

**MEMORANDUM**

DATE: June 5, 2020

RE: Amendments to PPP Loan Program

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Congress has passed, and the President has signed, the Paycheck Protection Program Flexibility Act, which makes several amendments to the CARES Act providing greater flexibility to borrowers with PPP loans. The highlights are below:

**Program Extension.** The loan program has been extended so that PPP loans will be available through December 31, 2020 (subject to available appropriations, of course).

**Longer Covered Period for Loan Forgiveness.** The “covered period” for loan forgiveness was originally eight weeks, so that loan proceeds spent on permissible costs during the eight-week period (i.e., 56 days) after loan funding were eligible for forgiveness. The covered period still starts on the date of loan funding, but now ends on the earlier of (a) 24 weeks (168 days) after loan funding, or (b) December 31, 2020. However, any current borrower may still elect to use the eight-week period, if desired.

This means that any borrower with a loan funded after July 17, 2020 will have less than 24 weeks to spend the proceeds for forgiveness purposes. We expect that the 24-week period will give most borrowers enough time to fully expend their PPP loans.

**Lower Percentage Requirement for Payroll Costs.** A borrower must now use at least 60% of loan proceeds for payroll costs, which is less than the 75% previously required. However, the Flexibility Act appears to make forgiveness contingent on meeting the 60% requirement.

**Changes regarding FTE Reductions.** Under the original CARES Act, a borrower’s loan forgiveness may be reduced by certain reductions in FTE employees or wages, comparing the covered period with certain measuring periods. However, a reduction in loan forgiveness would be eliminated if the borrower restores FTEs or wages by June 30, 2020. The Flexibility Act changes this provision in two ways:

- First, borrowers now have until December 31, 2020 to restore FTE or wage reductions.
- Second, FTE reductions between February 15-December 31, 2020 do not count against loan forgiveness if the borrower can satisfy one of two tests: (1) the borrower can document in good faith that (a) it has been unable to rehire persons who were employees on February 15, 2020, and (b) it has been unable to hire similarly qualified employees for unfilled

positions on or before December 31, 2020; or (2) the borrower can document in good faith an inability to return to the same level of business activity it had before February 15, 2020 due to compliance with HHS, CDC, or OSHA requirements or guidance from March 1-December 31, 2020 related to COVID safety. We hope that the SBA will give us additional guidance on these requirements and the necessary documentation.

**Later Start Date for Repayment.** Under the original CARES Act, repayment of a PPP loan did not start for six months. Now, repayment does not begin until the forgiveness amount is remitted to the lender, to ensure the borrower is paying only the portion of the loan that was not forgiven. If a borrower does not apply for loan forgiveness within ten months after expiration of the covered period, repayment begins at the ten-month mark.

**Longer Maturity Date for New Loans.** New loans will have a minimum five-year maturity date. However, this does not apply retroactively to existing loans, which still have a two-year maturity date. We are not sure if a lender and borrower could agree to extend current PPP loans to five years.

**Payroll Tax Deferral.** The original CARES Act permitted employers to defer payment of payroll taxes for two years, with half due at the end of 2021 and half due at the end of 2022. However, payroll tax deferral was not available if an employer received any PPP loan forgiveness. That exception has been eliminated, so all employers may now defer payment of payroll taxes. Please bear in mind that under normal tax rules, a “responsible party” may be personally liable for willful failure to pay payroll taxes (except certain third parties that were exempted by the CARES Act), so be careful if you choose to pay other liabilities before paying payroll taxes.

We expect the SBA to issue yet more rules interpreting the Flexibility Act and to make appropriate changes to its previous rules. Remember, at this time, any previous rules that weren’t superseded by the new Act remain in effect – for example, the cap on partner or owner-employee payroll costs.

For more information, please contact Katherine Moyer at [kmoyer@hershnerhunter.com](mailto:kmoyer@hershnerhunter.com) or Pablo Valentine at [pvalentine@hershnerhunter.com](mailto:pvalentine@hershnerhunter.com).

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