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# *Key Business Tax Provisions of the Consolidated Appropriations Act, 2021*

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The Consolidated Appropriations Act, 2021 (the “Act”) is now law and includes another round of COVID-19 relief legislation (known as the Bipartisan-Bicameral Omnibus COVID Relief Deal) as well as government funding and other bills. The Act’s COVID-19 relief expands and builds upon the 2020 relief bills, but provides much needed clarity on the tax treatment of some prior relief efforts passed by the federal government. Below is a summary of the Act’s key tax provisions. The tax treatment by individual state and local taxing authorities may vary, either in part or entirely, from the federal tax treatment under the Act.

## **Business Tax Aspects**

The Act extended, expanded, and provided clarity on relief provisions geared towards business under the Coronavirus Aid, Relief, and Economic Security Act of 2020 (the “CARES Act”), including:

### **I. Paycheck Protection Program (“PPP”).**

The Act expanded the PPP program first introduced in the CARES Act, providing an additional \$284 billion of funding for eligible applicants that never obtained a PPP loan and some businesses to receive a “PPP second draw.” In addition to expanding the PPP loan program, the Act clarified the tax treatment of forgiven PPP loans. The tax treatment provisions are effective as of March 27, 2020 (the CARES Act enactment date). The Act provides that:

- Forgiven PPP loans are not includable in a taxpayer’s gross income;
- Business expenses paid for with forgiven PPP loan funds remain tax deductible for federal income tax purposes, overturning previously released guidance by the Treasury and IRS (Notice 2020-32, Revenue Ruling 2020-27, and Revenue Procedure 2020-51) disallowing such deductions;
- A borrower’s tax basis in assets and other tax attributes, such as available credits, will not be reduced as a result of any PPP loan forgiveness; and
- Partnerships and S corporations with tax-exempt income from PPP loan forgiveness, also may treat such amounts as tax-exempt income for purposes of the Internal Revenue Code of 1986, as amended (the “Code”) Sections 705 and 1366.

The Act also expanded the PPP forgivable expenses to include:

- “Covered operations expenditures,” which includes certain expenditures for software or cloud computing services that facilitate 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;
- “Covered property damage costs,” which includes costs relating to property damage and vandalism or looting due to public disturbances in 2020 that was not covered by insurance or other compensation;
- “Covered supplier costs,” which includes expenditures paid to suppliers for essential goods pursuant to certain contracts or orders; and
- “Covered worker protection expenditures,” which includes expenditures incurred in order to comply with governmental COVID-19 requirements or guidance.

## **II. Tax Treatment of EIDL, EIDL Grants, and Certain Loan Repayment Assistance.**

The Act clarifies the tax treatment of forgiven Economic Injury Disaster Loans (“EIDL”), emergency EIDL grants, and certain EIDL loan repayment assistance. The tax treatment provisions are effective for tax years ending after March 27, 2020. The Act provides that:

- Businesses need not include in gross income forgiveness of EIDL, emergency EIDL grants, and certain loan repayment assistance funds;
- Otherwise tax deductible expenses paid for with EIDL, emergency EIDL grants, and certain EIDL loan repayment assistance funds remain tax deductible even if these loans are forgiven;
- A borrower’s or recipient’s tax basis in assets and other tax attributes, such as available credits, will not be reduced as a result of forgiven amounts being excluded from gross income; and
- Partnerships and S corporations with tax-exempt income from forgiven amounts also may treat such amounts as tax-exempt income for purposes of Code Sections 705 and 1366.

## **III. Fifty Percent Deduction Limitation on Business Meals Provided by Restaurants Is Temporarily Suspended.**

The Act provides that businesses may take a 100% deduction (rather than a 50% deduction under previous law) for business food and beverages provided by a restaurant that are paid or incurred in 2021 or 2022. This temporary rule applies to meals eaten on a restaurant’s premise, as well as takeout and delivery meals provided by a restaurant.

## **IV. Depreciation of Certain Residential Rental Property over 30-Year Period.**

The Tax Cuts and Jobs Act changed the alternative depreciation system (“ADS”) recovery period for residential rental property from 40 years to 30 years for property placed in service after December 31, 2017. To correct a drafting error in the Tax Cuts and Jobs Act for electing real property trade or businesses, the Act assigns a 30-year ADS depreciation period to residential rental property placed in service before January 1, 2018. This correction is effective for tax years beginning after December 31, 2017.

## Employer Tax Aspects

In addition to the new business tax provisions discussed above, the Act provided extensions and clarifications to prior COVID-19 relief efforts for employers, including:

### I. Refundable Payroll Tax Credit.

For employers who provide paid sick and family leave related to the COVID-19 pandemic, the Act extends the refundable payroll tax credit provided under the Families First Coronavirus Response Act (the "FFCR Act") to wages paid through March 31, 2021. The Act also extends these credits for self-employed individuals and allows them to alternatively calculate the credit based on their average reported wages from 2019 instead of 2020.

