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CLIENT ALERT

THE PAYCHECK PROTECTION PROGRAM FLEXIBILITY ACT AND THE JUNE 11, 2020 INTERIM FINAL RULE

Since the Paycheck Protection Program ("PPP") was first introduced on March 27, 2020 through the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), the Small Business Administration and U.S. Department of Treasury (the "Treasury") have issued a series of interim final rules and other guidance clarifying the program and addressing borrower and lender concerns. The latest update to the program comes in the form of The Paycheck Protection Program Flexibility Act of 2020 (the "Flexibility Act"), signed into law on June 5, 2020, and the Interim Final Rule issued by the Small Business Administration (the "SBA") on June 11, 2020 (the "June 11, 2020 Interim Final Rule"). Borrowers will be relieved to learn that the Flexibility Act and the June 11, 2020 Interim Final Rule have relaxed a number of requirements relating to the program, making it easier for PPP borrowers to obtain loan forgiveness.

Extended loan forgiveness covered period

The "covered period" for the loan forgiveness sections of the CARES Act (now referred to as the "loan forgiveness covered period") has been extended from an 8-week to a 24-week period from the date of loan origination, with an outside date of December 31, 2020. The extension of this period provides borrowers with more time to apply their PPP loan proceeds towards eligible payroll costs and other eligible expenditures that will entitle them to loan forgiveness. Note that the Flexibility Act permits borrowers whose loans were made before June 5, 2020, to retain the 8-week loan forgiveness covered period, a choice that some borrowers might make to improve the FTE calculation discussed below.

Minimum payroll costs

The Flexibility Act also relaxes the requirement that borrowers apply at least 75% of their PPP loan proceeds to payroll costs. Under the Flexibility Act, only 60% of PPP loan proceeds must be applied toward eligible payroll costs, with as much as 40% of PPP loan proceeds to be applied toward nonpayroll costs. Moreover, the June 11, 2020 Interim Final Rule specifies that a failure to meet the 60% standard will not preclude a borrower from PPP loan forgiveness, but will merely effect a proportionate reduction in PPP loan forgiveness available to the borrower.

The FTE calculation and wage calculations

The CARES Act includes two limitations on loan forgiveness that have been relaxed by the Flexibility Act: the FTE calculation; and the wage calculation. In each case, the Flexibility Act impacts the manner in which the calculations are made. The Flexibility Act relaxes the FTE calculation and wage calculation limitations imposed by the CARES Act through expansion of an existing exemption provision, and through two new exemptions.

The FTE calculation

The CARES Act provides that loan forgiveness will be reduced to the extent that the average number of FTEs who are employed per month during the loan forgiveness covered period is reduced from one of two base periods chosen by the borrower. As discussed above, the loan forgiveness covered period under the Flexibility Act is now 24 weeks, unless the borrower elects to retain the 8-week loan forgiveness covered period.

The wage calculation

The CARES Act provides that loan forgiveness will be reduced to the extent that any employee's total salary or wages during the loan forgiveness covered period is reduced by more than 25% of the total salary or wages during the most recent full quarter in which the employee was employed prior to the loan forgiveness covered period, or January 1, 2020 – March 31, 2020 pursuant to an interim final rule on loan forgiveness issued by the SBA and the Treasury on May 22, 2020, and published in the Federal Register on June 1, 2020 (the "June 1, 2020 Interim Final Rule"). In order to avoid double-counting, the June 1, 2020 Interim Final Rule provides that the wage calculation limitation only applies to the portion of decline in employee salary and wages not attributable to the FTE calculation limitation. The expansion of the loan forgiveness period to 24 weeks should make it easier for PPP borrowers to avoid a reduction of loan forgiveness on account of the wage calculation.

Exemption provisions

The CARES Act includes an exemption from the reduction of loan forgiveness as a result of the FTE and wage calculations, to the extent that the PPP borrower eliminated a reduction in FTEs, and/or a reduction in the salary or wages of employees, in each case if the reduction took place between February 15, 2020 and April 26, 2020 and if the number of FTEs and/or salary and wages were restored by June 30, 2020. The Flexibility Act relaxes this exemption by extending the date by which the number of FTEs or salary and wages must be restored from June 30, 2020 to December 31, 2020.

The Flexibility Act also creates two new exemptions to the limitation on forgiveness that might result from the FTE calculation and the wage calculation:

- The first new exemption applies if the PPP borrower in good faith is able to document both (i) an inability to rehire individuals who were employees on February 15, 2020, and

(ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.

- The second new exemption applies if the PPP borrower 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 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 of sanitation or social distancing, or any other worker or customer safety requirement related to COVID-19.

The June 11, 2020 Interim Final Rule does not discuss the new exemptions. We assume that further guidance on the new exemptions will be forthcoming.

Extension of the Payment Deferral Period

The Flexibility Act and the June 11, 2020 Interim Final Rule also extend the period of time during which payment of principal and interest may be deferred by a borrower whose PPP loan has not been forgiven in full. The CARES Act had initially made the deferral period six months from the date of disbursement. Under the Flexibility Act and the June 11, 2020 Interim Final Rule, as long as a PPP borrower submits a loan forgiveness application within 10 months after the end of the loan forgiveness covered period, the borrower will not have to make any payments of principal or interest on the loan before the date on which the SBA remits the loan forgiveness amount on the PPP loan to the PPP lender (or notifies the lender that no forgiveness is allowed). As discussed above, the loan forgiveness covered period is 24 weeks, unless the borrower whose loan was made before June 5, 2020 elects an 8-week loan forgiveness covered period. A borrower who does not submit a forgiveness application within 10 months after the end of the loan forgiveness covered period must begin paying principal and interest after that period. Note that interest begins to accrue during the deferral period.

If you have any questions about the Flexibility Act, the June 11, 2020 Interim Final Rule, or PPP loans, please contact Attorneys Elka Sachs, esachs@kb-law.com, or Anthony L. Leccese, ALeccese@kb-law.com.