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Flexibility for Small Businesses Under the Paycheck Protection Program Flexibility Act

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By **David M. Morosan**

The Paycheck Protection Program Flexibility Act of 2020 (the “Flexibility Act”), as recently passed by Congress, is expected to be signed by the President and to become law effective immediately. The Flexibility Act includes significant changes to Paycheck Protection Program Loans (“PPP Loans”) that will provide small businesses with additional time and increased flexibility regarding the use of PPP Loan proceeds.

Extension of the Covered Period

The Paycheck Protection Program originally established an eight-week covered period for borrowers to incur and pay payroll and approved non-payroll costs that were then eligible for loan forgiveness. The Flexibility Act allows borrowers to extend the covered period to the earlier of 24 weeks after the date on which a PPP Loan is originated, or December 31, 2020. Accordingly, borrowers will now have additional time to use PPP Loan proceeds.

Reduction in the Percentage of Loan Proceeds Required to be Spent on Payroll Costs

In implementing the Paycheck Protection Program, the SBA issued a regulatory rule providing that payroll costs must account for 75% or more of the forgiveness eligible costs paid with PPP Loan proceeds. Under the Flexibility Act this rule has been relaxed to provide that payroll costs must only account for 60% or more of the forgiveness eligible costs, which will allow borrowers to use more PPP Loan proceeds on costs such as rent, transportation, utility costs, and mortgage interest. However, the Flexibility Act also appears to change the effect of the rule. Failure to comply with the prior 75% threshold resulted in a corresponding reduction of forgiven non-payroll costs. In contrast, failure to

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comply with the new 60% threshold appears to result in total loss of eligibility for loan forgiveness. This may be an unintended consequence created in the drafting of the Flexibility Act and may be clarified, or eliminated, in subsequent rulemaking by the Treasury Department and the SBA.

Extended Maturity Date for New Loans

The Flexibility Act extends the maturity date of PPP Loans to five years, but only for new loans that are originated after the passage of the Flexibility Act. For existing loans, the Flexibility Act provides that lenders and borrowers may mutually agree to modify the maturity date to five years.

Extended Deferral Period and a New Forgiveness Deadline

The Paycheck Protection Program originally provided for principal and interest payments on PPP loans to be deferred for six months after loan origination. Under the Flexibility Act, the deferral period has been extended until the date that the lender receives the borrower's forgiveness amount from the SBA. As part of this extension, however, the Flexibility Act created a deadline for forgiveness applications to be submitted. If a borrower fails to apply for forgiveness within ten months after the last day of either the eight-week or twenty-four-week covered period, as applicable, principal and interest payments will commence ten months after the last day of such covered period.

Extended Safe Harbor for Eliminating Reductions in Employee Count and Wages

For borrowers whose businesses are not yet fully operational, or cannot be fully staffed due to government orders, the Flexibility Act provides relief by extending the safe harbor deadline by which borrowers must eliminate reductions in employee count, and/or wage reductions in excess of 25%, until December 31, 2020.

New Exemptions from Reduction in Loan Forgiveness

The Flexibility Act creates two new exemptions that allow borrowers to avoid being penalized on loan forgiveness due to a failure to restore reductions in employee counts. The exemptions provide that loan forgiveness will be determined without regard to a proportional reduction in the number of full-time equivalent employees if a borrower, in good faith (i) is able to document an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020, and an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or (ii) is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary

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of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending 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.

Delayed Payment of Employer Payroll Taxes

Lastly, the Flexibility Act reverses a prior IRS position related to payroll tax deferrals by borrowers and allows borrowers to continue to defer payments of their share of social security taxes even after their PPP Loan is forgiven. Previously a borrower could defer its share of social security taxes accruing through the end of 2020, paying half of the deferred amount by December 31, 2021, and remainder by December 31, 2022, but could not defer taxes accruing after its PPP Loan was forgiven. The Flexibility Act reverse this position and allows a borrower to continue its tax deferral after forgiveness of its PPP Loan.

It is expected that the SBA and the Treasury Department will continue to issue further guidance and rulemaking on the Paycheck Protection Program. We will continue to provide updates as details become available.

Please contact us with any questions.

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