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MEMORANDUM

To: Powers Clients and Friends

From: Legislative Practice Group

Date: June 8, 2020

Re: Paycheck Protection Program Update

On June 5, 2020, President Trump signed into law H.R. 7010, the Paycheck Protection Program Flexibility Act of 2020, to assist borrowers seeking loans administered by the U.S. Small Business Administration (SBA) under the Paycheck Protection Program (PPP). The PPP was enacted on March 27, 2020, as part of the first bill passed to address the COVID-19 pandemic: The Coronavirus Aid, Relief, and Economic Security (CARES) Act (to read Powers' memos on the CARES Act, click here). Intended to address economic hardship caused by the outbreak, the PPP was established to provide loans that would offer a direct incentive for small businesses to keep workers on the payroll. The loans were to be forgiven by the SBA if the employees of primarily small businesses of less than 500 workers were kept on a company or 501(c)(3) non-profit payroll for eight weeks, so long as the money was used for payroll, rent, mortgage interest, and/or utilities (with at least 75% of the loan used solely for payroll costs).

The initial appropriation of $349 billion provided in the CARES Act was quickly exhausted, and funding for the program was thereafter replenished by the Paycheck Protection Program and Health Care Enhancement Act, signed into law on April 24 (to read Powers' memo on the PPP and Health Care Enhancement Act, click here). That legislation increased the total lending authority of the PPP to $659 billion, an increase of $310 billion. It also contained lending "set asides" for smaller lenders.

Less than two months later, faced with continued economic disruption marked by near historic levels of unemployment not seen since the Great Depression, Congress passed the relatively succinct, three-page Paycheck Protection Program Flexibility Act of 2020. The new law, introduced by Dean Phillips (D-MN) and Chip Roy (R-TX), provides no additional funding but modifies the PPP to make use of loans under the program more flexible. The bill passed the U.S. House of Representatives on May 28, 2020 by a vote of 417 to 1, with Thomas Massie (R-KY) recorded as the single vote in opposition. The same bill then passed the Senate by unanimous consent without amendment six days later. Overall, the bill modifies pre-existing provisions of the CARES Act to give borrowers more time to have their loans forgiven, or to pay back the loans if they are not forgiven. It also reduces the amount of the loan that must be spent on payroll expenses in order to be forgiven and defers payroll taxes.

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Specifically, the new law makes the following changes to prior law:

- ***Extended Time to Use Loan Funds***: Gives borrowers twenty-four weeks, rather than eight, following the origination of their loan in which to use the funds received to qualify for loan forgiveness (though more specifically, the law extends the new "covered period" for loan forgiveness to either 24 weeks from loan origination or December 31, 2020, whichever is earlier).[1] However, the new law also allows borrowers who received their loans prior to the enactment of this legislation to continue using the eight-week covered period if they choose to do so;

- ***Increased Use of Funds for Non-Payroll Costs***: Reduces the amount of the loan required to be used for payroll costs in order for the borrower to be eligible for loan forgiveness from 75 percent to 60 percent (with the remaining 40 percent available to pay rent, mortgage interest, and utilities);

- ***Extension of Loan Repayment Terms***: Changes the period in which new loans obtained but not forgiven must be repaid from two to five years, though the new law states that nothing in its provisions, the CARES Act, or any other applicable law "shall be construed to prohibit lenders and borrowers from mutually agreeing to modify the maturity terms of a covered loan" on their own;

- ***Flexibility in Retaining Workforce***: Exempts borrowers from having their loan forgiveness reduced if they are unable to retain all of their full-time equivalent (FTE) employees, so long as the eligible recipient or borrower can document in good faith that, for the period of February 15 to December 31, 2020, they were unable to rehire individuals who had been employed by them on February 15, 2020 and they were unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020. The same exemption also applies if an eligible recipient or borrower can document their inability to return to the same level of business activity at which they were operating before February 15, 2020, due to compliance with federal requirements or guidance issued by the U.S. Department of Health and Human Services (HHS), the Centers for Disease Control and Prevention (CDC), or the Occupational Safety and Health Administration (OSHA) between March 1 and December 31, 2020. Such federal

[1] Senators Ron Johnson (R-WI), Mike Lee (R-UT), and Marco Rubio (R-FL) expressed concern that the new law's extension of the "covered period" to December 31, 2020 for certain purposes nonetheless should not permit the SBA to accept or approve PPP applications *after* June 30, 2020. To avoid a delay in enactment of the bill, Senate Majority Leader Mitch McConnell (R-KY) on June 3, 2020, agreed to enter a letter into the *Congressional Record* of the Senate's consideration of the bill to memorialize congressional intent that, despite providing for an extension of the time in which borrowers can receive loan forgiveness, the new law "should not be construed so as to permit the SBA to continue accepting applications for loans after June 30, 2020." The letter was signed by six members of both chambers, including Sens. Johnson, Lee, Rubio, and Ben Cardin (D-MD). The House authors of the PPP Flexibility Act, Reps. Dean Phillips and Chip Roy, also signed the letter.

requirements or guidance are described as relating to “the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19;”

- ***Extension of Time to Repay Loans***: Eliminates the six-month deferral of loan payments (including the payment of principal, interest, and fees) due under the PPP in the CARES Act, and replaces it with deferral “until the date on which the amount of loan forgiveness . . . is remitted to the lender.” The new law also includes an additional rule of construction, which states that, “[I]f an eligible recipient [borrower] fails to apply for forgiveness of a covered loan within 10 months after the last day of the covered period,” the borrower must then start to make payments on its PPP loan at that time. This means that borrowers who do not apply for forgiveness will have at least 10 months after the program’s expiration to begin making payments; and

- ***Deferral of Payroll Taxes***: Permits businesses that obtain loan forgiveness under the program to defer payroll taxes by eliminating a provision enacted in the CARES Act, which had prohibited the deferral of payroll taxes incurred between March 27, 2020 and December 31, 2020.

For further questions regarding the Payment Protection Program or any other COVID-19 related issues, please contact any Powers professionals with whom you normally work. Contact information for all professionals and practice groups can be found at https://www.powerslaw.com/professionals/.

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