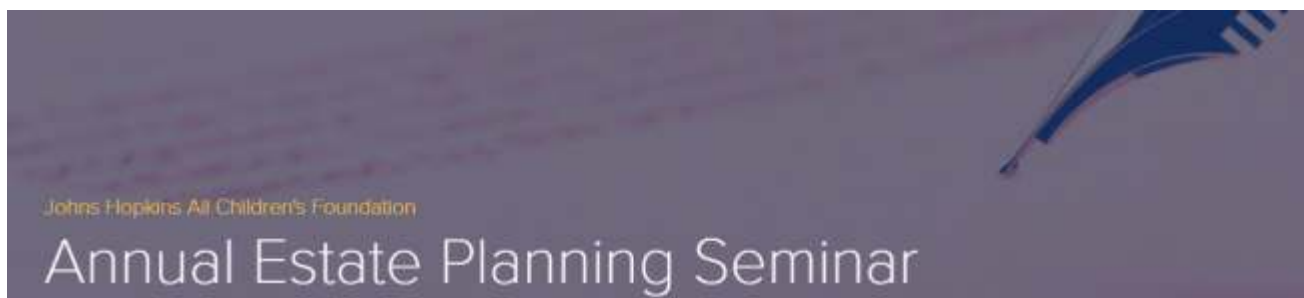
While the SBA has indicated that it will not review the necessity issue with respect to loans of less than \$2,000,000, other agencies (not to mention whistleblowers) can, and probably will in many situations.

Today's Thursday Report provides access to three primary new articles that we have been working on:

1. How the New Act Impacts Charities and Not For Profit Organizations; and
2. The Ten Biggest Open Questions and Confusing Sets of Rules Under the New Act.
3. COVID-19 LEGISLATION IMPACTING CHARITIES AND NOT-FOR-PROFITS

We welcome your questions, comments and suggestions on these articles, and anything else that comes to mind. Please note that our video webinar from last Saturday (***January 6th SBA Regulations Help Solidify PPP And EIDL Changes***) that briefly reviews the primary changes under these programs [can be viewed by using this link](#).

UPCOMING EVENTS



Join Alan and Ava at the 2021 Johns Hopkins All Children's Annual Estate Planning Seminar.

[Use this link to watch Alan explain 678 Trusts to his Granddaughter at the 2019 Seminar.](#)

[MORE INFORMATION AND REGISTRATION IS AVAILABLE HERE](#)

We look forward to hosting you at our 23rd annual continuing education seminar. Join us as we go virtual for 2021. All registrants will be provided with a link to attend the event. We are seeking to qualify the seminar for 7 hours of CE/CLE credits. Please see CE Credit tab for more details.

Event Information

23rd Annual Estate, Tax, Legal & Financial Planning Seminar

Thursday, February 11, 2021

8:30 AM - 4:45 PM

Sessions

The Year In Review: An Estate Planner's Perspective on Recent Tax Developments

Presented by Howard M. Zaritsky, J.D., LL.M.

Electronic Wills

Presented by Sarah S. Butters, J.D.

All In The Family (Or Not)

Presented by Bruce Stone, J.D.

Normal? New Normal? What's Normal? In Charitable Planning For 2021 and Beyond

Presented by Turney P. Berry, J.D.

Structuring the Tax Consequences of Marriage and Divorce

Presented by Carlyn S. McCaffrey, J.D., LL.M.

Dynamic Planning from Today's Presentations and More

Presented by Jonathan Blattmachr, J.D. and Martin M. Shenkman, C.P.A., M.B.A., P.F.S., A.E.P. J.D.

Registration Fee

Seminar registration is \$225 and includes live streaming, Q & A opportunities, and access to speaker handouts and support materials.

[MORE INFORMATION AND REGISTRATION IS AVAILABLE HERE](#)

When	Who	What	How

When	Who	What	How
Friday, January 15, 2021	NYSSCPA FAE	<p>Alan Gassman, Sidney Kess & Brandon Ketron present:</p> <p>SBA Explanation of New Cares Act Changes For PPP, EIDL, etc: What Advisors Need To Know</p> <p>from 10 to 11:40 AM EST</p>	Register
Tuesday, January 19, 2021	CPA Academy	<p>Alan Gassman, Jerry Hesch, Michael Lehmann and Brandon Ketron present:</p> <p>Charitable Planning Series Finale - Putting It All Together With Real Life Examples</p> <p>from 5:30 to 6:30 PM EST</p>	Register
Friday, January 22, 2021	Collier County Bar Association	<p>Alan Gassman presents:</p> <p>An Estate Tax Planning Tune Up</p> <p>from 11 AM to 12 PM EST</p>	Register
Tuesday, January 26, 2021	CPA Academy	<p>Alan Gassman and Brandon Ketron present:</p> <p>PPP & EIDL RULES FOR CHARITIES & NON-PROFITS</p> <p>from 5:30 to 6:30 PM EST</p>	Coming soon
Friday, January 29, 2021	Florida Bar Health Law Section: Representing the Physician	<p>Alan Gassman presents:</p> <p>Medical Practices And PPP, EIDL, and Provider Relief Fund Planning and Implications</p> <p>from 1:10 to 2 PM EST</p>	Register
Wednesday, February 3, 2021	CPA Academy	<p>Alan Gassman and Michael Lehmann present:</p> <p>Establishing 501(c)(3) Organizations and the Form 1023</p> <p>from 5:30 to 6:30 PM</p>	Register
Wednesday, February 10, 2021	CPA Academy	<p>Alan Gassman presents:</p> <p>The Creditor Protection Conversation - What CPAs Can Explain to Their Clients (and Themselves) to Safeguard Wealth and Insulate from Potential Creditor Catastrophe</p> <p>from 5:30 to 6:30 PM</p>	Register

When	Who	What	How
Thursday, February 11, 2021	Johns Hopkins All Children's Annual Estate Planning Seminar	Alan Gassman & Friends: Introduce speakers and listen carefully from 8:30 AM to 4:45 PM EST	Register
Wednesday, February 17, 2021	CPA Academy	Alan Gassman presents: How Asset Protection Trusts Work, and When They Won't Work - Pros, Cons and Related Going Ons from 5:30 to 6:30 PM	Coming soon
Tuesday, February 23, 2021	Estate Planning Council of Northern New Jersey	Alan Gassman presents: WHAT YOUR BEST CLIENTS NEED TO KNOW ABOUT FLORIDA LAW AND PLANNING from 4:30 to 5:30 PM EST	Register
Saturday, February 27, 2021	MOTE Vascular Surgeon Conference	Alan Gassman presents: Managing Your Money: How to Save It, Manage It and Protect It from 1:15 to 2:15 PM EST	More information
Friday, March 26, 2021	Florida Bar: Tax Section	Alan Gassman, Leslie Share, Brandon Ketron & Friends present: Creditor Protection Nuts & Bolts from 9 AM to 2 PM EDT	Coming soon
Thursday, May 13, 2021	FICPA-FSU Spring Accounting Conference	Alan Gassman presents: Fine Tuning and Improving Estate and Asset Ownership Planning For All Categories of Clients & The Florida CPA's Practice Guide to Effective Creditor Protection Planning	Register
Friday, May 21, 2021	Michigan ICLE Annual Probate & Estate Planning Institute	Alan Gassman presents: Prebankruptcy and Bankruptcy Avoidance Strategies for Challenging Situations from 11:15 AM to 12 PM CT	Register

When	Who	What	How
Thursday, June 10, 2021	AICPA & CIMA ENGAGE 2021 in Las Vegas, NV	Alan Gassman and Ken DeGraw present: Pre-Bankruptcy and Creditor Planning During the COVID-19 Pandemic from 3 to 3:50 PM PT	Register
Thursday, November 4, 2021	Estate Planning Council of Birmingham	Alan Gassman presents: Hot Topics In Estate Tax And Creditor Protection from 8 to 10 AM CT	Coming soon

Call us now! Bookings accepted for haunted houses, bar mitzvahs, weddings, seminars, and symposiums (or symposia)!

Updates to PPP Reapplication Procedures Following 01/13/21 SBA Procedural Notice

On January 13th the SBA released Procedural Notice 5000-20076 which provides further guidance on reapplication processes required for borrowers who are eligible to receive an increased amount on their initial PPP loan.

