<u>Paycheck Protection Program Flexibility Act of 2020, that amends the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)</u>

On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (the "PPP Flexibility Act") was passed into law. The PPP Flexibility Act makes a handful of significant changes to the Paycheck Protection Program ("PPP") that may be impactful for businesses facing challenges in complying with the previously existing rules relating to PPP loan forgiveness. Importantly, unless noted, these changes have retroactive effect to the date of enactment of the CARES Act and, as a result, will apply to all outstanding PPP loans regardless of when originated. The key changes implemented by the PPP Flexibility Act are outlined below.

- <u>Forgiveness Spending Window</u>. Under the PPP Flexibility Act, borrowers can now obtain forgiveness for the amount of the PPP loan proceeds used between the date the loan is disbursed and the earlier of (i) 24 weeks thereafter and (ii) December 31, 2020.
- <u>Change in Limitations on Forgiveness</u>. Previous PPP loan rules and guidance provided that the amount of forgiveness for a PPP loan depended on using 75% of the loan proceeds for payroll costs, and up to 25% could be used for other permitted purposes.

  The PPP Flexibility Act provides that, in order to receive loan forgiveness, a borrower must use at least 60% of the loan proceeds for payroll costs and may use up to 40% for other permitted purposes. While this gives borrowers substantially more flexibility to use proceeds for permitted purposes aside from paying payroll, it also retroactively imposes a new requirement that all borrowers must comply with for any portion of their PPP loan to be forgiven—any borrower that uses less than 60% of their PPP loan proceeds for payroll costs will be ineligible for forgiveness. (This provision may be subject to additional clarification through subsequent legislation or guidance.)
- <u>Relaxation of Impact of Employee Reductions</u>. The PPP Flexibility Act provides that forgiveness will not be reduced for employee headcount reductions between February 15, 2020 and December 31, 2020 if the borrower is able to document that either: (i) it is unable to rehire individuals who were employees on February 15, 2020 and is unable to hire similarly qualified employees for unfilled positions by December 31, 2020, or (ii) it is unable to return to the same level of business that was conducted prior to February 15, 2020 as a result of guidance from the Secretary of Health and Human Services, the Director of the CDC or OSHA relating to COVID-19 safety (including as a result of complying with standards for sanitation, social distancing and other worker or customer safety requirements). In addition, the period to cure reductions in headcount, salary and wages is extended from June 30, 2020 to December 31, 2020.
- <u>Impact of PPP Loan Forgiveness on Payroll Tax Deferral</u>. The PPP Flexibility Act eliminates the exclusion for borrowers receiving PPP loan forgiveness, making all PPP loan borrowers eligible for the deferral of payment of the social security component of employer payroll taxes provided under the CARES Act
- <u>Extension of Deferral Period</u>. The PPP Flexibility Act extends the deferral period until the date the lender receives the applicable forgiven amount from the SBA. In addition, it clarifies that if a borrower fails to apply for forgiveness within 10 months after the end of the covered period, the deferral period for that loan will end on the date that is 10 months after the last day of the covered period.
- <u>Extension of Maturity for New Loans</u>. PPP loans issued after the enactment of the PPP Flexibility Act will have a minimum maturity of 5 years. Borrowers that already have a loan with a two-year maturity date may negotiate with their lenders.

These changes will likely require changes to the current loan forgiveness application.

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All of the foregoing is subject to the wording of the PPP Flexibility Act as well as further guidance from the federal government, lenders and other institutions and agencies. We recommend that you consult your attorneys and advisers for further advice and counsel.