BERGER SINGERMAN
FLORIDA'S BUSINESS LAW FIRM

CLIENT ALERT - COVID-19: CONGRESS PASSES SWEEPING CHANGES TO PAYROLL PROTECTION PROGRAM

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Last night, the Senate passed by a unanimous voice vote the same version of the Paycheck Protection Program Flexibility Act of 2020 (the "Flexibility Act") passed by the House last week. While we await the President's expected signature, we have prepared the following summary of key highlights from the Flexibility Act:

- The Flexibility Act extends the deadline to apply for a PPP loan from June 30 to December 31, 2020. As of last night, approximately $130 billion of the second round of PPP funds approved by Congress remains.

- The Flexibility Act also extends the "covered period" in which borrowers must use the funds for forgiveness purposes from the current 8 weeks to the earlier of 24 weeks from loan disbursement or December 31, 2020. Borrowers whose loans were in place prior to the passage of the Flexibility Act could elect to continue using the 8-week covered period.

- The Flexibility Act also extends the deadline by which borrowers must either rehire employees or reverse salary cuts greater than 25% from June 30, 2020 to December 31, 2020. This change is intended to address the concerns of numerous borrowers whose businesses remain subject to continuing state and local shutdown orders.

- The Flexibility Act also expands on the SBA's FAQ 40 and subsequent Interim Final Rule regarding a borrower's efforts to rehire employees to avoid the proportional reduction in loan forgiveness. The Flexibility Act provides that borrowers will be exempt from that reduction to loan forgiveness if the borrower is able to document in good faith that, from February 15 to December 31, 2020, the borrower was unable to (i) rehire employees who had been employed on February 15, 2020, or hire similarly qualified employees for unfilled positions by December 31, 2020, or (ii) return to the same level of business activity at which the borrower was operating before February 15, 2020 due to compliance with federal requirements or guidance set forth between March 1 and December 31, 2020 relating to standards of sanitation, social distancing, or other worker or customer safety requirements related to COVID-19.

- One of the most significant changes in the Flexibility Act is to the existing 75%/25% rule. Prior to the Flexibility Act, borrowers were required to use at least 75% of their PPP loan proceeds during the covered period for Payroll Costs to qualify for loan forgiveness. The SBA's forgiveness application seemed to indicate that a failure to meet that threshold could result in a reduction in the non-Payroll Costs eligible for forgiveness. The Flexibility Act changes the threshold to 60% but all indications are that a failure to use at least 60% of PPP loan proceeds for Payroll Costs will render a borrower ineligible for forgiveness, not merely a reduction in the non-Payroll Costs portion.

- The Flexibility Act changes the existing 6-month deferral period for payments due on PPP loans to a deferral until the date on which a borrower submits it forgiveness application to the lender. However, if a borrower fails to make application for forgiveness within 10 months after the last day of the covered period, deferral ends and the borrower must immediately begin making payments of principal, interest, and fees on its PPP loan.

- The Flexibility Act extends the terms of new PPP loans (made on or after the Act's enactment) from 2 years to 5 years. Borrowers and lenders for existing PPP loans are not prohibited from mutually agreeing to extend the terms of their PPP loans.

- The Flexibility Act also removes the CARES Act provision restricting borrowers who receive PPP loan forgiveness from deferring payroll taxes incurred between March 27, 2020 and December 31, 2020.

We are continuing to monitor the President's action on the Flexibility Act, and to assess the Act and its impact on existing and future PPP borrowers.

The COVID-19 pandemic continues to create rapidly-changing issues for businesses, and government aid processes and measures designed to assist businesses may also change materially from when this Client Alert is issued. We therefore encourage you to monitor our website, review our future Client Alerts and generally remain alert for additional updates or modifications to laws and regulations.

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