In previous presentations we have stated that borrowers can amend their initial PPP loan applications to request increased amounts attributable to group life, group dental, group vision, and group disability insurance costs. This was because these costs were added retroactively to Section 636(a)(36) of the CARES Act which governs the rules for first draw loans. The relevant section reads as follows:

SEC. 308. SPECIFIC GROUP INSURANCE PAYMENTS AS PAYROLL COSTS.

(a) IN GENERAL.—Section 7(a)(36)(A)(viii)(I)(aa)(EE) of the Small Business Act (15 U.S.C. 636(a)(36)(A)(viii)(I)(aa)(EE)) is amended by inserting “or group life, disability, vision, or dental insurance” before “benefits”.

(b) EFFECTIVE DATE; APPLICABILITY.—The amendment made by subsection (a) shall be effective as if included in the CARES Act (Public Law 116–136; 134 Stat. 281) and shall apply to any loan made pursuant to section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) before, on, or after the date of enactment of this Act, including forgiveness of such a loan.

Our reading of Section 312(b)(2) of the new Economic Aid Act led us to believe that, because first draw PPP borrowers were retroactively permitted to include group insurance payments towards payroll costs, this would mean that borrowers who did not include these costs on their initial loan application would not have received the full loan amount that they were (or later became) eligible for, and would therefore be permitted to request an increased loan amount. Section 312(b)(2) reads as follows:

(2) in the case of an eligible recipient that did not accept the full amount of an included 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 section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)).

Now, however, SBA Procedural Notice 5000-20076 makes clear that this is not the case and provides “First Draw PPP Loan increases can . . . only be made under the circumstances outlined in this notice.” The circumstances provided by the notice are as follows:

1. **Partnerships:** If a partnership received a First Draw PPP Loan that only included amounts necessary for payroll costs of the partnership’s employees and other eligible operating expenses, but did not include any amount for partner compensation, and the SBA has not remitted a forgiveness payment to the Lender on that loan, then the borrower may request their Lender of Record to submit a request for an increased loan amount.

2. **Seasonal Employers:** Section 336 of the Economic Aid Act revised the method by which a seasonal employer may determine its maximum loan amount for purposes of the PPP to allow the seasonal employer to use the average total monthly payments for payroll for any 12-week period selected by the seasonal employer beginning February 15, 2019, and ending February 15, 2020. If a seasonal employer received a First Draw PPP Loan and SBA has not remitted a forgiveness payment to the Lender on that loan, and the new calculation would yield a higher loan amount than that which the borrower already received, then the seasonal employer may request their Lender of Record to submit a request for an increased loan amount.
3. **Farmers and Ranchers:** Section 313 of the Economic Aid Act changed the calculation of the maximum loan amount for certain farmers and ranchers to allow them to calculate their amount based upon gross income rather than net income. If a farmer or rancher received a First Draw PPP Loan and SBA has not remitted a forgiveness payment to the Lender on that loan, and the new calculation would yield a higher loan amount than that which the borrower already received, then the farmer or rancher may request their Lender of Record to submit a request for an increased loan amount.
4. **Eligible Borrowers that fully repaid a First Draw PPP Loan before December 27, 2020:** If an eligible borrower received a First Draw PPP Loan, the Lender reported to SBA before December 27, 2020, that the borrower fully repaid the loan, and SBA has not remitted a forgiveness payment to the Lender on that loan, the borrower may reapply for a new First Draw PPP Loan in an amount for which the borrower is eligible under current PPP rules.
5. **Borrowers that returned part of a First Draw PPP Loan before December 27, 2020:** If a borrower returned (or repaid) part of a First Draw PPP Loan, the Lender reported to SBA before December 27, 2020, that the borrower repaid the loan in part, and SBA has not remitted a forgiveness payment to the Lender on that loan, the Lender of Record may approve a borrower's request for a loan increase and re-disburse funds equal to the difference between the amount retained by the borrower and the amount previously approved.
6. **Borrowers that did not accept the full amount of a First Draw PPP Loan for which they were approved:** If a borrower did not accept before December 27, 2020, the full amount of a First Draw PPP Loan for which it was approved in SBA's E-Tran Origination site and SBA has not remitted a forgiveness payment to the Lender on that loan, the borrower may request an increase and the Lender of Record may approve and disburse a loan increase in the amount of the First Draw PPP Loan up to the amount previously approved.

Notably, the above does not include the ability to amend the application for mathematical errors, to include group insurance costs for life, dental, vision, or disability as a payroll cost, or to include tips paid by customers that may not have been included on the initial PPP loan application by many borrowers.

Stay tuned as SBA is expected to release more guidance in the coming days on changes made to the Paycheck Protection Program following the passage of the Economic Aid Act.

THE 10 BIGGEST QUESTIONS FOLLOWING THE ECONOMIC AID ACT AND SUBSEQUENT GUIDANCE

It is hard to draft perfect legislation. It is especially hard to draft perfect legislation when it is an emergency stimulus package drafted in response to an ongoing global pandemic and passed under enormous political pressure just days before Congress was set to break for a recess.

Nevertheless, the enactment of the recent Economic Aid Act was crucial to get aid into the hands of struggling businesses, families, and professionals. Somewhere in the fray of 5500 pages worth of omnibus legislation, Congress extended the Paycheck Protection Program, extended eligibility for the Employee Retention Credit, and extended numerous other relief programs like the Provider Relief Fund, rental assistance initiatives, and supplemental federal unemployment insurance.

Because these programs are so vital right now, it is important for advisors to understand their intricacies and exactly how they work, regardless of how flawed or complicated they might be.

That being said, in this article we will take a look at 10 of the biggest questions remaining after the passage of the Economic Aid Act and subsequent guidance issued thereon.

1. Did they really mean to give farmers and ranchers loans based upon gross income?

Much to their delight, farmers and ranchers who file their taxes on an IRS Form 1040 Schedule F finally had their eligibility for PPP loans codified in the new Economic Aid Act... with one interesting twist, however.

In guidance issued back in June of 2020, the SBA provided that Schedule F filers could calculate their loan amount based upon 20.833% of Schedule F line 34 net income. Now, under this new Act, however, Schedule F filers are permitted to

calculate their loan amount based upon 20.833% Schedule F line 9 gross income. Schedule F filer's loans remain limited to \$100,000.

This is an enormous distinction and a huge windfall to Schedule F filers if it continues to apply. What is even more interesting is the fact that Schedule F filers were the only group to whom this change was applied to.

Upon our first reading of the new Economic Aid Act we assumed that this was a simple drafting error. However, now that this change has been confirmed by Interim Final Rules released by the SBA on January 6th, we are left wondering why this change was made and why farmers and ranchers are the only ones who will benefit from it.

It will be interesting to see if this is addressed in the future.

2. Did they really mean to prevent soup kitchens and food pantries from getting the 40% larger loans that restaurants and bars are eligible for?

North American Industry Code System 72 entities, which include food service providers like bars, restaurants, hotels, RV parks, concession stands, etc., also received a windfall under the new Economic Aid Act due to the fact that they are now eligible for loan amounts 40% larger than that of any of their counterparts in other industries. This is because NAICS Code 72 entities are eligible to receive loans equal to 3.5 times their average monthly payroll costs whereas all other entities are eligible to receive 2.5 times their average monthly payroll costs.

This difference is palatable insofar as it is easy to see that Congress probably wanted to give the suffering food service industry and extra boost. What is not palatable is the fact that this windfall will not extend to community food service providers like soup kitchens and food pantries because they are classified under NAICS Code 62.

As far as we can tell there really is no good justification for giving this extra loan amount to code 72 entities but not code 62 entities. They largely deal with the same struggles regarding staff layoffs and safety protocols that hinder operation - but in reality, community food service providers are only seeing demand for their services go up as more and more Americans struggle with food instability resulting from increased economic hardship during the pandemic.

Consider this our official plea to Congress to extend eligibility for these increased loan amounts to community food service providers.

