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Big changes coming to the Paycheck Protection Program (PPP)

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On Wednesday (June 3, 2020), the United States Senate passed significant amendments to the Paycheck Protection Program ("PPP") aimed at providing borrowers additional flexibility for using loan proceeds as they seek to recover from the effects of the COVID-19 pandemic. The bill, known as the "Paycheck Protection Program Flexibility Act of 2020" (H.R. 7010), was passed by the House of Representatives last week and now heads to the president's desk to be signed into law. The bill's highlights include:

- An extension of the covered period during which loan proceeds can be used from eight weeks to 24 weeks;
- A reduction in the percentage of eligible forgiveness expenses that must be spent on payroll costs from 75% to 60%, allowing borrowers to use up to 40% of their eligible forgiveness expenses on mortgage interest, rent, and utility obligations. Significantly, though, the bill states that borrowers "shall" use up to 60% of the "covered loan amount" on payroll costs, which, if enforced literally by the SBA, would eliminate the possibility of partial forgiveness for those borrowers who do not meet this threshold.
- An extension of the safe harbor period for rehiring full-time equivalent employees ("FTEs") and for undoing salary and wage reductions from June 30 to December 31, 2020. This gives borrowers six additional months to restore employee headcount and to undo cuts previously made to salaries and wages in order to avoid reductions in loan forgiveness.

The bill also provides that if a borrower does not rehire to its prior FTE level, it can still avoid a reduction in loan forgiveness proportionate to any reduction in FTEs if the borrower can establish:

- An inability to rehire individuals who were employees on February 15, 2020, and an inability to rehire similarly qualified employees on or before December 31, 2020; or
- An inability to return to the same level of business activity experienced by the borrower before February 15, 2020, due to compliance with requirements established by HHS, CDC, or OSHA related to the COVID-19 pandemic during the period March 1, 2020, through December 31, 2020.

Finally, the bill eliminates the prohibition on deferment of payroll taxes under CARES Act § 2302 for borrowers who receive loan forgiveness, meaning borrowers can now receive forgiveness and continue to defer 50% of their portion of the FICA tax until December 21, 2021, and the remaining 50% until December 31, 2022.

The bill is expected to be signed by President Trump before the end of the week. The bill includes no new funding for the PPP program, which, as of the latest reports, still has nearly $100 billion left for distribution.

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