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Statutory Revisions to the PPP

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This week, the House and the Senate passed the Paycheck Protection Program Flexibility Act of 2020 (the Bill), making it easier for borrowers to obtain forgiveness of loans obtained under the Paycheck Protection Program (PPP). President Trump is expected to sign the Bill. For our previous coverage on the requirements for PPP loan forgiveness, please see here.

Below are the highlights of the Bill:

- The period of time to spend the proceeds of a PPP loan on payroll costs and other qualifying expenses (the covered period) has been extended from eight weeks to 24 weeks (or until December 31, 2020, if earlier). This change will make it much easier for borrowers to spend the loan proceeds on payroll costs and thus qualify for forgiveness of their PPP loans. Many borrowers found it difficult to incur sufficient payroll costs to qualify for forgiveness because their businesses were shut down or only partially operating.

- The payroll requirement was reduced from 75 percent of loan proceeds to 60 percent. Although not part of the CARES Act, the SBA created a requirement that 75 percent of the amount of the PPP loan to be forgiven must be used on payroll costs. Many businesses had trouble meeting this threshold during the eight-week covered period since there was a significant decrease in business activity, and in many cases employees had been furloughed or laid off. If less than 75 percent of the total PPP loan amount was used for payroll costs, the forgiveness amount was reduced. In the Bill, Congress added the payroll requirements into the statute itself, but lowered the required percentage to 60 percent. The reduction in payroll percentage is a mixed blessing because it appears that the 60 percent requirement is an “all or nothing” proposition – the language of the Bill implies that if a borrower does not meet this 60 percent threshold, no amount of the PPP loan is to be forgiven.

- The SBA’s guidance on reductions in the number of “full-time equivalent” employees was codified and expanded. One of the requirements for full forgiveness of a PPP loan is that a borrower cannot reduce its workforce during the covered period. The SBA previously provided guidance noting that a reduction in workforce will not negatively affect the borrower’s forgiveness if the borrower offered to hire back employees but the employees did not accept. The Bill adds this exception to the law if the borrower also attempts to hire other qualified employees but is unable. The Bill adds a further exception to the FTE reduction rule for a borrower that documents its inability to return to the same level of business activity as before February 15, 2020, due to compliance with guidance by certain federal agencies, including the CDC. For example, if a restaurant is only able to operate at a 50 percent capacity due to social distancing requirements, and the restaurant in turn requires fewer servers, this reduction in workforce will not be held against the borrower. It is unclear how this exception will apply for businesses that are complying with state and local government requirements, and we await clarification through further SBA guidance.

- The minimum maturity for a PPP loan has been extended to five years. For new PPP loans issued after the date of enactment of the Bill, the maturity for the loan will be at least five years from issuance. Previously, the minimum maturity was two years. The Bill does not retroactively change any of the previous PPP loans to have a five-year maturity, though the Bill notes that lenders and borrower may be able to modify the loan to this longer period.