

TAX & WEALTH ADVISOR ALERT: WISCONSIN WILL NOT TAX FORGIVEN PAYCHECK PROTECTION PROGRAM LOANS

Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the federal government is providing much needed relief to small businesses in the form of loans that can be forgiven under the Paycheck Protection Program (PPP). A PPP loan can be forgiven if the loan is used for specific costs such as payroll costs, interest payments on loans secured by a mortgage, rent, and utilities, as discussed in more detail [here](#). The federal government will not tax the amount of the loan that is forgiven, and the forgiven amount will not count as taxable income to small businesses; however, this might not be the case in some states. Luckily, Wisconsin small businesses will not have the unexpected tax burden of owing state tax on forgiven PPP loans thanks to A.B. 1038, signed by Governor Tony Evers on April 15, 2020.

Under federal law (see [Internal Revenue Code Section 108](#)), if a debt is forgiven, taxpayers must include the forgiven amount in their taxable income and pay taxes on that income unless a certain exception applies. Most states conform with this federal tax code provision and incorporate this code section into their own state tax codes. The CARES Act, however, changes federal tax law and specifically excludes the amount of loan forgiveness under the PPP from this code section, and therefore, the amount of loan forgiveness does not count as taxable income. Since most states follow the federal tax treatment of loan forgiveness, one would expect all states to incorporate this exception as well. However, state conformity to the federal tax code is not automatic in some states, including Wisconsin.

States conform to the federal tax code in one of two ways—either fixed date or static conformity or moving date conformity. In a moving date conformity state, or what is sometimes referred to as a “rolling” conformity state, changes in federal tax law automatically apply to the state tax code as they occur. If the state does not want to conform to a new federal tax law, the state must pass specific legislation doing so. Illinois, Michigan, Iowa, and Missouri are just a few examples of moving date conformity states. In these states and other moving date conformity states, there will be no issue with the state taxation of loan forgiveness under the PPP—the state will automatically conform to the CARES Act exception and they will not tax the forgiveness of federal loans under the PPP unless the state otherwise adopts a law to do so.

With fixed date or static conformity states, like Wisconsin, Minnesota, Indiana, Massachusetts, and California, a state conforms to the federal tax code as it existed on a certain date. The state does not automatically incorporate changes to federal tax law that occur after that date. For instance, if a state's conformity date is January 1, 2017, the state's tax code conforms to the federal tax code (usually by including large references to the Internal Revenue Code) as of January 1, 2017, and any federal code changes after January 1, 2017 are not included in the state tax code unless and until the state changes its conformity date or makes express provisions conforming to certain federal tax law changes. This means that unless a static state conforms to the most recent version of the Internal Revenue Code, which includes the CARES Act exception, or makes an express provision for the exclusion, small businesses in those states will owe state taxes on forgiven PPP loans.

Typically, each year, lawmakers in static states vote to update their conformity date, but often times this simply doesn't occur. Many static states are usually a year behind—for example, a state will be using the current 2020 legislative session to conform to the Internal Revenue Code as it existed at the end of the 2019 tax year. Unfortunately, there are a few states that are infamous for not updating their conformity dates and Wisconsin is one of them. Wisconsin uses a 2017 conformity date which is not great, but still ahead of California whose conformity date is 2015 and Massachusetts where the individual (but not corporate) conformity date is 2005! While it is not unusual for a state to be behind on its conformity date, this year it is important for PPP loan forgiveness and many other provisions related to the CARES Act.

Although the Wisconsin legislature adopted omnibus legislation on April 15, 2020 to address the coronavirus pandemic, the bill does not update Wisconsin's conformity date. Rather, the bill includes express language that brings the state's tax code into conformity with several federal tax law changes under the CARES Act. The good news for Wisconsin small businesses seeking PPP loans is that the bill expressly conforms to the CARES Act exception that permits loan forgiveness on a tax-free basis under the PPP from February 15, 2020 through June 30, 2020.

Other static state legislators must update their conformity date or provide express provisions before calendar year 2020 tax returns are due (March 15, 2021) so businesses will not owe state taxes on forgiven PPP loans. If these states do not conform by then, small businesses might face the burden of state taxes on this much-needed relief. Business owners in static conformity states seeking PPP loans should be aware of the potential tax burden associated with PPP loan forgiveness and plan accordingly.

O'Neil, Cannon, Hollman, DeJong & Laing remains open and will continue to monitor federal and state law tax changes. For questions or further information relating to taxation under the CARES Act, please contact attorney [Britany E. Morrison](#).

UPDATE: On May 5th, 2020, Senator John Cornyn (R-Tex.) recently introduced the bipartisan Small Business Expense Protection Act (S. 3612), which moves to essentially nullify Notice 2020-32. Senate Bill 3612 provides that business expenses otherwise deductible under Code Section 162 would still be deductible even if they were funded by forgiven PPP loan proceeds. Currently, the bill has picked up 23 sponsors. Neither Senator Ron Johnson nor Senator Tammy Baldwin have yet to express support. Nevertheless, this bill is strongly supported by the American Institute of Certified Public Accountants (AICPA). It was read twice in the Senate and referred to the Senate Committee on Finance but has been sitting there since. On May 12th, 2020, the House introduced an identical bill (HB6821) and referred it to the House Committee on Ways and Means. It has been sitting with the House Committee on Ways and Means since referral. The attorneys at O'Neil, Cannon, Hollman, DeJong & Laing will continue to monitor the status of both bills and provide information on any federal and state law changes.