SBA Defines ‘Gross Receipts’ for Second Draw PPP Loans

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On January 6, 2021, the Small Business Administration (SBA) issued two interim final rules related to Paycheck Protection Program (PPP) loans under the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act. In our prior alert, we described that the act authorized second draw PPP (PPP2) loans for second-time PPP borrowers who have exhausted their original PPP loan (PPP1) funds.

As previously noted, to be eligible for a PPP2 loan businesses must (among other things) have seen at least a 25% decrease in “gross receipts” in comparable quarters of 2020 relative to 2019 (with modified tests for businesses that were not operating in the particular comparable quarter of 2019), but the act does not define “gross receipts.”

The SBA somewhat clarified things in one of its January 6 rules by providing the following definition of “gross receipts”:

1. Gross receipts include all revenue in whatever form received or accrued (in accordance with the entity’s accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees or commissions, reduced by returns and allowances. Generally, receipts are considered “total income” (or in the case of a sole proprietorship, independent contractor, or self-employed individual “gross income”) plus “cost of goods sold,” and excludes net capital gains or losses as these terms are defined and reported on IRS tax return forms. Gross receipts do not include the following: taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees); proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts.
2. Gross receipts of affiliates are calculated as follows:
    a. Gross receipts of a borrower with affiliates is calculated by adding the gross receipts of the business concern with the gross receipts of each affiliate.
    b. If a borrower has acquired an affiliate or been acquired as an affiliate during 2020, gross receipts includes the receipts of the acquired or acquiring concern. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose. However, if a concern acquired a segregable division of another business concern during 2020, gross receipts do not include the receipts of the acquired division prior to the acquisition.
    c. The gross receipts of a former affiliate are not included. This exclusion of gross receipts of such former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a borrower sold a segregable division during 2020, the gross receipts will continue to include the receipts of the division that was sold.
    d. All terms in this subsection shall have the meaning attributed to them by the IRS.
3. For an eligible nonprofit organization, a veterans organization, an eligible nonprofit news organization, an eligible 501(c)(6) organization or eligible destination marketing organization, gross receipts means gross receipts within the meaning of section 6033 of the Internal Revenue Code of 1986.

While the new interim final rule is a helpful starting point, ambiguity remains and borrowers contemplating seeking a PPP2 loan should work with counsel and accountants regarding their specific methodology and any associated risks.

The January 6 rules also clarified certain other aspects of PPP2 and consolidated all prior PPP rulemaking.

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