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The Paycheck Protection Program Flexibility Act:
Welcome Improvements and Open Issues

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Legislative and Regulatory Update

On June 5, 2020 (the *"**Enactment Date**"*), the President signed the Paycheck Protection Program Flexibility Act of 2020 (the *"**Flex Act**"*), after the Senate approved the House bill without change.

While the Flex Act makes welcome improvements to the Paycheck Protection Program (*"**PPP**"*), implementing administrative guidance remains necessary.

On June 8, the SBA issued a press release clarifying a key Flex Act provision on loan forgiveness and outlining its initial regulatory priorities (the *"**Press Release**"*).

COVID – 19 Resource Guide

To see the Flex Act and the Press Release, visit our COVID – 19 Resource Guide at:

https://www.olshanlaw.com/blogs-covid-19-legal-resources,federal-and-state-responses-to-covid-19

In addition, our resource guide provides a convenient index of all primary legislative and regulatory sources relating to COVID – 19 (including loan and forgiveness applications) and practical legal advice.

Q1: Does the Flex Act extend the application and approval period for PPP loans.

A1: No. In the Press Release, the SBA declares the application window closed on June 30, 2020. A borrower must apply for *and* receive approval of a PPP loan prior to the June 30 deadline.

Q2: What is the effective date for the Flex Act amendments?

A2: Except for the term extension (as discussed in Q&A-3), the Flex Act amendments apply retroactively to loans originated prior to the Enactment Date. The term extension applies only to new loans "made" on or after the Enactment Date.

Q3: Does the Flex Act extend the maturity date for an unforgiven PPP loan?

A3: Yes. But only for loans made after the Enactment Date, the term is extended from two to five years. The term of a loan originated prior to the Enactment Date (an *"**Existing Loan**"*) remains at two years, unless the borrower and the lender mutually agree to amend the term (as the Flex Act permits).

Q4: Does the Flex Act extend the spending period for forgiveness purposes?

A4: Yes, at the borrower’s option in the case of an Existing Loan.

For forgiveness purposes, the spending period for loan proceeds increases from the original 8 weeks to 24 weeks (capped at December 31, 2020) from the first disbursement date.

A borrower under an Existing Loan can elect to use the original 8-week spending period (instead of the extended 24-week period), which may be advantageous for a borrower that took action based on original 8-week period.

Q5: Is a borrower still required to spend at least 75% of loan proceeds on Payroll Costs?

A5: The Flex Act reduces the percentage of loan proceeds that, as a pre-condition to loan forgiveness, a borrower must spend on Payroll Costs to 60% (down from 75%).

In the Press Release, the SBA clarified that a borrower can still qualify for partial loan forgiveness if the borrower uses less than 60% of the loan proceeds for Payroll Costs, allaying concerns that a payroll spending miss would result in a complete "cliff" loss of loan forgiveness.

Q6: Under the Flex Act, when does a borrower have to start repaying a PPP loan?

A6: If a borrower applies for loan forgiveness within 10 months from the end of the borrower's selected spending period, loan repayment remains deferred until the SBA's final determination on loan forgiveness.

Some have cautioned that an application for loan forgiveness must be made within the 10-month period or not at all. In our view, if a borrower applies for loan forgiveness after the 10-month period, the borrower's PPP loan will go into repayment mode, and the borrower will have to seek reimbursement for any excess loan repayments as part of the loan forgiveness process.

NOTE: Just apply for loan forgiveness within 10 months !

Q7: Does the Flex Act extend the deadline for re-hiring laid-off employees and restoring wage cuts?

A7: Yes.

Under the original provisions of the CARES Act, loan forgiveness is scaled back to reflect lay-offs and wage cuts, unless restored by June 30, 2020.

The Flex Act extends the deadline for re-hiring employees and/or restoring wage cuts from June 30 to December 31, 2020.

Q8: What happens if business conditions prevent a borrower from restoring FTE count?

A8: Under the CARES Act, loan forgiveness is reduced proportionately to reflect any reduction in the borrower's full-time equivalent (FTE) count during the borrower's selected spending period (8 or 24 weeks).

Under the Flex Act, a lost FTE doesn't reduce loan forgiveness, if the borrower in good faith can document either:

1. The borrower is unable to (a) rehire a laid-off employee who was on payroll on 2.15.20, and (b) fill the resulting vacancy with a similarly-qualified employee on or before 12.31.20; or

2. The borrower is unable return to "the same level of business activity the business was operating at before 2.15,20," as a result of compliance with health guidelines issued during 2.15 to 12.31,20 period by a specified federal (not state) agencies.

Q9: Does the FTE relief rule apply to compliance with state and local health restrictions?

A9: No.

Only COVID-related guidelines issued by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention or Occupational Safety and Health Administration) count as valid excuses.

Q10: Does PPP loan forgiveness still result in the loss of payroll tax deferral?

A10: No.

Under the Flex Act, forgiveness of a PPP loan no longer results in the loss of payroll tax deferral under the CARES Act.

OPEN ISSUE #1 – Per Employee Spending Cap

The interaction of the CARES Act and the Flex Act implies that the expansion of the spending period from 8 to 24 weeks raises the per-employee cap on payroll costs from $15,385 (8/52 * $100,000) to $46,155 (24/52 * $100,000).

Given the importance of this cap in determining loan forgiveness, SBA guidance on this point is crucial.

OPEN ISSUE #2 – Loan Documentation

Agreements and other documentation for Existing Loans do not sync with the Flex Act. Unless documentation for an Existing Loan is amended to take into account the Flex Act, a borrower cannot benefit from the Flex Act's improvements and following the Flex Act will put a borrower into default.

NOTE: Call your bank !

OPEN ISSUE #3 –SBA Documentation

All existing SBA documentation is now out-of-date, including the loan forgiveness application. Borrowers should wait to apply for forgiveness until the SBA issues updated forms and additional guidance.

NOTE: Watch the SBA website!

OPEN ISSUE #4 – Tax Consequences

For tax purposes, a modification of an Existing Loan to reflect the Flex Act will likely result in a constructive cancellation and reissue of the Existing Loan, possibly causing the borrower to recognize debt discharge income.

Guidance on this point from the Internal Revenue Service is needed.

For further information please contact:

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