3. Can you really only retroactively claim healthcare costs OR wages for the ERC?

Regarding the Employee Retention Credit, Section 206(e)(2) of the Economic Aid Act features a nice provision which allows employers to retroactively claim credits for wages paid in past quarters if they filed their payroll tax return before December 27th, 2020. The provision in relevant part states the following:

Section 206(e)(2)(A): *For purposes of section 2301 of the CARES Act, an employer who has filed a return of tax with respect to applicable employment taxes . . . before the date of the enactment of this Act may elect . . . to treat any applicable amount as an amount paid in the calendar quarter which includes the date of the enactment of this Act.*

The problem here, however, is how Sec. 206(e)(2)(B) defines “applicable amount”

Section 206(e)(2)(B): *the term “applicable amount” means the amount of wages which—*

(i) are—

*(I) described in section 2301(c)(5)(B) of the CARES Act, as added by the amendments made by subsection (b), **or***

(II) permitted to be treated as qualified wages under guidance issued pursuant to section 2301(g)(2) of the CARES Act (as added by subsection (c))

The amended CARES Act Section of 2301(c)(5)(B) is where Congress moved the definition of “health care costs” for ERC purposes and stated that they could be included as part of “wages.” The amended Section 2301(g)(2) of the CARES Act is the section where Congress provides that wages that were paid with PPP funds that were subsequently not forgiven can be counted towards ERCs retroactively.

Essentially what Congress is saying here is that employers can either retroactively claim wage credits attributable to healthcare costs, **or** employers can retroactively claim wage credits attributable to qualified wages that were initially paid using PPP loans that were not subsequently forgiven, but not both.

This issue was highlighted by Tony Nitti in his recent article entitled “Breaking Down Changes To The Employee Retention Tax Credit In The New Covid Relief Bill.” We greatly appreciate Tony for his leadership and expertise in this area.

Why would Congress require employers to choose between healthcare costs OR wages paid with PPP loans that were not forgiven? Why can't an employer claim all the wage credits they retroactively became eligible to receive? It is very possible that this was a simple drafting error. It is also possible that this was Congress's way of ensuring that employers could not retroactively claim credits on wages that they paid with forgivable PPP loans. One of the important new features of the Economic Aid Act was the ability for employers to get both PPP loans and ERCs but the big stipulation was that employers could not claim credits on wages that they paid with forgivable PPP loans.

This problem is significant enough that we can expect clarification on this in the future.

4. Will it be possible to get two PPP loans in the second draw window?

The new Economic Aid Act creates a chance for borrowers who received a PPP loan to receive a second one and for potential borrowers who didn't receive a loan in the first round to apply for a loan now. The application window reopened on January 11th on a limited basis to allow those most in need to receive their loans first, and on January 13th for all other applicants.

One question is whether an entity that didn't receive a loan during the first application window can apply for and receive both the first and second draw loans during this second application window which closes on March 31st, 2020.

There doesn't appear to be any express prohibition in the new Act against receiving two loans in this second window. If a borrower can satisfy the other eligibility tests for a second draw loan, including the 25% reduction in gross receipts test, then the only rule that seems to prevent a borrower from receiving two loans in the second window is the fact that the borrower must certify that they "have or will" expend the full amount of the first loan before the date they receive the second loan.

This creates a logistical challenge for borrowers hoping to land two loans in this second application window. Could a borrower really expend the full amount of their loan in just two months (assuming they don't receive their first loan until approximately the end of January) in order to meet the March 31st deadline to apply again? Conceivably, they could - however, this would require aggressive "non-payroll" cost spending. Additionally, could a borrower truly certify in good faith, as they are required to do, that the second loan is "necessary to support the ongoing operation" of the business? Conceivably, they could.

It seems plausible that a borrower could pull this off with some careful planning and creativity. It will be interesting to see if any borrowers attempt this or if the SBA prohibits it in future guidance releases.

5. Why are they letting people wonder about the "necessity requirement"?

Speaking of the necessity requirement, borrowers are still required to certify in good faith that the loan is "necessary to support the on-going operations of the applicant." This requirement has been a source of confusion since the inception of the PPP. Just how much economic hardship is enough to make a loan "necessary" for a business is a question that has never been formally answered.

Instead, the SBA opted to issue FAQ #46 in the summer of 2020 which essentially provided that the SBA would deem any borrower with a loan amount under \$2 million to have made their necessity certification in good faith. While this may ease some borrower's minds, it is not the ultimate waiver it first appears to be. Borrowers could still face scrutiny from whistleblowers, the public, and even the IRS if it is later discovered (by one way or another) that their loan was not exactly necessary.

Instead of eliminating this requirement or fleshing out a workable definition under the new Act, in the Interim Final Rule issued on January 6th, the SBA chose to reaffirm their position taken in FAQ #46. This has left borrowers confused and frustrated. Many borrowers who truly needed help abstained from taking loans in the first round for fear of violating this requirement - and yet it is still in place.

Perhaps the new 25% reduction in gross receipts test was intended to serve as a de facto necessity test, but if that is the case then it would've behooved many borrowers for Congress to have removed the required certification from the loan application.

6. How will EIDL loans targeted at "low income" communities work?

The new Economic Aid Act creates a more targeted EIDL program for "low income" communities, but extremely little is said about how this program will work as far as identifying those low income communities most in need and which communities will receive aid first.

It seems that the communities and businesses that need this aid the most are standing at the back of the line.

Furthermore, the Act makes numerous exceedingly complicated tax changes concerning the interaction between PPP loans and EIDL grants. Even less is known about how these tax changes will operate and how borrowers should navigate

these changes while also simultaneously applying for first, second, or increased PPP loan amounts.

The SBA has promised further guidance on these EIDL programs and we will certainly be keeping our eye out for that.

7. Do you definitely have to spend the full amount of your first PPP loan before getting a second one?

One of the statements that borrowers must make on a second draw PPP loan application is that “on or before the expected date on which the [second] covered loan . . . is disbursed to the eligible entity, has used, or will use, the full amount of the [first] loan.” This rule was confirmed and clarified by the January 6th Interim Final Rules which provide that on or before the expected date on which the Second Draw PPP Loan will be disbursed to the borrower, the borrower must have used, or will use the full amount of its First Draw PPP Loan on eligible expenses.

This rule seems air tight, but we fear it will lead to confusion and guesswork by borrowers seeking to squeeze a second loan application in before the March 31st deadline. The fact that a borrower is only required to *certify* that they have or will spend the full amount, rather than provide documentation that substantiates as much, creates an incentive for borrowers to lie.

Furthermore, the fact that a borrower is only required to expend the full amount prior to the date the second loan is received creates a sizable grey area because many borrowers will have no way to know for sure exactly when the second loan will hit their accounts. This leaves wiggle room for borrowers to say “oh, we thought we would expend the full amount of the first loan but the second loan was disbursed much faster than we anticipated.”

Some borrowers would be wise to save their precious dollars in case they did not receive their second loan for whatever reason. However, these borrowers will need to be careful to allow themselves adequate time to spend the remaining balance of the loan in the event that they receive notification that they have been approved for their second loan. It will be a shame for borrowers who quickly spend the remaining balance of their loan before submitting an application for a second loan only to later be rejected.

It probably would have been smarter for Congress to mandate that the full amount of the first loan be expended prior to the date the borrower files their application for the second loan.

8. Can you reapply for an increased PPP loan if you made a mathematical error on your initial application?

The new Act allows first round borrowers to amend their first round loan applications in order to receive amounts they were eligible for but did not receive. Specifically, the January 6th Interim Final Rules provide that the following groups of borrowers would be eligible to amend their applications: those who returned all or part of their initial PPP loan amount, those who did not accept the full amount of their initial PPP loan, and those who became eligible for larger loan amounts following retroactive rule changes.

What is unclear is whether a borrower who simply made a mathematical error when calculating the maximum loan amount they were eligible for on their initial application will be permitted to submit an amended initial loan application.

The January 6th Interim Final Rules don't shed much light on this topic but the Economic Aid Act does require the SBA to publish guidance on how re-application for additional loan amounts will work. We have not received this guidance yet but perhaps the pool of those eligible to amend their application will be expanded in that future guidance.

9. Can you pay your CPA to prepare PPP applications for you?

Interestingly, the CARES Act and subsequent guidance mandated that if an agent assisted a borrower in preparation of their PPP application, then that agent had to be paid by the borrower's lender using funds received from fees paid by the SBA to the lender. Further to that point, there were caps set on those fees by the SBA. 13 C.F.R. § 103.1(a) defines an agent as an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other person representing an Applicant or Participant by conducting business with SBA.

