COVID-19 Alert: PPP Flexibility Act

Payroll Protection Program Flexibility Act Passes: Congress Fundamentally Changes PPP Loan Forgiveness Rules

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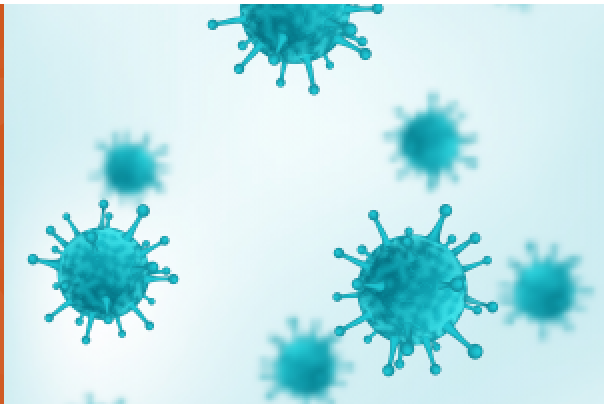

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As authorized by the CARES Act, a recipient of a Paycheck Protection Program ("PPP") loan may be excused from the obligation to repay the loan if certain "Forgiveness Criteria" are met. Under the *original* terms of the CARES Act, such Forgiveness Criteria included:

- The loan recipient uses the loan proceeds to pay certain payroll costs ("Qualified Payroll Costs") and certain mortgage interest, rent, and utility costs ("Qualified Non-Payroll Costs") during the 8-week period following the distribution of the loan (the "Forgiveness Period");
- The loan recipient uses no more than 25% of the loan for Qualified Non-Payroll Costs;
- The loan recipient maintains employee wage levels and headcount during the Forgiveness Period; and
- If the loan recipient reduces wages or employee headcounts during the Forgiveness Period, the forgiveness rate of the PPP loan is proportionally reduced (the "Forgiveness Reduction Rules"), *unless* the loan recipient restores wage and headcount levels by June 30, 2020 (the "Safe Harbor").

Congress has now acted to change those rules. On June 3, 2020, the Senate passed, by unanimous consent, the *Payroll Protection Program Flexibility Act* (the "Act").

The Act fundamentally changes PPP Forgiveness Criteria, easing certain forgiveness requirements to the favor of PPP loan recipients. Specifically:

- **Forgiveness Period Extended:** The Act extends the Forgiveness Period of the PPP loan from 8 weeks to the earlier of 24 weeks or December 31, 2020. This extension provides PPP loan recipients with additional time to allocate PPP loan proceeds to Qualified Payroll and Non-Payroll Costs. *(A loan recipient that received a PPP loan before passage of the Act may elect to continue using the 8-week Forgiveness Period, and apply for forgiveness at the end of that 8-week period.)*
- **The "25% Rule" Relaxed:** The Act permits loan recipients to allocate up to 40% of loan proceeds to Qualified Non-Payroll Costs, as opposed to the 25% limit imposed by prior Treasury Department regulations.
- **The Safe Harbor Date Extended:** The Act exempts a loan recipient from the Forgiveness Reduction Rules if the loan recipient restores previously reduced wages and employee

headcount levels by December 31, 2020, replacing the June 30, 2020 Safe Harbor date established in the CARES Act.

- **Additional "Safe Harbors" Established:** The Act provides loan recipients with additional safe harbors from the Forgiveness Reduction Rules. Under the Act, a loan recipient will not be penalized for a reduction in employee headcount if the loan recipient is able to document in good faith that, for the period of February 15 to December 31, 2020, the loan recipient was unable to:

  – rehire employees who had been employed on February 15, 2020, or hire similarly qualified employees for unfilled positions by December 31, 2020; or

  – return to the same level of business activity at which the loan recipient was operating before February 15, 2020, due to compliance with federal requirements or guidance relating to standards of sanitation, social distancing, or other worker or customer safety requirements related to COVID-19.

In addition to the changes to the forgiveness elements of the PPP, the Act also provides for:

- **An extension of the Payroll Deferral Program:** The Act permits PPP loan recipients to defer FICA costs up to December 31, 2020.

- **PPP Loan Term Extended:** The Act extends the repayment term of any portions of PPP loan proceeds that are not forgiven from 2 years to 5 years.

- **Repayment Commencement Date Extended:** The Act eliminates the six-month deferral of payments due under PPP loans, and replaces it with deferral until the date on which the amount of loan forgiveness is remitted to the lender. If a loan recipient fails to apply for loan forgiveness within 10 months after the last day of the covered period for PPP loan forgiveness, the loan recipient must begin to make payments of principal, interest, and fees on its PPP loan.

The Act has already been approved by the House of Representatives, and the President is expected to sign the Act into law in the coming days.

Morse continues to review the evolving regulatory landscape related to PPP loans and is focused on assisting our clients through these unprecedented and challenging times. Please contact the Firm should you have questions concerning this subject, or any other COVID-19 response matters.

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