For example, an employer who pays qualified sick leave wages to an employee unable to work due to COVID-19 will be able to claim a refundable tax credit on the employer's quarterly payroll taxes corresponding to the amount of qualified sick leave paid through March 31, 2021.

### II. Employee Social Security Tax Deferral Repayment.

President Trump issued a memorandum on August 8, 2020 allowing the deferral of withholding and payment of the employee's share of Social Security tax and the railroad retirement tax equivalent for wages paid from September 1, 2020 through December 31, 2020 for employees whose pre-tax compensation for a biweekly pay period is generally less than \$4,000. The memorandum required repayment of the deferred tax amounts by April 31, 2021, with the accrual of interest and penalties on unpaid deferred amounts beginning on May 1, 2021. The Act extends the repayment period for the deferred tax amounts to December 31, 2021, with the accrual of interest and penalties on unpaid deferred amounts beginning on January 1, 2022.

### III. Employee Retention Tax Credit ("ERTC").

The ERTC under the CARES Act provided employers with a refundable payroll tax credit of 50% of qualified wages up to \$10,000 per employee for a maximum credit of \$5,000 beginning March 13, 2020 through December 31, 2020. The Act extends and expands certain provisions of the ERTC through June 30, 2021 including:

- Increasing the ERTC rate from 50% to 70% of qualified wages paid between January 1, 2021 and June 30, 2021 up to \$20,000 (but not more than \$10,000 per quarter) in qualified wages per employee for a maximum credit of \$14,000 (\$7,000 per quarter) per employee for 2021 as opposed to the CARES Act's \$10,000 cap on qualified wages for a maximum credit of \$5,000 per employee for all of 2020;
- Expanding credit eligibility for employers by reducing the requisite reduction in gross receipts for the relevant calendar quarter compared to the same quarter in 2019 from a 50% reduction to a 20% reduction, along with a provision allowing employers to use prior quarter gross receipts to determine eligibility instead of the current quarter;
- Classifying group health plan expenses as includable in qualified wages, including for employees who have not received any other wages (e.g., furloughed employees);
- Increasing the employee threshold at which wages paid in 2021 to an employee still providing services to the employer will be treated as qualified wages, from an average of 100 full-time equivalent ("FTE") employees in 2019 to an average of 500 or fewer FTE employees in 2019.

Thus, an employer who had an average of 500 or fewer FTE employees in 2019 may include wages paid to all employees, regardless of whether the employee is working, in qualified wages for calculation of the ERTC in 2021. Employers who averaged more than 500 FTE employees in 2019 may only treat wages paid to employees who are not working as qualified wages. Employers who began operations in 2020 may claim the credit based on average FTE employees in 2020. The Act does not change the CARES Act's treatment of a controlled group of corporations as a single employer for ERTC purposes; and

- Allowing employers with 500 or fewer employees to claim an advance payment of the credit during the quarter based on wages paid in the same quarter in a previous year. If the advance payment is greater than the actual ERTC due, then the employer's payroll tax for the quarter will be increased by the excess.

Prior to the Act, an employer receiving a PPP loan could not claim the ERTC on any wages (including wages that were not funded by the PPP loan). The Act now allows employers that received PPP loans to claim the ERTC on qualified wages paid with PPP loans that were not forgiven. Under the Act, employers may not claim the ERTC on qualified wages paid for with forgiven PPP loan proceeds. Therefore, eligible employers may seek PPP loan forgiveness to the maximum extent possible and may claim the ERTC for wages not covered by a forgiven PPP loan.

#### **IV. Employer Tax Credit for Paid Leave.**

Code Section 45S allows eligible employers that provide paid family and medical leave to their employees under the Family and Medical Leave Act to claim a credit equal to a percentage (ranging from 12.5% to 25%) of wages they pay to qualifying employees while those employees are on family and medical leave. The Act extends the credit from December 31, 2020 to December 31, 2021.

#### **V. Flexible Spending Accounts ("FSAs").**

The Act includes several provisions providing greater flexibility for employer-sponsored FSA plans. The Act allows employers to amend their FSA plans to permit:

- Carryover of an unlimited amount of unused FSA funds from the 2020 plan year to 2021 (rather than the \$550 amount permitted under the CARES Act) as well as any unused funds from the 2021 plan year to 2022;
- Increase of the grace period for unused funds to 12 months after the plan year instead of the regular grace period of 2 months and 15 days after the end of the plan year; and
- Mid-year modifications of the FSA election amount without the plan participant having to experience a change in status.