It seems illogical that a borrower who retained an agent to assist them in applying for PPP loans wouldn't be permitted to pay that agent. Perhaps this was the SBA's way of protecting borrowers from predatory agents.

Regardless, the new Act changed these rules and now provides that “if an eligible recipient has knowingly retained an agent, such fees shall be paid by the eligible recipient and may not be paid out of the proceeds of a covered loan. A lender shall only be responsible for paying fees to an agent for services for which the lender directly contracts with the agent.”

While the new rule appears to permit borrowers to pay their agents themselves, one has to wonder about the dichotomy between the fact that a borrower must certify that the loan is necessary for the survival of the business, and the fact that the borrower is also not permitted to pay expensive agent fees using PPP funds. The problem is that many businesses will find that the PPP loan application and forgiveness process is exceedingly complicated, and can probably not be navigated without the help of a professional advisor.

Small borrowers who are not permitted to pay their agents more than 1% of the amount loaned will struggle to find advisors willing to work for such meager amounts. Denying someone the right to pay a reasonable fee to their own long time CPA or lawyer to provide an essential service was probably not what Congress had in mind.

Talk about being stuck between a rock and a hard place.

10. Can you really get Employee Retention Credits for wages paid to yourself and your spouse?

The Employee Retention Credit (ERC) provides employers with refundable tax credits based upon the amount of “qualified wages” they paid to their employees in 2020 and now 2021. Guidance from the IRS on the ERC provides that wages paid to “related individuals” cannot be counted towards qualified wage for the purposes of the ERC.

Section 51(i)(1) of the Internal Revenue Code defines “related individuals” as the following people: A child or a descendant of a child, brother, sister, stepbrother, stepsister, father or mother, or an ancestor of either, stepfather or stepmother, niece or nephew, aunt or uncle, or a son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

You may notice that the owner themselves and their spouses are not included on that list. This would allow an owner to claim ERCs on wages paid to themselves and their spouses - a loophole ripe for being taken advantage of. It is unknown why Congress or the IRS would allow owners to count wages paid to themselves and their spouses towards ERCs but our gut tells us this is simply a legislative oversight.

Perhaps we can expect further guidance on this issue in the future.

COVID-19 LEGISLATION IMPACTING CHARITIES AND NOT-FOR-PROFITS (PART 1 OF 4)

Alan Gassman, J.D., LL.M., Brandon Ketron, J.D., LL.M., CPA, Ian MacLean and Patrick Collins

The economic and personal crisis of COVID-19 has hit many charities and not-for-profit entities in a painful manner.

Fortunately, federal programs that were enacted to mitigate COVID-19's negative economic impacts on businesses and professionals are also available to charities and nonprofit organizations. “Charities” include 501(c)(3) charitable organizations and religious organizations that qualify under Section 501(c)(3).

In addition, the programs provide benefits for many quasi charities and nonprofits such as 501(c)(6) chambers of commerce, business leagues, real estate boards, boards of trade, 501(c)(19) veterans organizations, and Indian Tribal Business concerns.

The new grants for Shuttered Venue Operators will be available to both charitable and non-charitable live performance venues and theatres, motion picture theatres, and museums (please note that the Act provides that museums may not be for-profit entities).

When we refer to “nonprofits” we mean to include both 501(c)(3) charities and other organizations, such as 501(c)(6) and 501(c)(19) organizations that do not qualify to allow income tax deductions for donors, but that qualify to not have to pay income tax on their non-UBIT revenues or net receipts. Other nonprofits that may qualify for these new programs include police and fire benevolent associations, and cemetery associations, which are also usually “nonprofit” but not considered to qualify for the income tax charitable deduction.

By way of background, the 501(c)(3) organizations that qualify to allow donors an income tax deduction come under two categories in IRC Section 170:

1. Organizations under IRC Section 170(b)(1)(A)(i)-(ix) which includes churches, schools, hospitals, university endowment foundations, publicly supported organizations, and private operating foundations.
2. Organizations under IRC Section 170(c) which are allowed an income tax deduction because they consist of governmental entities, or other organizations organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals.

Furthermore, all “nonprofit” and charitable entities are subject to the UBIT tax, which is a tax on the unrelated business income generated by a trade or business that an exempt organization engages in. The trade or business must be

regularly carried on, and not substantially related to the charitable, educational, or other purpose that is the basis of the organization's exemption.

The newest legislation signed by the President on December 27, 2020, is aptly named the Economic Aid Act.

This series will review the primary CARES Act rules that apply to charitable and not-for-profit organizations, while concentrating on what has been changed since the enactment of the CARES Act, including changes under Interim Final Rules issued by the SBA on Wednesday, January 6th.

In the interest of brevity, we are assuming that the reader is generally familiar with the loan and grant programs and how they work for normal business entities.

For the reader's convenience, statutory language most relevant to charitable or not-for-profit organizations will be underlined. We have chosen to include much of the relevant statutory language in an effort to ensure that nothing gets "lost in translation," and to provide advisors with the tools they need to best guide their clients through these trying times. To that end, a full package of reference sources that were put together for the purposes of writing this article can be obtained by [request to agassman@gassmanpa.com](mailto:requesttoagassman@gassmanpa.com). Please put ("501(c)(3)") in the re line. The author invites questions and comments which may expand our knowledge and identify areas of interest for refinement.

The CARES Act and its progeny includes the following programs which are intended to provide funds to certain eligible organizations so that they may survive the pandemic, keep people employed, and keep charitable causes supported.

In this four part series we will closely examine all the opportunities that eligible non-profits and charitable organizations have to obtain relief funding from various CARES Act and Economic Aid Act programs. Here in part one, we will focus our efforts on the Paycheck Protection Program.

The PPP program generally provides loans based upon 2.5 times the average monthly payroll costs for eligible entities - and now 3.5 times for eligible NAICS code 72 entities which generally consists of food service providers like restaurants, bars, RV parks, and hotels, but sadly not community food service providers like soup kitchens and food banks.

In order to receive a PPP loan, an "eligible recipient" will also still need to satisfy the "Necessity Test." Some may remember that borrowers were required to certify in good faith on their initial PPP loan application that the loan is "necessary to support the ongoing operations of the applicant." Notably, this "necessity requirement" still appears to be in place following the passage of the new Act. The necessity requirement is interesting because it was never fully de-fined which left many borrowers wondering just how much economic harm had to be inflicted upon their business before they could certify in good faith that the loan was "necessary."

(Please note, in this article when we refer to the first PPP loan program established under the CARES Act as the "First Draw" and the second PPP Loan Program established under the Economic Aid Act, 2021 as the "Second Draw.")

The Paycheck Protection Program Covers 501(c)(3), (c)(6), and (c)(19) Organizations As Well As Tribal Business Concerns and Section 115 Nonprofit Hospitals

SBA PPP FAQ #3 which was issued on April 6, 2020, clarified that eligibility to receive a PPP Loan is not limited to businesses that qualify as a small business concern. The language of this FAQ is as follows:

In addition to small business concerns, a business is eligible for a PPP loan if the business has 500 or fewer employees whose principal place of residence is in the United States, or the business meets the SBA employee-based size standards for the industry in which it operates (if applicable). Similarly, PPP loans are also available for qualifying tax-exempt nonprofit organizations described in section 501(c)(3) of the Internal Revenue Code (IRC), tax-exempt veterans organization described in section 501(c)(19) of the IRC, and Tribal business concerns described in section 31(b)(2)(C) of the Small Business Act that have 500 or fewer employees whose principal place of residence is in the United States, or meet the SBA employee-based size standards for the industry in which they operate.

Additionally, the SBA issued PPP FAQ #42 on May 3, 2020, which provides that nonprofit hospitals that are exempt from taxation under section 115 of the Internal Revenue Code qualify as "nonprofit organizations" under section 1102 of the CARES Act. The language of this FAQ is as follows:

Section 1102 of the CARES Act defines the term "nonprofit organization" as "an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and that is exempt from taxation under section 501(a) of such Code." The Administrator, in consultation with the Secretary of the Treasury, understands that nonprofit hospitals exempt from taxation under section 115 of the Internal Revenue Code are unique in that many such hospitals may meet the description set forth in section 501(c)(3) of the Internal Revenue Code to qualify for tax exemption under section 501(a), but have not sought to be recognized by the IRS as such because they are otherwise fully tax-exempt under a different provision of the Internal Revenue Code.

