June 4, 2020

Congress Passes Amendment to Paycheck Protection Program

On June 3, 2020, the Senate unanimously passed H.R. 7010, also known as the Paycheck Protection Program Flexibility Act of 2020 (the "Act"), which amends certain provisions of the Paycheck Protection Program ("PPP") established under the CARES Act. The bill will now be sent to President Trump for signing. The relevant provisions of the Act are as follows:

1. Extension of Deadline to Use Proceeds: The "covered period" for which borrowers may use the loan proceeds and still be eligible for forgiveness was increased from eight weeks after loan origination to 24 weeks after loan origination. Borrowers who have received loans prior to the enactment of the Act may elect the shorter eight-week covered period.

2. Increased Percentage of Non-Payroll Costs Eligible for Forgiveness: Borrowers can now use up to 40% of their PPP loan proceeds on eligible non-payroll expenses and still be eligible for full loan forgiveness. At least 60% of the loan proceeds must still be used on payroll costs, down from the 75% provided for in the CARES Act. The Act's passage in the Senate was delayed, in part, because of a drafting issue in the text that permits the reading that use of less than 60% of loan proceeds for payroll costs would disqualify a borrower from any forgiveness. We expect clarification through letters expressing Congressional intent as well as rulemaking from the SBA to clarify this point. The Act does not modify the categories of eligible non-payroll expenses – i.e., mortgage interest, interest on pre-existing debt, rent and utilities.

3. Extension of Loan Deferral Period: Extends the payment deferral period on PPP loans to the date on which the applicable borrower receives word from the SBA on its application for loan forgiveness. Deferral also ends for any borrower that does not apply for forgiveness within 10 months after the covered period under its PPP loan.

4. Extension of Safe Harbor for Rehiring Employees: The FTE Reduction Safe Harbor, which grants borrowers an exemption from the reduction in forgiveness amount based on a reduction in full-time equivalent ("FTE") employees if rehired by June 30, 2020, has been extended to allow borrowers to be eligible for the safe harbor if the reductions in FTE employee levels are restored by December 31, 2020.

5. Exemption for Inability to Rehire Employees: Establishes a new exemption to a reduction in loan forgiveness for borrowers that have a reduction of full-time equivalent employees between March 1, 2020 and December 31, 2020 if the borrower is unable to rehire individuals who were employees on February 15, 2020 and is unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020. This new provision is broader than the exemption in the current SBA loan forgiveness application (which only applies where the borrower made a good-faith, written offer to rehire former employees). However, the new exemption leaves open the question as to whether borrowers will still be required to inform state unemployment insurance offices of rejected employment offers in order to obtain forgiveness (which is currently required under the SBA rules).

6. Exemption for Inability to Return to Same Level of Business Activity: Establishes a new exemption to a reduction in loan forgiveness for borrowers that have a reduction of full-time equivalent employees between March 1, 2020 and

December 31, 2020 if the borrower, in good faith, 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 for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19.

7. Payroll Tax Deferrals: Allows PPP loan recipients who have had the loan forgiven to defer payroll tax payments under Section 2302 of the CARES Act.

8. Extension of Maturity Date for New Loans: All loans made after the date of the enactment of the Act will have a minimum maturity of five years; the Act itself does not affect the maturity of outstanding loans. However, the Act permits lenders and borrowers to mutually amend the maturity terms of a covered loan made prior to the enactment of the Act to extend maturity in accordance with the Act.