### **Tax Credits**

The Act contains a number of provisions relating to tax credits available to certain taxpayers, including the following:

#### **I. Low-Income Housing Tax Credit ("LIHTC").**

The LIHTC under Code Section 42 provides a credit to finance the development, renovation, and rehabilitation of low-income housing at either a 9% or 4% rate, depending on the type of construction and the financing used for the project. Previously, the applicable percentage rate could fall below 4%

due to cuts to the federal borrowing rate. The Act creates a 4% floor for the LIHTC. For projects financed with tax-exempt bonds, the fixed 4% rate is effective for buildings for which the tax-exempt bonds are issued after December 31, 2020. For projects that are not financed with tax-exempt bonds, the fixed 4% rate is effective for buildings that receive a LIHTC allocation after December 31, 2020.

## **II. New Markets Tax Credit.**

The New Markets Tax Credit provides a credit for certain investments in low-income communities. For 2020, Congress provided a \$5 billion allocation for the New Markets Tax Credit, but the program was scheduled to expire on December 31, 2020. The Act extends the program by including a \$5 billion allocation for each of 2021 through 2025 (\$25 billion in total). In addition, the Act gives taxpayers the ability to carry forward any unused New Markets Tax Credits for five years.

## **III. Work Opportunity Tax Credit.**

The Work Opportunity Tax Credit provides a credit for employers that hire individuals who are members of certain specified groups. The program, which bases the credit on first-year wages paid to specified employees, was scheduled to expire on December 31, 2020. The Act extends the program for an additional five years and will now apply to specified employees that begin work before January 1, 2026.

## **IV. Carbon Capture Credits.**

The carbon oxide sequestration credit under Code Section 45Q is available to “qualified facilities.” The Act extends the commencement date for construction of facilities that the IRS will consider “qualified facilities” under Code Section 45Q from December 31, 2023 to December 31, 2025.

## **V. Renewable Energy Production Tax Credit.**

A production tax credit for electricity produced from qualified energy resources at “qualified facilities” is available under Code Section 45. The Act extends the commencement date for construction of wind facilities, qualifying closed-loop biomass, open-loop biomass, geothermal energy, landfill gas and trash, qualified hydropower, and marine and hydrokinetic renewable energy facilities that the IRS will consider “qualified facilities” under Code Section 45 from December 31, 2020 to December 31, 2021.

## **VI. Renewable Energy Investment Tax Credit.**

An investment tax credit equal to the “applicable energy percentage” of the basis of “energy property” placed in service during the applicable taxable year for solar, fiberoptic solar, qualified fuel cell, and qualified small wind energy properties is available under Code Section 48. The applicable energy percentage is subject to reduction based on when the energy property begins construction and when the energy property is placed in service.

*Extension and Phaseout of Credit.* The Act extends the requisite dates of construction for solar, fiberoptic solar, qualified fuel cell, qualified small wind energy and waste recovery properties by two years. The “applicable energy percentage” for those projects is now (a) 26% if the construction of such property commences between January 1, 2020 and December 31, 2022 (extended from December 31, 2020) and the property is placed in service by December 31, 2025 (extended from December 31, 2023), (b) 22% for property if construction of such property commences between January 1, 2023 (extended from January 1, 2021) and December 31, 2023 (extended from December 31, 2021) and that is placed in service by December 31, 2025 (extended from December 31, 2023), and (c) 10% for any solar property with respect to which construction commences by December 31, 2023 (extended from December 31, 2021) and that is placed in service on or after January 1, 2026 (extended from

January 1, 2024). The energy percentage is 0% with respect to fiberoptic solar, qualified fuel cell, qualified small wind energy and waste recovery properties that are not placed in service by December 31, 2025 (extended from December 31, 2023).

*Waste Energy Recovery Property Treated as "Energy Property."* The Act amends Code Section 48 to include "waste energy recovery property" in the definition of energy property. Waste energy recovery property generally is defined as property that generates electricity solely from heat from buildings or equipment if the primary purpose of such building or equipment is not the generation of electricity.

### **Additional Tax Extenders**

In addition to the extensions discussed above, the Act extends the following provisions, many of which were set to expire at the end of 2020:

- The deduction for the cost of "energy efficient commercial building property" under Code Section 179D has been permanently extended for all property placed in service after December 31, 2020.
- The look-through rule for related controlled foreign corporation ("CFC") payments under Code Section 954(c)(6), under which dividends, interest, rents, and royalties received or accrued by a CFC from a related CFC will not be treated as foreign personal holding company income, has been extended through taxable years beginning before January 1, 2026.
- The gross income exclusion for mortgage debt forgiveness under Code Section 108(a)(1)(E) has been extended through December 31, 2025; although, the maximum amount has been reduced from \$2 million to \$750,000.
- The designation of "empowerment zones" in which businesses are entitled to receive certain tax incentives has been extended through December 31, 2025.

### **Charitable Organizations**

#### **I. Charitable Contribution Deduction for Corporations.**

The Act expanded and extended the charitable contribution provisions for corporations under the CARES Act, providing corporations with a charitable contribution deduction up to 100% of the corporation's taxable income for qualified disaster relief contributions paid between January 1, 2020 and February 25, 2021. The Act also extends the CARES Act's increased deduction limitation for corporations for qualified contributions for 2021.



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