Accordingly, the Administrator will treat a nonprofit hospital exempt from taxation under section 115 of the Internal Revenue Code as meeting the definition of “nonprofit organization” under section 1102 of the CARES Act if the hospital reasonably determines, in a written record maintained by the hospital, that it is an organization described in section 501(c)(3) of the Internal Revenue Code and is therefore within a category of organization that is exempt from taxation under section 501(a). The hospital’s certification of eligibility on the Borrower Application Form cannot be made without this determination. This approach helps accomplish the statutory purpose of ensuring that a broad range of borrow-ers, including entities that are helping to lead the medical response to the ongoing pandemic, can benefit from the loans provided under the PPP.

This guidance is solely for purposes of qualification as a “nonprofit organization” under section 1102 of the CARES Act and related purposes of the CARES Act, and does not have any consequences for federal tax law purposes. Nonprofit hospitals should also review all other applicable eligibility criteria, including the Interim Final Rules on Promissory Notes, Authorizations, Affiliation, and Eligibility (April 28, 2020) regarding an important limitation on ownership by state or local governments. 85 FR 23450, 23451.

501(c)(6) Organizations Are Now Eligible for PPP Loans:

Under the new Act, organizations that are classified as a 501(c)(6) will now have the right to apply for a PPP loan if they meet the requirements provided below. A 501(c)(6) includes the following organizations so long as they are not organized for profit and no part of the net earnings of which insures to the benefit of any private shareholder or individual:

1. Business leagues,
2. Chambers of Commerce,
3. Real-Estate boards,
4. Boards of Trade, or
5. Professional football leagues

Regarding 501(c)(6) eligibility, the new Act provides the following:

(l) IN GENERAL.—Any organization that is described in section 501(c)(6) of the Internal Revenue Code and that is exempt from taxation under section 501(a) of such Code (excluding professional sports leagues and organizations with the purpose of promoting or participating in a political campaign or other activity) shall be eligible to receive a covered loan if—

(aa) the organization does not receive more than 15 percent of its receipts from lobbying activities;

(bb) the lobbying activities of the organization do not comprise more than 15 percent of the total activities of the organization; and

(cc) the cost of the lobbying activities of the organization did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and

(dd) the organization employs not more than 300 employees.

The maximum loan amount that a 501(c)(6) organization may receive is equal to the lesser of (1) \$2 million (not \$10 million) or (2) 2.5 times average monthly payroll costs calculated using either calendar year 2020, calendar year, 2019 or the 12 months prior to the date the loan is made).

Nonprofits That Were Eligible to Take a First Draw may Request an Increase for a PPP First Draw Loan if the Borrower Returned All or Part of a Loan, or Did Not Accept the Full Amount Previously Approved:

Some churches and other nonprofits that applied for loans may not have accepted the full amount, or they may have returned all or some of the loan amount because they were not sure if the loans were permitted or whether they met the necessity requirement.

The January 6th Interim Final Rules provide that the following borrowers can reapply or request an increase in their PPP loan amount:

- If a borrower returned all of a PPP loan, the borrower may reapply for a PPP loan in an amount the borrower is eligible for under current PPP rules.
- If a borrower returned part of a PPP loan, the borrower may reapply for an amount equal to the difference between the amount retained and the amount previously approved.
- If a borrower did not accept the full amount of a PPP loan for which it was approved, the borrower may request an increase in the amount of the PPP loan up to the amount previously approved.

The Interim Final Rules also provide that a borrower’s lender may submit an electronic request through the SBA’s E-Tran Servicing site to increase the PPP loan amount. The borrower will be required to provide the lender with documentation to

support the calculation of the increase.

Additionally, the Interim Final Rules state that the SBA “is developing a process to collect the information necessary for eligible borrowers to reapply or request an increase in their PPP loan amount as described in this Interim Final Rule.”

The deadline to reapply will be March 31st, 2021 and these additional loan amounts will be subject to the availability of funds.

PPP Second Draw Loans for Nonprofit Organizations:

Under the PPP Second Draw Loan Program, an “eligible entity” is defined as “any business concern, nonprofit organization, housing cooperative, veteran’s organization, Tribal business concern, eligible self-employed individual, sole proprietor, independent contractor, or small agricultural cooperative” that meets the following requirements:

1. Employs not more than 300 employees;
2. Has or will use the full amount of their first PPP loan;
3. 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 25 percent reduction from the gross receipts of the entity during the same quarter in 2019; and
4. Must meet the necessity requirement, meaning that the circumstances are such that the loan is necessary to support the ongoing operations of the organization.

Previous iterations of the new Act that did not pass would have required a 50 percent reduction in gross receipts in order to be eligible, so this draw down to 25 percent was a welcome variation that will surely help get PPP loans into even more hands.

PPP Second Draw Loans for Churches:

Sec. 311 of the new Act codifies the SBA’s April 15th Interim Final Rule which “properly clarified” that churches and other religious organizations were previously eligible, and will maintain their eligibility, to receive PPP loans. The language from this provision is as follows:

(c) ELIGIBLE CHURCHES AND RELIGIOUS ORGANIZATIONS.—

(1) SENSE OF CONGRESS.—It is the sense of Congress that the interim final rule of the Administration entitled “Business Loan Program Temporary Changes; Paycheck Protection Program” (85 Fed. Reg. 20817 (April 15, 2020)) properly clarified the eligibility of churches and religious organizations for loans made under paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)).

(2) APPLICABILITY OF PROHIBITION.—The prohibition on eligibility established by section 120.110(k) of title 13, Code of Federal Regulations, or any successor regulation, shall not apply to a loan under paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)).

Churches employ many people and have been able to use PPP loans to save jobs. Many churches have not had in person attendance, so donations have dramatically decreased. Any religious organization that employs people can be praised for receiving a PPP loan, if they were able to retain employees because of it.

From a virus control standpoint, giving money to churches can be viewed as a positive because it makes religious institutions less likely to push hard for people to come through the doors and give donations, which ultimately helps prevent the spread of COVID-19.

Please note that individuals and entities cannot get these loans if they are involved in any illegal activity (Federal, state and local). Some religious organizations have broken the law by allowing many people to congregate indoors in defiance of social distancing restrictions and have subsequently lost their ability to have a PPP Loan.

Additionally, in FAQ #32 published by the SBA on April 24, 2020, the SBA provides that housing allowances for clergy are included in a church’s payroll costs for the purposes of applying for, and seeking forgiveness of a PPP loan. This FAQ states the following:

32. Question: Does the cost of a housing stipend or allowance provided to an employee as part of compensation count toward payroll costs?

Answer: Yes. Payroll costs includes all cash compensation paid to employees, subject to the \$100,000 annual compensation per employee limitation.

Borrowers that are Not Eligible for a Second Draw PPP Loan:

Under the new Act, the following borrowers are prohibited from receiving a Second Draw PPP Loan:

Entities listed in 13 C.F.R. § 120.110 and subsequent SBA guidance, including the following:

1. *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);*
2. *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);*
3. *Life insurance companies;*
4. *Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);*
5. *Pyramid sale distribution plans;*
6. *Businesses deriving more than one-third of gross annual revenue from legal gambling activities;*
7. *Businesses engaged in any illegal activity;*
8. *Private clubs and businesses which limit the number of memberships for reasons other than capacity;*
9. *Government-owned entities (except for businesses owned or controlled by a Native American tribe);*
10. *Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;*
11. *Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;*
12. *Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;*
13. *Businesses in which the Lender or CDC, or any of its Associates owns an equity interest;*
14. *Businesses which:*
 1. *Present live performances of a prurient sexual nature; or*
 2. *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;*
15. *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 sustain a loss in any of its programs. For purposes of this section, a compromise agreement shall also be considered a loss;*
16. *(s) Speculative businesses (such as oil wildcatting).*
17. **Note:** *Businesses that are included in 13 C.F.R. § 120.110 but have otherwise expressly been made eligible for SBA loans include:*
 1. *Entities which have otherwise been made eligible by statute or guidance, and*
 2. *nonprofits and religious organizations;*

Entities primarily engaged in political or lobbying activities, including 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;

Certain entities organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or with other specified ties to the People's Republic of China or the Special Administrative Region of Hong Kong;

Any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612);

A publicly traded company, defined as 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); and

Entities that receive a grant under the Shuttered Venue Operator Grant program.

