



THE CARES ACT AMENDED: PAYCHECK PROTECTION PROGRAM FLEXIBILITY ACT OF 2020

June 8, 2020

On June 5, 2020, the Paycheck Protection Flexibility Act (the “PPP Flexibility Act”) was signed into law. The PPP Flexibility Act amends certain use and forgiveness provisions of the Coronavirus Aid, Relief, and Emergency Security Act (the “CARES Act”), providing recipients of loans under the Paycheck Protection Program (“PPP”) with greater flexibility over their use of PPP funds and relaxing certain forgiveness requirements. The SBA continues to issue guidance on the CARES Act and the PPP on an ongoing basis, and we anticipate additional direction from the SBA related to the modifications discussed below.

KEY MODIFICATIONS TO THE PPP LOAN PROGRAM

- **Extension of the Covered Period.** Under prior SBA rulemaking, PPP loan funds were “forgivable” only to the extent they were used on certain permitted payroll and non-payroll expenses during the 8-week “covered period” following disbursement of a PPP loan. Under the PPP Flexibility Act, the covered period for forgiveness is extended from 8 weeks to 24 weeks (or December 31, 2020, whichever is earlier). If a borrower received its PPP loan prior to the effectiveness of the PPP Flexibility Act, it has the option to choose the 8-week covered period.
- **Modification of Payroll to Non-Payroll Expense Ratio.** Under its initial PPP guidance, the SBA determined that to qualify for maximum forgiveness, at least 75% of a borrower’s PPP loan funds needed to be used for payroll costs and no more than 25% of a borrower’s loan forgiveness amount could be attributable to non-payroll expenses¹. The PPP Flexibility Act adjusts these percentages and a borrower can obtain full forgiveness of its PPP loan as long as it uses at least 60% of the loan amount for payroll costs and, as a

result, a borrower may now allocate up to 40% of its forgivable loan amount to non-payroll expenses.

- **Extension of “Restoration” Safe Harbor Date.** To avoid a reduction in the forgivable amount of a PPP loan, the CARES Act required that a borrower maintain the same average number of full-time equivalent (“FTE”) employees as it had prior to the COVID-19 pandemic and pay employees at least 75% of the salary or wages they received in the last fiscal quarter before the borrower applied for its PPP loan. The CARES Act included a safe harbor (and no reduction in forgiveness) if the borrower restored any eliminated FTE positions or reduced salaries and wages prior to June 30, 2020. The PPP Flexibility Act extends the CARES Act safe harbor for restoring these positions and compensation levels until December 31, 2020.
- **Additional Reduction Safe Harbors.** The PPP Flexibility Act provides for additional safe harbors whereby any reduction in forgiveness based on a reduction in a borrower’s number of FTE will be disregarded if that borrower is able to document:
 - (i) an inability to rehire individuals who were employees of the borrower on February 15, 2020;
 - (ii) an inability to hire qualified employees for unfilled positions on or before December 31, 2020; or
 - (iii) that it is unable to return to the same level of business activity as the business operated on or before February 15, 2020 due to compliance with requirements established by the Centers for Disease Control and Prevention or the Occupational Safety and Health Administration during the period from March 1, 2020 through December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.
- **PPP Loan Repayment Period Extended.** The PPP provided for a two-year maturity term. The PPP Flexibility Act has extended the loan repayment period to five years for those loans that are issued after the date of the Act. The maturity date of an existing PPP loan may be extended to five years upon the mutual agreement of lender and borrower.
- **Modification of Deferral Period.** Under the PPP and related SBA guidance, principal and interest on a PPP loan is deferred for the first six months following disbursement. The PPP Flexibility Act extends the deferral period until the date on which the amount of forgiveness determined under the PPP is remitted to the lender. If a borrower fails to apply for forgiveness within 10 months of the end of its covered period (*i.e.*, 24 weeks after

disbursement (or 8 weeks, if the borrower has chosen such period, as described above)), all payments of principal and interest on its PPP loan will be deferred for a period not shorter than 10 months after the last day of such borrower's covered period.

- **Extension of Payroll Tax Deferral.** The CARES Act allowed employers and self-employed individuals to defer the deposit of the employer portion of social security taxes. However, the CARES Act also prohibited an employer who had obtained PPP loans from taking advantage of the payroll tax deferral after the date its lender issued a decision on forgiveness. The PPP Flexibility Act removes this limitation, allowing a PPP borrower to take advantage of the payroll tax deferral until December 31, 2020.

If you have already received a PPP loan, the PPP Flexibility Act will not allow you to apply for or receive a second loan. With respect to loans applied for after enactment of the PPP Flexibility Act, although the covered period has been extended to 24 weeks, there has been no change to the maximum loan amount that can be borrowed under the PPP - it remains 2.5 times a borrower's one-month average payroll cost, as determined under the existing PPP application.

A debt forgiveness application was issued by the Treasury on May 15, 2020, followed by an Interim Final Rule on May 22, 2020. We expect that these will be revised in connection with the PPP Flexibility Act. When these revisions are released, we will update the information contained in this alert accordingly.

¹ The PPP Flexibility Act made no modifications to the definitions of "payroll cost" or the categories of non-payroll expenses eligible for forgiveness. Click [here](#) for our Client Alert dated May 6, 2020 for a more detailed discussion of those terms.

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If you have any questions concerning PPP loans and the forgiveness process, please contact any of the undersigned or your regular Warshaw Burstein attorney.

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