Insights

PPP Extended Life and Expanded Flexibility [Updated June 9, 2020]

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The Paycheck Protection Program received extended life and expanded flexibility, when on June 5, 2020, President Trump signed the Paycheck Protection Program Flexibility Act of 2020 (the “Flexibility Act”). The Department of the Treasury and the Small Business Administration also issued a joint statement on June 8, 2020, that clarified an issue regarding loan forgiveness and stating that the SBA in consultation with the Treasury, will issue rules and guidance ‘soon’ about implementation of the Flexibility Act, including modified borrower forgiveness and loan applications. As additional guidance comes out, we will continue to provide additional updates.

The flurry to apply for and obtain funds under the PPP started in late March when the CARES Act was enacted and continues even now. As is well known, the PPP authorized $659 billion of loans for small businesses to be disbursed and administered under the Small Business Administration. When the first $349 billion was fully allocated within weeks, Congress approved the second tranche of $310 billion. As of the date of this Alert, approximately $138 billion remains available based on the latest reports.

The PPP has been subjected to significant criticism around issues of eligibility and terms of use in order to qualify for the loan forgiveness component – a key attraction for borrowers struggling to survive the COVID pandemic. Congress responded at first by increasing the amount available under the PPP. Additionally, the Small Business Administration has regularly issued guidance through its rulemaking process and issuing Frequently Asked Questions to help with an understanding of important issues for the PPP. Click **here** for our prior alerts on key issues that have been addressed.

The Flexibility Act addresses several (but not all) significant issues that had not been resolved by that prior guidance. The key changes are the following:

- *Extension of Availability*. Funds under the PPP will now be available until December 31, 2020. The initial period over which application for a PPP loan could be made would have expired June 30, 2020. The policy supporting this extension recognizes the continuing impact of COVID on businesses who are likely to experience negative impact for the foreseeable future.

- *Maximum Period for Use of PPP Funds for Forgiveness*. Borrowers who received PPP funds prior to the date of enactment of the Flexibility Act may now choose to extend the covered period (i.e. the period over which the PPP funds need to be expended to be eligible for loan forgiveness) to 24 weeks or keep the covered period at 8 weeks after receipt of the proceeds to expend PPP funds for permitted purposes.

Borrowers who receive PPP funds after the date of enactment of the Flexibility Act will now have a covered period of 24 weeks, with an outside date of December 31, 2020. The initial 8 week covered period had been set to match the maximum amount that could be borrowed to cover 8 weeks of payroll. However, the COVID circumstances made this impractical for many businesses, as the 'shut down' orders from state and local governments made a return to full activities unworkable. Many business trade groups and others pushed for an extension of this time frame to better accommodate the return to work timeframes.

- *Flexibility for Employment Reduction*. The Flexibility Act removes a key aspect of determining the amount of reduction of the forgiveness available. Under the initial PPP terms, reductions in the FTE headcount would result in a proportional reduction in the amount available for forgiveness. Now, a borrower may avoid this reduction (and thus keep a higher level of forgiveness) if the borrower can document its inability to rehire persons who were employed on February 15, 2020 or to hire similarly qualified employees for unfilled positions on or prior to December 31, 2020 and its inability to return to normal operations by December 31, 2020 due to government mandates or guidance regarding safe operations relating to social distancing, sanitation and customer safety due to COVID-19.

- *Adjustments to Use Mix*. Under the Flexibility Act, borrowers must use at least 60% of their PPP funds for payroll costs, thus allowing use of up to 40% for other permitted uses such as rent and utilities. These limits had previously been 75%/25%, respectively. This change responds to the voices of businesses expressing a greater need to cover non-payroll costs for survival, especially when rehiring has been delayed because of delays in re-opening due to continuing 'shut down' orders. While some initial confusion arose about whether the language in the Flexibility Act created a 'forgiveness cliff' that required a borrower to spend at least 60% of its PPP proceeds on payroll costs in order to receive any forgiveness, the Treasury and the SBA announced in their joint statement released on June 8, 2020, that additional guidance is forthcoming clarifying that if a borrower uses less than 60% of the loan proceeds for payroll costs during the covered period, the borrower will continue to be eligible for partial forgiveness. At least 60% of the amount to be forgiven must have been used on payroll costs.