The January 6th Interim Final Rules further specified which borrowers are ineligible to receive a Second Draw PPP Loan by providing the following list of examples:

"You are ineligible for a PPP loan if, for example:

- *You are engaged in any activity that is illegal under Federal, state, or local law;*
- *You are a household employer (individuals who employ household employees such as nannies or housekeepers);*
- *An owner of 20 percent or more of the equity of the applicant is presently incarcerated or, for any felony, presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of, pleaded guilty or nolo contendere to, or commenced any form of parole or probation (including probation before judgment) for, a felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year;*

- *You, or any business owned or controlled by you or any of your owners, has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government;*
- *Your business or organization was not in operation on February 15, 2020;*
- *You or your business received or will receive a grant under the Shuttered Venue Operator Grant program under section 324 of the Economic Aid Act;*
- *The President, the Vice President, the head of an Executive Department, or a Member of Congress, or the spouse of such person as determined under applicable common law, directly or indirectly holds a controlling interest in your business;*
- *Your business is 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);*
- *Your business has permanently closed."*

Note: One sector of businesses that may be unfairly hampered by the prohibition against businesses engaged in illegal conduct may be the marijuana industry. It is, of course, still illegal on the federal level to prescribe and or sell marijuana, but many states have developed successful cannabis industries or have otherwise taken steps to decriminalize the drug. It has long been the federal government's policy that businesses that comply with state cannabis regulations would not be prosecuted for their operation; however, by the letter of the law, it is still illegal to do so on the federal level. It is unclear how this dynamic between the states and the federal governments will affect businesses engaged in the sale of marijuana and their eligibility for SBA loans.

First Round PPP Borrowers are Now Required to Expend Full Amount Before Second Round PPP Loan Disbursement:

Before taking a Second Round PPP loan, an eligible entity is required to certify that, if they received a First Round PPP Loan, they "have or will" spend the full amount of their first loan before receiving the second loan.

The statute specifically provides the following language below. Our interpretation of this paragraph is that the loan money need not be fully expended at the time of application for the second loan, only that it is expended before the second loan is disbursed to the business.

- *"A covered loan under this paragraph may only be made to an eligible entity that 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 loan received under paragraph (36)."*

The statute does not provide a time period for when the first loan would eventually have to be used, but if it is not spent on appropriate expenses during the 24 week period following the original loan disbursement date then it will not be forgivable.

The January 6th Interim Final Rules clarify that, to be eligible for a Second Draw PPP Loan, a borrower must . . .

- *On or before the expected date on which the Second Draw PPP Loan will be disbursed to the borrower, the borrower must have used, or will use the full amount of its First Draw PPP Loan on eligible expenses under the PPP rules.*
 - *"The full amount" of the borrower's First Draw PPP Loan includes the amount of any increase on such First Draw PPP Loan made pursuant to the new Act.*

Additional Loans Cannot Exceed \$2,000,000 per Borrower—90 Day Wait Between Loans:

The loan amounts for a vast majority of borrowers will be almost identical to what the borrower received for their original PPP loan. This second round of funding, however, is capped at \$2 million per borrower rather than \$10 million under the initial round of PPP loans in the CARES Act.

For borrowers who received a PPP loan within the last 90 days, the new Act requires that the aggregate of the new and old loan not exceed \$10 million.

New Deadline to Apply for PPP Loans:

The new deadline to apply for and receive a PPP Loan will be March 31, 2021.

SEC. 323. COMMITMENT AUTHORITY AND APPROPRIATIONS.

- (a) COMMITMENT AUTHORITY.—Section 1102(b) of the CARES Act (Public Law 116–136) is amended—
- (1) in paragraph (1)—
- (A) in the paragraph heading, by inserting "AND SECOND DRAW" after "PPP";
- (B) (B) by striking "August 8, 2020" and inserting "March 31, 2021";

The January 6th Interim Final Rules clarify that if a borrower did not apply for a First Draw PPP Loan before the first application window closed on August 8, 2020, then the borrower will not be eligible to receive a Second Draw PPP Loan. However, borrowers may still be eligible to receive a First Draw PPP Loan when the application window reopens on the week of 01/11/21.

There is an Alternate Way to Substantiate a 25% Revenue Reduction to Qualify for a Second PPP Loan:

The January 6th Interim Final Rules provide that “a borrower that was in operation in all four quarters of 2019 is deemed to have experienced the required revenue reduction if it experienced a reduction in annual receipts of 25 percent or greater in the calendar year 2020 as compared to the calendar year 2019 and the borrower submits copies of its annual tax forms substantiating the revenue decline.”

This won't really help any borrower from a technical standpoint because it would be virtually impossible for a business that suffered a 25% reduction year over year to not also have suffered a 25% reduction from quarter to corresponding quarter. This rule does simplify the process for calculating and documenting a 25% reduction, however.

This allows calendar year nonprofits to simply compare the revenues on their Form 990 tax return for 2020 to the revenue on their Form 990 for 2019.

The following highlights the SBA's reasoning for implementing this variable method for borrowers to substantiate their revenue reduction:

- *“This provision will allow a borrower to provide annual tax return forms to substantiate its revenue reduction. The Administrator, in consultation with the Secretary of the Treasury (Secretary), has determined that this is necessary to improve administrability of Second Draw PPP Loans by providing borrowers an additional verifiable method for substantiating their revenue reduction. This method will be particularly important for small borrowers that may not have quarterly revenue information readily available. Moreover, this approach is appropriate because, if annual filings show a 25 percent revenue reduction, then at least one quarter in 2020 would have had at least a 25 percent revenue reduction.”*

Alternate Test to Compare Each Quarter to Each 2019 Quarter:

For borrowers that did not experience a 25% annual decline in revenues, and for borrowers that were not in operation in all four quarters of 2019, the revenue reduction requirement for receiving a Second Draw PPP Loan can still be met under the modified law by demonstrating that the borrower had a 25% reduction in gross receipts during the first, second, third or fourth quarter in 2020 when compared to the same corresponding quarter in 2019. If a borrower is not in operation during all four quarters of 2019, then they can meet any of the following three alternative tests in order to satisfy the 25% reduction rule requirement:

1. If the applicant:
 - a. Was not in business during the first or second quarter of 2019; but
 - b. Was in business during the third and fourth quarters of 2019; and
 - c. Had gross receipts during the first, second, third, or fourth quarter of 2020 that demonstrate at least a 25 percent reduction from the applicant's gross receipts during the third or fourth quarter of 2019.
2. If the applicant:
 - a. Was not in business during the first, second, or third quarter of 2019; but
 - b. Was in business during the fourth quarter of 2019; and
 - c. Had gross receipts during the first, second, third or fourth quarter of 2020 that demonstrate at least a 25 percent reduction from the fourth quarter of 2019.
3. If the applicant:
 - a. Was not in business during 2019; but
 - b. Was in operation on February 15, 2020; and
 - c. Had gross receipts during the second, third, or fourth quarter of 2020 that demonstrate at least a 25 percent reduction from the gross receipts of the entity during the first quarter of 2020.

“Gross Receipts” Defined for Nonprofit Organizations:

For purposes of calculating a nonprofit's gross receipts to determine eligibility for a second draw loan, the language of the new Act states the following:

“(ii) FOR NONPROFIT AND VETERANS ORGANIZATIONS.—For purposes of calculating gross receipts under subparagraph (A)(iv)(I)(bb) for an eligible entity that is a nonprofit organization, a veterans

organization, or an organization described in subparagraph (A)(iv)(II), gross receipts means gross receipts within the meaning of section 6033 of the Internal Revenue Code of 1986.

