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COVID-19 Help for Small Businesses

Paycheck Protection Program Flexibility Act

June 4, 2020

The Paycheck Protection Program Flexibility Act (the "Flexibility Act") has been passed by the House and Senate and awaits signature by the President. The Act makes it easier to obtain forgiveness of a PPP loan in many respects.

Under the CARES Act and prior guidance issued by the SBA, forgiveness of a PPP loan would be determined by reference to the extent to which the loan proceeds were used for allowable uses during the "covered period." The covered period was defined as the eight week period following loan disbursement (subject to flexibility to conform to the borrower's payroll period), and payroll costs had to account for at least 75% of the total amount eligible for forgiveness.

The Flexibility Act extends the definition of the covered period to 24 weeks following loan disbursement (but not longer than December 31, 2020) and allows non-payroll costs to account for up to 40% of the forgiveness amount.

A borrower who received a PPP loan prior to enactment of the Flexibility Act has the option to elect to use a covered period of 8 weeks following loan disbursement. This will allow a borrower to apply for loan forgiveness sooner than 24 weeks following loan disbursement if it is to the borrower's advantage.

Under the CARES Act, the term of a PPP loan would be a maximum of 10 years, and the commencement of repayment would be deferred for a minimum of six months and a maximum of one year. Prior guidance issued by SBA established loan maturity of 2 years and payment deferral of six months. The Flexibility Act establishes a minimum loan term of 5 years and states that payment will be deferred until the amount of forgiveness has been determined. If a borrower fails to apply for forgiveness within 10 months following the last day of the covered period the borrower will have to commence payment 10 months plus one day after the end of the covered period.

Under the CARES Act the amount of a PPP loan otherwise forgivable would be reduced for reductions in full-time equivalent employees ("FTEs") and for certain reductions in compensation of employees. These reductions could be avoided in certain circumstances if employees were rehired or compensation levels restored by June 30, 2020. This date has been extended to December 31, 2020.

Under prior SBA guidance a reduction in FTEs would not be counted against a borrower in seeking forgiveness if the borrower offered to rehire a laid off employee and the employee declined. This has been modified and embodied in the Flexibility Act so that the forgivable amount will be determined without regard to a reduction in FTEs if the borrower is unable to rehire former employees or similarly qualified employees, or is unable to return to the same level of business activity due to compliance with federal requirements or guidance related to COVID-19.

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