Paycheck Protection Program Flexibility Act

On June 5th, the President signed H.R. 7010 which contains key modifications to the CARES act, specifically the Paycheck Protection Program ("PPP"). Most, if not all, of the changes benefit borrowers, including an extension of time to apply for the loan and an extension of the covered period to spend loan funds. We have summarized the changes contained in the bill, and what it means for current and potential.

Changes to the PPP

Extension of "Covered Period"

- The "covered period" for borrowers to apply for a PPP loan is extended from 6/30/2020 to 12/31/2020.
    a. As of the Treasury's most recent PPP funding report on June 1, there is still over $100 billion of the second round of PPP remaining to fund PPP loans.
- The "covered period" for eligible expenses when applying for loan forgiveness for borrowers is extended from the date of the loan disbursement and the earlier of 24 weeks or 12/31/2020.
    a. Current PPP recipients may elect to use the original 8-week period. If no election is made, it will be extended to 24 weeks.

Updates to Existing Safe-Harbor Provisions

- The safe harbor date to remedy a reduction in full-time-equivalent employees ("FTE") or a greater than 25% salary/wage reduction for employees who make less than $100,000, is extended from 6/30/2020 to 12/31/2020.

New Safe-Harbor Provision – Employee Availability

- A new safe harbor related to "employee availability" is added for borrowers. Loan forgiveness is not reduced due to a reduction in FTEs if the borrower is able to document in good faith that between 2/15/2020 and 12/31/2020:
    a. the borrower is unable to rehire the individuals who were employees on 2/15/2020; and
    b. the borrower was unable to hire similarly qualified employees for those positions by 12/31/2020; or
    c. the borrower is able to document an inability to return to the same level of business activity prior to 2/15/2020 due to compliance requirements issued by certain government officials related to COVID-19.

Payroll Cost Spending Requirement and Increase to Forgivable Non-Payroll Costs

- The Act increases the amount of non-payroll costs that may be forgiven from 25% to 40%, but at least 60% of the forgiveness amount must be for payroll costs.

Loan Terms

- Increases the deferral period of payments from 6 months to the date on which the amount of loan forgiveness determined by the lender has been remitted by the SBA to the lender.
- Includes a deadline to apply for loan forgiveness of 10 months after the last day of the covered period of a borrower's loan.
- Increases the term of the loan from 2 to 5 years for all new loans.
    a. This does not automatically extend the term for existing PPP loans. Borrowers who received a PPP loan prior to the amendment would have to work with their lender to increase the loan term.

Employer Payroll Tax Deferral

- Allows borrowers to defer the payment of employer payroll taxes under Section 2302 of the CARES Act, even if they received a PPP loan. This was previously unavailable for borrowers under the PPP.

What does this mean for me?

New and existing borrowers who have not spent all of the funds are afforded additional flexibility for the use of the funds, as well as an extended time period to exhaust the loan. However, borrowers must be careful of the new requirement that at least 60% of the funds be allocated to payroll costs for the borrower to be eligible for loan forgiveness. Failure to comply with this would mean the entire loan would be unforgiveable.

The changes to the existing safe-harbor provisions and new safe-harbor provision regarding employee availability are favorable changes for borrowers. You have more time to bring employees back and/or restore their wage levels. You are also not penalized if the open positions could not be filled. Finally, there is a catch-all provision where loan forgiveness is not reduced if the borrower is unable to return to pre-pandemic business activity.

If you already have spent the full amount of the loan, you may consider electing to use the original 8-week covered period if you prefer to go ahead and apply for loan forgiveness. There is likely to be an influx of applications later in the year.