Interestingly, Internal Revenue Code Section 6033 does not provide an express definition for gross receipts, but it does seem clear that the SBA was referring to the regulations under Section 6033. These regulations at 26 C.F.R. § 1.6033-1 provide the following definition for this term:

“Gross receipts” means the gross amount received by the organization during its annual accounting period from all sources without reduction for any costs or expenses including, for example, cost of goods or assets sold, cost of operations, or expenses of earning, raising, or collecting such amounts. Thus, “gross receipts” includes, but is not limited to,

(a) the gross amount received as contributions, gifts, grants, and similar amounts without reduction for the expenses of raising and collecting such amounts,

(b) the gross amount received as dues or assessments from members or affiliated organizations without reduction for expenses attributable to the receipt of such amounts,

(c) gross sales or receipts from business activities (including business activities unrelated to the purpose for which the organization received an exemption, the net income or loss from which may be required to be reported on Form 990–T),

(d) the gross amount received from the sale of assets without reduction for cost or other basis and expenses of sale, and

(e) the gross amount received as investment income such as interest, dividends, rents, and royalties.

Note: There have been many questions regarding the applicability of PPP funds and Provider Relief Fund payments from the HHS to a business's calculation of gross receipts. As provided by the new Act and discussed above, we know that PPP funds will not be attributable to a business's gross receipts. Regarding HHS funds, neither the IRS, the SBA, nor HHS have expressly stated that Provider Relief Fund payments are not included in a businesses' gross receipts. However, in a July 2020 FAQ, the IRS provided that “payment from the Provider Relief Fund is includible in gross income under section 61 of the Code.” While this does not expressly say that HHS funds are attributable to gross receipts, the fact that the funds are treated as income and taxed as income leads us to believe that it should ultimately be counted towards a business's gross receipts until official guidance provides otherwise.

“Any Forgiveness Amount” of a First Draw PPP Loan and Any EIDL Grants are Excluded from a Borrower's Gross Receipts:

First Draw borrowers that hope to receive a Second Draw PPP Loan will be relieved to know that the Interim Final Rules clarify that “any forgiveness amount of a First Draw PPP Loan that a borrower received in calendar year 2020 is excluded from a borrower's gross receipts.”

The January 6th Interim Final Rules state that excluding the forgiveness amount from a borrower's gross receipts is “consistent with section 7A(i) of the Small Business Act, which expressly excludes PPP forgiveness amounts from being taxed as income.”

Additionally, the Interim Final Rules provide that this clarification “ensures the effectiveness of the second draw loan program by ensuring that a borrower is not disqualified from receiving a Second Draw PPP Loan because it received forgiveness on a First Draw PPP Loan.”

SBA Guidance for Calculating the Maximum PPP Loan for Nonprofit Organizations:

On June 26, 2020, SBA guidance was updated to provide information on how eligible nonprofit organizations are to calculate the maximum PPP loan that they may receive. This guidance was enacted before subsequent changes which now permit the inclusion of group dental, group vision and group disability and group life insurance costs.

Step 1: Compute 2019 payroll costs by adding the following:

1. 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pretax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S.;

2. 2019 employer health insurance contributions (portion of IRS Form 990 Part IX line 9 attributable to health insurance);

- a. Includes: "Contributions by the filing organization, common paymasters, and payroll/reporting agents to the filing organization's employee benefit programs (such as insurance, health, and welfare programs that aren't an incidental part of a pension plan included on line 8), and the cost of other employee benefits."
- b. Not including: "Contributions on behalf of current or former officers, directors, trustees, key employees or other persons that were included on line 5 or 6."

3. 2019 employer retirement contributions (IRS Form 990 Part IX line 8); and

- a. Includes: "Contributions to, or accruals under, qualified and nonqualified pension and deferred compensation plans for the year. The organization should include contributions made by the filing organization, common paymasters, and payroll/reporting agents to the filing organization's sections 401(k) and 403(b) pension plans on behalf of employees."
- b. Not including: "Contributions to qualified pension, profit-sharing, and stock bonus plans under section 401(a) solely for the benefit of current or former officers, directors, trustees, key employees, or disqualified persons, which are reportable on line 5 or 6."

4. 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).

Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).

Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.

Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

The nonprofit organization's 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with the filed IRS Form 990 Part IX or other documentation of any retirement and health insurance contributions, must be provided to substantiate the applied for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date. Eligible nonprofits that do not file an IRS Form 990, typically those with gross receipts less than \$50,000, should see the next question

SBA Guidance for Calculating the Maximum PPP Loan for Eligible Religious Institutions, Veterans Organizations, and Tribal Businesses:

On June 26, 2020 SBA guidance was also updated to provide information on how eligible religious institutions, veterans organizations, and Tribal businesses are to calculate the maximum PPP loan that they may receive. This guidance was enacted before subsequent changes which now permit the inclusion of group dental, group vision and group disability and group life insurance costs. It reads as follows:

Step 1: Compute 2019 payroll costs by adding the following:

- 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pretax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S.;
- 2019 employer health insurance contributions;
- 2019 employer retirement contributions and
- 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).

Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).

Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.

Step 4: Add any outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

The entity's 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with documentation of any retirement and health insurance contributions, must be provided to substantiate the applied for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date.

One would assume that retirement contributions include contributions made to 403(b) plans and possibly “non-qualified rabbi trusts” and similar retirement plans.

Calculating the Maximum PPP Second Draw Loan for Eligible Nonprofit Seasonal Employers:

For season employers, which includes seasonal nonprofit employers, the maximum amount of new PPP loans is based upon 2.5 times the average monthly payroll costs for any 12-week period between February 15th, 2019 and February 15th, 2020. The loan can be for up to, but not exceed, \$2 million. The new Act provides as follows:

“(ii) SEASONAL EMPLOYERS.—

The maximum amount of a covered loan made to an eligible entity that is a seasonal employer is the lesser of—

“(I) the product obtained by multiplying—

“(aa) at the election of the eligible entity, the average total monthly payments for payroll costs incurred or paid by the eligible entity for any 12-week period between February 15, 2019 and February 15, 2020; by

“(bb) 2.5; or

“(II) \$2,000,000.

The January 6th Interim Final Rules recognized that there may be some overlap between seasonal employers and NAICS Code 72 entities and clarified that a business that qualifies as both a seasonal employer and a NAICS Code 72 entity may calculate their payroll costs used to determine their loan amount based upon either the seasonal employer payroll costs formula, or the standard formula used to calculate payroll costs for every other type of borrower, while still being allowed to utilize the 3.5 times multiplier that is applied to NAICS Code 72 entities under the new Act.

Second Draw PPP Loan Application and Documentation Requirements:

On January 8, 2020, the SBA released the PPP Second Draw Borrower Application Form and Instructions which can be accessed by using the following link:

<https://www.sba.gov/sites/default/files/2021-01/PPP%20Second%20Draw%20Borrower%20Application%20Form%20%281.8.2021%29.pdf>

The January 6th Interim Final Rules specified that the application and documentation requirements that borrowers could begin to gather are as follows:

“The documentation required to substantiate an applicant’s payroll cost calculations is generally the same as documentation required for First Draw PPP Loans. However, no additional documentation to substantiate payroll costs will be required if the applicant:

- *(i) used calendar year 2019 figures to determine its First Draw PPP Loan amount,*
- *(ii) used calendar year 2019 figures to determine its Second Draw PPP Loan amount (instead of calendar year 2020), and*
- *(iii) the lender for the applicant’s Second Draw PPP Loan is the same as the lender that made the applicant’s First Draw PPP Loan.”*

The Interim Final Rules provide that in such cases described above, “additional documentation is not required because the lender already has the relevant documentation supporting the borrower’s payroll costs.”

Notwithstanding the above, the Interim Final Rules provide that the lender may request additional documentation if it “concludes that it would be useful in conducting the lender’s goodfaith review of the borrower’s loan amount calculation.”

For loans with a principal amount greater than \$150,000, the Interim Final Rules state that borrowers must submit documentation “adequate to establish that the applicant experienced a revenue reduction of 25% or greater in 2020 relative to 2019.” This documentation may include:

- Relevant tax forms, including annual tax forms, or
- Quarterly financial statements or bank statements if relevant tax forms are not available.