- *Payroll Tax Deferral*. Under the CARES Act, an employer is able to defer payment of the employer's portion of payroll taxes that would otherwise be due from March 27, 2020, until December 31, 2020, so long as the employer paid 50% of the deferred amount by December 31, 2021, and the remainder by December 31, 2022. But, if an employer received a PPP loan that was forgiven, the borrower would not be eligible to defer those payroll taxes. Under the Flexibility Act, if a borrower's loan is forgiven, the borrower is still able to defer and pay its payroll taxes pursuant to the CARES Act.

- *Maturity Extended*. The minimum maturity for the loans has been set at 5 years. The CARES Act had set a maximum of 10 years, and the SBA had set a maturity of 2 years. With this change, any loan that originates after June 5, 2020, and that is not forgiven will now be repayable over 5 years.

- *Deferral Period*. Under the Flexibility Act, the period during which repayment is deferred has been changed to better coordinate with the practical aspects of the PPP. Previously, the deferral was for 6 months after origination. Now, deferral will be provided until the lender receives from the SBA the amount of the loan that has been forgiven. Because the processes for submitting loan applications, processing the applications, and possibly appealing an adverse determination could extend beyond 6 months, this change creates some uncertainty for the borrower as to when repayment will begin.

- *Failure to Apply for Forgiveness*. While it may seem unlikely, some borrowers may choose not to apply for forgiveness. One reason could relate to the guidance provided that the SBA has tied review of a PPP loan to the forgiveness application. If no forgiveness application is submitted within 10 months of the last day of the covered period for the loan (currently, 24 weeks after loan origination with the change from the Flexibility Act), then repayment will begin not earlier than 10 months after such last day.

- *Final Date to Apply for PPP*. In their joint statement, the Treasury and the SBA confirmed that the final day for a PPP loan to be approved will continue to be June 30, 2020.

- *Safe Harbor From Reductions in Loan Forgiveness*. Again, in their joint statement, the Treasury and the SBA has indicated that an additional safe harbor will be forthcoming protecting borrowers from reductions in loan forgiveness based on reductions in full-time equivalent employees, for borrowers who are unable to return to the same level of business activity the business was operating at before February 15, 2020, due to compliance with requirements or guidance issued between March 1, 2020 and December 31, 2020 by the CDC and the Secretary of Health and Human Services, related to worker or customer safety requirements related to COVID-19. Krieg DeVault will provide more information as further guidance comes out on this new safe harbor.

- *What Has Not Changed*. The Flexibility Act did not address many aspects of the PPP, including several that involve some controversy:
  - The permitted uses remain the same, namely payroll costs, rent, utilities and mortgage interest for forgivable amounts, as well as some other debt interest and refinancing of any Economic Injury Disaster Loan. Click **here** and **here** for our Alert on payroll costs and forgiveness issues and **here** for our Alert on the EIDL.
  - Borrowers must still certify, in good faith, to the necessity of the PPP funds after considering other sources of liquidity. The Flexibility Act does not quell the controversy regarding this requirement. Cick **here** for our Alert on this certification requirement.
  - The Flexibility Act did not increase the aggregate funds available under the PPP.
  - The interest rate of 1% per annum has not changed.

Krieg DeVault is committed to helping you and your business during these unprecedented times. With your needs in mind, we have established a **COVID-19 Resource Center** to assist you through this process.

If you have any further questions, comments or concerns, please feel free to contact **Robert A. Greising**, **Corben A. Lee** or a member of our **Business, Acquisitions & Securities team**.