On June 5, 2020, the President signed the Paycheck Protection Program Flexibility Act of 2020 (the “Flexibility Act”), which amends and eases many of the terms of the PPP loan program. The changes in the Flexibility Act will result in many changes to the forgiveness regulations released by the SBA. I will provide you with an update once the loan forgiveness regulations are revised. The SBA’s regulations would allow applications for forgiveness to be submitted beginning July 1, 2020 but that may be altered by the passage of the Flexibility Act.

The Flexibility Act provides the following changes to the PPP loan:

1. The Flexibility Act extends the loan forgiveness “covered period” from 8 weeks to 24 weeks or December 31, 2020, whichever comes first. Thus, a borrower now has three times as long to use the funds on forgivable expenses. Provided that there are no reductions in loan forgiveness, this change should make it easier to obtain full loan forgiveness. This change also extends the period for measuring full-time equivalent employee averages and salary/hourly wages related to reductions in loan forgiveness.
   a. A borrower with a loan disbursed before enactment of the Flexibility Act could elect the statutory 8 week covered period instead of the new 24 week period. We will see what benefits this option may provide in calculating loan forgiveness when the SBA updates its loan forgiveness regulations.

2. The Flexibility Act replaces all uses of June 30, 2020 with December 31, 2020. Thus, the safe harbor cut off dates for restoring salary/hourly wage reductions and FTE reductions have been extended to the end of the year. As you may remember, the CARES Act and SBA regulations essentially required that a borrower maintain the same average number of FTEs during the covered period as they had during their applicable look back period (February 15, 2019 to June 30, 2019 for seasonal employers and February 15, 2019 to June 30, 2019 or January and February 2020 for non-seasonal employers). If such FTEs were not maintained, there is a reduction in forgiveness proportional to the reduction of average FTEs during the covered period. Any reduction in salary or hourly wages exceeding 25 percent paid to employees who made $100,000 or less on an annualized basis during an during any pay period in 2019 would be met with a dollar for dollar reduction in forgiveness. However, the CARES Act provided a safe harbor if these FTE and/or salary/hourly wage reductions were eliminated by June 30, 2020. The Flexibility Act has extended that safe harbor date to December 31, 2020.

3. The Flexibility Act also creates exceptions to the FTE reduction that otherwise would apply if the borrower can in good faith document:
   a. An inability to rehire individuals employed on February 15, 2020 and an inability to hire similarly qualified individuals by December 31, 2020; or
   b. it is unable to return to the same level of business activity it had on February 15, 2020 due to compliance with requirements from HHS, CDC or OSHA “related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19.”

4. The Flexibility Act changes the SBA’s requirement that 75 percent of forgivable expenses consist of payroll costs. Specifically, the Flexibility Act requires that 60 percent of the loan amount be used for payroll costs to receive loan forgiveness. Note the distinction. The SBA
has since issued an interim final rule that indicates if a borrower does not use 60 percent of the loan amount for payroll costs, the forgiveness will be reduced so that 60 percent of the forgiveness amount is attributable to payroll costs.

5. The CARES Act had set a deferral period for all payments on PPP loans of 6 months to a year. The SBA chose 6 months. Now, the Flexibility Act extends the deferral period up to the date SBA remits the forgiveness amount to the lender. If a borrower does not apply for forgiveness within 10 months of the end of the covered period (24 weeks after origination or December 31, 2020), payments on principal, interest and fees would begin on the day no earlier than 10 months of the end of the covered period.

6. It extends the maturity on any unforgiven loan balance from 2 years to 5 years by placing a minimum maturity on the loan. This extension of loan maturity applies only to new loans made after June 5, 2020. Loans before that date still have a 2 year maturity. However, lenders and borrowers may mutually agree to change the maturity provisions to provide a 5 year maturity. There remains no prepayment penalty. The CARES Act had placed a maximum maturity of 10 years and SBA took the liberty of making it 2 years.

7. The CARES Act provides a social security tax deferral period, allowing the deferral a borrower’s 2020 payroll tax payments due through January 1, 2021. Half of the deferral is due by December 31, 2021 and the other half by December 31, 2022. The self-employed are only entitled to defer 50 percent of their SECA payments for social security. Borrowers who receive PPP loan forgiveness had been exempted from this deferral program. The Flexibility Act removes this exemption.

8. A letter was entered into the Congressional Record without objection by Sen. Ron Johnson and others clarifying some issues. First, it was clarified that no new PPP loans will be made after June 30, 2020 without further action by Congress. His letter also clarifies that “The CARES Act requires that PPP loans may only be spent on allowable uses during the covered period. ... The intention of the extension of the covered period in H.R. 7010 is to allow borrowers who received PPP loans before June 30, 2020 to continue to make expenditures for allowable uses until December 31, 2020.” (Emphasis added.) Note that express language of the Flexibility Act actually provides 24 weeks or through December 31, 2020, whichever is first, as the end of this covered period. It was not clear under the CARES Act whether all of the loan funds must be spent during the covered period but it seemed that was not the case. This language changes things. Given the extended time provided, meeting this requirement should not be an issue. However, in the unlikely event that a Borrower has funds left on January 1, 2021, or 24 weeks and 1 day after funding, it appears that those funds could no longer be used and would have to be returned.

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