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Client Alert: Paycheck Protection Program Flexibility Act

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On June 5, 2020, the Paycheck Protection Program (PPP) Flexibility Act became law. This Act amends the Small Business and CARES Acts to provide additional flexibility to recipients of PPP loans in achieving forgiveness of the loan and other benefits. Congress adopted the following provisions:

- Previously, to receive loan forgiveness, the PPP loan recipient was required to use at least 75 percent of the PPP loan proceeds for payroll costs. If the loan recipient used a smaller percentage, no matter what the percentage was, those proceeds used for payroll costs were forgivable (assuming other requirements were met). Congress lowered that percentage to 60 percent, but under the PPP Flexibility Act, the entire loan will not qualify for forgiveness if the PPP loan recipient uses less than 60 percent of the proceeds for payroll costs. This “cliff” may be remedied by regulatory guidance.
- The “Covered Period” of the PPP loan is extended until the earlier of 24 weeks after the origination of the recipient’s PPP loan or December 31, 2020. Previously, the PPP loan recipient had eight weeks to use the proceeds for the intended purposes and to qualify for forgiveness of the loan. A PPP loan recipient that received a loan prior to the date of this Act may elect to use the shorter eight-week covered period.
- Congress added two provisions exempting the PPP loan recipient from the requirements for loan forgiveness related to restoring its payroll and rehiring its employees if:
 - The loan recipient is able to document that it is unable to return to the same level of business prior to the recipients operations before February 15, 2020, due to compliance with federal requirements or guidance from Department of Health and Human Services (DHHS), Centers for Disease Control and Prevention (CDC), or Occupational Safety and Health Administration (OSHA) issued between March 1, 2020 and December 31, 2020, related to maintenance of standards for sanitation, social distancing, or other worker or customer safety requirements related to COVID-19.
 - The loan recipient is able to document that it was unable to rehire its former employees and is unable to hire similarly qualified employees for the unfilled positions.
- The PPP loan maturity date was extended to five years from the original two years. PPP loan recipients now have up to five years to repay the PPP loan.

- PPP loan repayment was deferred for a period of six months to one year under the CARES Act. The deferral period for repayment of the PPP loan was revised to end on the date on which the amount of the forgiveness is determined with respect to the PPP loan recipient's PPP loan, unless the recipient fails to apply for loan forgiveness within 10 months of the last day of the recipient's covered period, in which case the deferral period is 10 months from the last day of the covered period.
- Congress also provided that any PPP loan recipient may defer payroll taxes through December 31, 2020, even if the loan recipient does not qualify for loan forgiveness.