Hughes Hubbard & Reed

The Paycheck Protection Program Flexibility Act of 2020

Client Advisories

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June 5, 2020 - The Paycheck Protection Program Flexibility Act of 2020 (PPPFA), which President Trump signed into law today, makes important modifications to the recently-enacted CARES Act Paycheck Protection Program (PPP). The modifications make it easier for borrowers to obtain forgiveness of their PPP loans and provide more favorable repayment terms.

PPP Loan Term Extended to Five Years

Under the CARES Act and the Small Business Administration's implementing regulations, the term of any unforgiven portion of a PPP loan has been two years from origination. The PPPFA extends this term to five years. This extended repayment period applies only to PPP loans made after passage of the PPPFA, but the PPPFA also allows lenders and borrowers to renegotiate the maturity of any preexisting PPP loan in conformance with this extension.

PPP Loan Repayment Deferral Period Extended

The CARES Act required lenders to defer the payment of PPP loan principal, interest and fees for the first six months of the loan. The PPPFA extends this mandatory deferral period to the date on which the SBA remits to the lender the amount of the loan that is forgiven, a period which is expected to be significantly longer in most cases.

"Covered Period" May Be Extended to 24 Months or the End of 2020

The CARES Act established an eight-week "covered period" during which a PPP borrower can incur costs eligible for forgiveness. Those costs include the costs of employee wages and salaries up to an annualized $100,000 per employee. The PPPFA gives a borrower the option to expand the "covered period" to 24 weeks from the date of origination, or to December 31, 2020, whichever is earlier. Accordingly, it is expected that wage and salary costs of $46,153 per-employee will be forgivable for a 24-week covered period. The PPPFA does not spell this out, so look to forthcoming guidance from the SBA confirming this.

Cap on Non-Payroll Expense Forgiveness Raised to 40%

Under the CARES Act, the portion of a PPP loan used for payroll costs, mortgage interest, rent and utility expenses is forgivable. SBA regulations have further limited forgiveness of the non-payroll costs (i.e., mortgage interest, rent and utility expenses) to 25% of the total amount forgiven. The PPPFA raises this limit to 40%. But the PPPFA adds an important condition: the borrower will be ineligible for any forgiveness unless the borrower uses at least 60% of the PPP loan for payroll costs (which are broadly defined). Addendum: on June 8, the SBA clarified that despite the PPPFA's literal text, a borrower that uses less than 60% of its PPP loan for payroll costs during the forgiveness "covered period" will be eligible for forgiveness if it meets all other forgiveness criteria. However, the forgiveness amount will be limited such that at least 60 percent of the loan forgiveness amount was used for payroll costs.

FTE and Salary Restoration Deadline Extended to End of 2020

Under the CARES Act, the amount of a PPP loan that has been eligible for forgiveness is reduced in proportion to the loss of full-time equivalent employees during the "covered period" relative to one of several base periods. The eligible amount is also reduced if the average annual salary or hourly wage of certain employees is reduced by more than 25% during the coverage period relative to the first quarter of 2020. However, the borrower could restore any forgiveness reduction by rehiring employees and/or restoring salaries and wages to their February 15, 2020 levels by June 30, 2020. The PPPFA extends this deadline to December 31, 2020.

Forgiveness Is Available If Lost Employees Cannot Be Rehired

The PPPFA preserves loan forgiveness for a borrower who loses employees if the borrower can document:

- an inability to rehire individuals who were employees on February 15, 2020;
- an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or
- an inability to return to the level of business activity that existed before February 15, 2020, due to compliance with requirements or guidance established between March 1 and December 31, 2020 by the Department of Health and Human Services, the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration relating to COVID–19 sanitation, social distancing, or worker or customer safety.

PPP Borrowers Can Obtain Forgiveness and Still Defer 2020 Social Security Tax Payments

Under the CARES Act, an employer can defer its share of 2020 social security taxes, with 50% due at the end of 2021 an 50% due at the end of 2022. But this deferral has not been available if the employer obtains forgiveness of a PPP loan. The PPPFA allows a PPP borrower that obtains forgiveness to get the benefit of that deferral if the PPP loan is forgiven before December 31, 2020.

The text of the PPPFA is available at https://www.congress.gov/116/bills/hr7010/BILLS-116hr7010eh.pdf.

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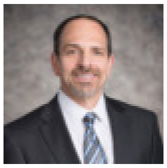

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