For Second Draw PPP Loans of \$150,000 or Less, Revenue Reduction Documentation is Not Required to be Submitted at the Time the Borrower Submits an Application for a Loan:

For loans with a principal amount of \$150,000 or less, the January 6th Interim Final Rules provide that the previously mentioned documentation “is not required at the time the borrower submits its application for a loan, but must be submitted on or before the date the borrower applies for loan forgiveness, as required under the Economic Aid Act.”

Finally, the Interim Final Rules provide that if a borrower does not submit an application for loan forgiveness, the borrower must provide such documentation to the SBA upon the SBA’s request.

PPP Loan Forgiveness

The statutory language for PPP Loan forgiveness is as follows:

- *An eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the sum of the following costs **incurred and payments made** during the covered period:*
- Payroll costs are defined to include the following:
- *salary, wage, commission, or similar compensation*
- *payment of cash tip or the equivalent*
- *payment for vacation, parental, family, medical or sick leave*
- *allowance for dismissal or separation (severance pay)*
- *payment required for the provisions of group health care benefits, including insurance premiums*
- *payment of any retirement benefit*
- *payment of state or local tax assessed on the compensation of employees*

Expanded Definition of Payroll Costs:

Payroll costs eligible for forgiveness under the 60% test now include employer payments for group life, disability, vision, and dental insurance payments. The new Act states as follows:

SEC. 308. SPECIFIC GROUP INSURANCE PAYMENTS AS PAYROLL COSTS.

(a) IN GENERAL.—Section 7(a)(36)(A)(viii)(I)(aa)(EE) of the Small Business Act (15 U.S.C. 636(a)(36)(A)(viii)(I)(aa)(EE)) is amended by inserting “or group life, disability, vision, or dental insurance” before “benefits”.

(b) EFFECTIVE DATE; APPLICABILITY.—The amendment made by subsection (a) shall be effective as if included in the CARES Act (Public Law 116–136; 134 Stat. 281) and shall apply to any loan made pursuant to section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) before, on, or after the date of enactment of this Act, including forgiveness of such a loan.

The 60% Rule for Full Loan Forgiveness Continues To Apply

To receive full loan forgiveness, a borrower must use at least 60 percent of the PPP loan for payroll costs, and not more than 40 percent of the loan forgiveness amount may be attributable to non-payroll costs. Payroll costs are those items described above (wages, unemployment taxes, pensions and group insurances).

For example, if a borrower uses 59 percent of its PPP loan for payroll costs, it will not receive the full amount of loan forgiveness it might otherwise be eligible to receive. Instead, the borrower will receive partial loan forgiveness. For example, if a borrower receives a \$100,000 PPP loan, and during the covered period the borrower spends \$54,000 (or 54 percent) of its loan on payroll costs and \$46,000 on non-payroll costs, then because the borrower used less than 60 percent of its loan on payroll costs, the maximum amount of loan forgiveness the borrower may receive is \$90,000 (with \$54,000 in payroll costs constituting 60 percent of the forgiveness amount and \$36,000 in nonpayroll costs constituting 40 percent of the forgiveness amount).

Eligible Expenses under the 60% Rule following the new Act:

Following the enactment of the Economic Aid Act, salaries, wages, commissions, tips, healthcare payments, retirement plan contributions, group life insurance, group disability insurance, group vision insurance, and group dental insurance were all officially codified under the definition of “payroll costs” that can be used to satisfy the 60% rule.

New Forgivable Non-Payroll Expenses:

The new Act creates four additional categories of expenses that are eligible for forgiveness as “non-payroll costs”. The sum of expenses from these categories cannot exceed 40% of the loan amount in order for a borrower to obtain full forgiveness.

SEC. 304. ADDITIONAL ELIGIBLE EXPENSES.

(a) ALLOWABLE USE OF PPP LOAN.— Section 7(a)(36)(F)(i) of the Small Business Act (15 U.S.C. 636(a)(36)(F)(i)) is amended—

(1) in subclause (VI), by striking “and” at the end;

(2) in subclause (VII), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following:

“(VIII) covered operations expenditures, as defined in section 7A(a);

“(IX) covered property damage costs, as defined in section 7A(a);

“(X) covered supplier costs, as defined in section 7A(a); and

“(XI) covered worker protection expenditures, as defined in section 7A(a).”

The term “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.”

The term “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 other compensation.”

The term “covered supplier cost” means “an expenditure made by an entity to a supplier of goods for the supply of goods that— “(A) are essential to the operations of the entity at the time at which the expenditure is made; and “(B) is made pursuant to a contract, order, or purchase order— “(i) in effect at any time before the covered period with respect to the applicable covered loan; or “(ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan;”

The term “covered worker protection expenditure” means “an operating or a capital expenditure 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, 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 (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.” This provision does not apply to residential real property or tangible personal property.

Examples of covered worker protection expenditures include:

- 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 expansion of additional indoor, outdoor, or combined business space, an onsite or offsite health screening capability or the purchase of covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, particulate filtering facepieces, or other kinds of personal protective equipment.

Prohibition on the Use of Loan Proceeds for Lobbying Activities:

Sec. 319 of the new Act codifies the prohibition on the use of loan proceeds for lobbying activities by amending Section 7(a)(36)(F) of the Small Business Act (15 U.S.C. 636(a)(36)(F)). Section 7(a)(36)(F) is amended by adding the following:

“(vi) PROHIBITION.—None of the proceeds of a covered loan may be used for—

“(I) lobbying activities, as defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602);

“(II) lobbying expenditures related to a State or local election; or

“(III) 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.”

Conclusion:

As evidenced by the expansiveness of this article, there are numerous sources of relief available for eligible nonprofits and charitable entities. These statutes and the guidance associated with them can be verbose and confusing, but it is crucial that advisors do their part to help get available relief funding into the hands of their clients.

Furthermore, working with speed and efficiency will be important in the coming months considering many application deadlines set by the new Act will close on March 31st, 2021.

We encourage all advisors to stay in touch and tune in to our weekly seminar on the CARES Act, Economic Aid Act, and all their associated progeny.

Stay tuned for future editions of this series on new opportunities for relief funding for non-profit and charitable organizations.

Good luck and stay safe!

Stop Trusting Your Gut When It Comes to Hiring and Other Common Interview Mistakes

David Finkel



The labor market is tight right now, and as such a lot of business owners and entrepreneurs are struggling to find good talent for their businesses. And even if you enlist the help of a recruiter to find your candidates, at some point you are going to have to interview the top contenders themselves, and that's where it gets tricky. You have to be smart and plan ahead, and most of all you have to be able to recognize good talent when it walks through your door. And unfortunately, after 25 years of business coaching, I can tell you that that skill isn't something that comes naturally for a lot of leaders.

So today, I wanted to share with you three interview mistakes that I see far too often.

Hiring Mistake #1: Trusting Your Gut In the Interview Process

There is a time and a place to trust your gut, but when you're first interviewing a candidate that is not the time and place to do it. When that occurs, you're basically just comparing that candidate to yourself. And of course you like yourself!

Trusting your gut has nothing to do with whether or not they can do the job and if you dislike them that doesn't mean they can't do the job either. It's probably just because they were nervous or don't interview well, so therefore they didn't come across as their best self in that particular moment. So, number one – stop trusting your gut. Use an analytical process that's objective and even scientific in how you decide.

Hiring Mistake # 2: Talking Too Much During the Interview

I've seen this time and time again with our business coaching clients. They will go into an interview talking too much and not listening to the candidate. You should do about 10% of the talking and most of the listening and it's tough when you're excited about your business and you're selling, which you need to be in this labor market, but you need to be listening more during your interviews.

Hiring Mistake #3: Not Asking Behavioral Questions

When it comes to asking interview questions you need to dig deeper. It's not only asking them about what experience and skills they have but asking them to use those in examples of past behaviors.

Lisa, I see that you have sales experience and overcoming difficult, challenging sales situations, but tell me about a time when you had a challenge with this.... How did you...? What was the plan? How did you execute the plan? Who did you involve in it? What was the result – how did it benefit the company? What did you learn to do differently?

Really getting granular when they tell you they know how to do something will go a long way in qualifying a candidate.

Being on the lookout for these top three mistakes, coupled with a solid idea of what you are looking for in a particular position will put you light years ahead of your competition and allow you to find and recruit good talent even if the talent pool is small.

Humor



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