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UPDATE:
CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT
PAYCHECK PROTECTION PROGRAM

On Friday, June 5th, 2020, President Donald J. Trump signed into law the Paycheck Protection Program Flexibility Act (the "PPPFA") (H.R. 7010). The PPPFA amends certain provisions of the Paycheck Protection Program (the "Program"), which was a key component of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act").

Except as expressly amended by the PPPFA, the original provisions of the Program (as modified and clarified by subsequent guidance from the Treasury and the Small Business Administration (the "Administration")) continue to apply. The Treasury and the Administration have additionally indicated that the Administration will promptly issue additional rules and guidance, a modified borrower application form, and a modified loan forgiveness application clarifying and implementing the amendments made by the PPPFA.

The following is a summary of the key terms and provisions of the PPPFA:

- Prior to the enactment of the PPPFA, the CARES Act provided that a borrower's "covered period" was the eight week period beginning on the date the borrower received a covered loan under the Program (a "Covered Loan"). The PPPFA has amended the definition of covered period to mean the period of time beginning on the date a borrower receives a Covered Loan and ending on the earlier of (a) the date that is 24 weeks following the date the borrower received the Covered Loan, and (b) December 31, 2020. This extension provides borrowers with significantly more time in which to spend the proceeds of their Covered Loans. However, borrowers that received a Covered Loan prior to the enactment of the PPPFA may elect to maintain their original, eight-week covered period. Borrowers that have spent all or substantially all of their Covered Loan proceeds within their original, eight-week covered period may benefit from electing to retain an eight-week covered period.

- The Administration had previously indicated that, in order to be eligible for forgiveness, at least 75% of Covered Loan proceeds must be spent on "payroll costs" (as defined in the CARES Act and clarified by subsequent Administration guidance and rules). The PPPFA has reduced the percentage that must be spent on payroll costs from 75% to 60%. The PPPFA did not amend or affect the definition of payroll costs. The Treasury and the Administration have subsequently clarified that if a borrower spends less than 60% of its Covered Loan amount on payroll costs, the borrower will still be eligible for partial loan forgiveness (subject to at least 60% of the requested loan forgiveness amount having been spent on payroll costs).

- Prior to the enactment of the PPPFA, the CARES Act provided that a borrower's loan forgiveness amount would be reduced if the borrower's full-time equivalent employee headcount or aggregate employee wages were reduced below certain thresholds. The

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CARES Act also provided that a borrower could prevent a reduction in its loan forgiveness amount if it hired or rehired employees and/or eliminated wage reductions prior to June 30, 2020. The PPPFA has left these loan forgiveness reduction "safe harbors" intact, but has extended the safe harbor deadline by which employees must be hired or rehired and/or wage reductions must be eliminated to December 31, 2020.

- The PPPFA has also provided for two additional safe harbors with respect to loan forgiveness reduction (one of these safe harbors is somewhat redundant of those included in the original loan forgiveness application). A borrower's loan forgiveness amount will not be reduced due to a proportional reduction in the number of full-time equivalent employees if the borrower is able to document in good faith:

    - that the corresponding reduction in the number of full-time equivalent employees was due to the borrower's inability to (a) rehire individuals who were employees of the borrower on February 15, 2020, and (b) hire similarly qualified employees for unfilled positions on or before December 31, 2020; or

    - that the borrower was unable to return to the same level of business activity as the borrower had experienced at or 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 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.

- The CARES Act (as modified by subsequent guidance and rules) provided that interest and principal payments owed on a Covered Loan would be deferred for a period of six months following funding of the Covered Loan. The PPPFA has extended the end of the deferral period to the date on which the Administration remits the borrower's loan forgiveness amount to borrower's lender (or, if the borrower does not apply for loan forgiveness, to ten months after the end of the borrower's covered period).

- The CARES Act (as modified by subsequent guidance and rules) provided that the maturity date for Covered Loans would be two years. The PPPFA has extended the maturity date for Covered Loans to five years but only for Covered Loans that are approved by the Administration on or after June 5, 2020. As such, any Covered Loans approved or funded prior to June 5, 2020 would still retain a two-year maturity date; however, the PPPFA explicitly states that lenders and borrowers may mutually agree to modify the maturity date of a previously approved or funded Covered Loan to be five years.

- The CARES Act permits employers to defer the payment of the employer portion of federal payroll taxes that would otherwise be due from March 27, 2020 through December 31, 2020. Fifty percent of any deferred federal payroll taxes must be paid by December 31, 2021; the remaining 50% must be paid by December 31, 2022. The CARES Act previously provided that once a borrower received a decision from its lender that its Covered Loan was forgiven the borrower could no longer defer its federal payroll taxes. The PPPFA has amended this provision to allow a borrower to continue to defer federal payroll taxes even after it has received a loan forgiveness determination from its lender. Any deferred federal payroll taxes would still need to be repaid by the due dates set forth above.

- Finally, the Treasury and the Administration have reiterated that June 30, 2020 remains the last date on which a Program loan application can be approved.

The full text of the PPPFA can be found at https://www.congress.gov/116/bills/hr7010/BILLS-116hr7010enr.pdf.

The foregoing legislative update is designed to be accurate and authoritative but is not intended to provide and should not be construed as providing legal advice or as creating any attorney-client relationship with the author or Parr Brown Gee & Loveless, P.C. For legal advice regarding the Coronavirus Aid, Relief, and Economic Security Act, you should consult with your legal counsel.