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Paycheck Protection Program Flexibility Act Brings (Mostly) Welcome Changes to PPP Loans

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On June 5, 2020, President Trump signed into law the Paycheck Protection Program Flexibility Act of 2020 (the “Flexibility Act”). The Flexibility Act amends key provisions of the Paycheck Protection Program (“PPP”) established by the CARES Act, giving borrowers important flexibility in their use of loan proceeds, timing requirements, and ultimate forgiveness of their loan.

Below is a summary of the changes introduced by the Flexibility Act:

- **Loan Maturity Date:** The Flexibility Act extends the repayment term from two years to five years at one percent per annum, to the extent a borrower's loan is not fully forgiven. This revision only applies to PPP loans made on or after June 5, 2020—the date the Flexibility Act became law. The Flexibility Act does not prohibit lenders and borrowers from amending the maturity date of pre-existing PPP loans, but it also does not require them to do so.
- **Covered Period of Loan:** The Flexibility Act extends the time period during which a borrower can use PPP loan proceeds and still qualify for loan forgiveness from 8 weeks, as originally required under the CARES Act, to the earlier of 24 weeks after origination or December 31, 2020. The clock still starts upon receipt of the PPP loan, but now borrowers have the flexibility to conserve their loan proceeds until they are able to reopen and/or until employees are actually able to return to work. While this will likely help most businesses that have not yet been able to reopen or fully re-staff, many businesses remain unable to open or open at full capacity, and many do not yet have visibility as to whether or when they can do so.
- **Extension of Deadline to Rehire Employees for Loan Forgiveness:** The Flexibility Act extends the date upon which borrowers need to rehire workers in order for salaries to count towards loan forgiveness from June 30, 2020 to December 31, 2020. This increases the likelihood that most businesses can reopen and fully re-staff by the deadline, yet many businesses have experienced difficulties bringing employees back to work due in part to generous unemployment benefits and to workplace safety concerns of some employees.
- **Exemptions for Rehiring Employees:** The Flexibility Act provides two new exemptions to the rules that otherwise reduced a

borrower's eligibility for loan forgiveness:

- a. A reduction in loan forgiveness will not apply if the borrower can document an inability to rehire the same or similar employees that were in place as of February 15, 2020; or
 - b. A reduction in loan forgiveness will not apply if the borrower can document its inability to return to the same level of business activity as before February 15, 2020 due to enforcement of social distancing, sanitation, and other safety requirements or guidance by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration issued between March 1, 2020, and December 31, 2020.
- **Uses of Loan Proceeds:** Under the CARES Act and existing SBA rules and guidance, the amount of the PPP loan eligible for forgiveness would be proportionally reduced to the extent the borrower spent less than 75% of the loan proceeds on eligible payroll costs. The Flexibility Act reduces this percentage from 75% to 60%. This change has the dual benefit of also increasing the proceeds available for the other allowable expenses, such as mortgage interest, rent, and utilities, from 25% to 40%, without reduction in loan forgiveness. However, the Flexibility Act appears to impose a “cliff” requirement, that at least 60% of the loan proceeds must be spent on payroll costs in order for the borrower to be eligible for **any** forgiveness. In other words, a PPP borrower with high fixed expenses for rent, mortgage interest, and/or utilities that was unable to spend more than 59.9% of the total loan proceeds on payroll costs (perhaps due to state or local restrictions on opening and/or inability to reach needed staffing levels) would be denied loan forgiveness entirely. We understand that certain Senators had discussions with the Treasury Department and SBA about a potential regulatory solution to this problem, but it does not yet exist.
 - **Deferred Loan Payments:** The Flexibility Act extends the “holiday” for payments on the PPP loan until after the loan forgiveness is remitted by the SBA to the lender, or 10 months after the applicable covered period, if the borrower does not apply for forgiveness during such 10-month period.
 - **Payroll Tax Deferral:** The Flexibility Act allows borrowers whose PPP loans were partially or fully forgiven to defer payment of payroll taxes.

Although the Flexibility Act yet again changes the PPP rules for borrowers, the result gives many borrowers important options in their use of loan proceeds, timing requirements, and ultimately forgiveness of the loan. That's a win for many businesses who have applied for or are still thinking about applying for a PPP loan. However, businesses that have not yet fully reopened or re-staffed and face continuing uncertainty over their prospects for doing so by late 2020 should carefully consider whether the revised PPP program (at least until there is relief from the 60% payroll costs “cliff”) is right for them, or whether they should apply for a lower loan amount than

they would otherwise be entitled to receive.

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