## About the Firm

Shapiro Sher was founded in 1972 with the mission of providing outstanding legal counsel for businesses of all sizes. Based in Baltimore, the Firm is nationally recognized for its practices in business law, litigation, bankruptcy, banking, and creditors' rights.

Shapiro Sher's banking lawyers provide experienced counsel in connection with all aspects of commercial loans. Chaired by **Scott Foley**, the firm's **Banking & Financial Services Group** regularly represents regional and community banks, credit unions, finance companies, and other financial institutions in the Mid-Atlantic and in transactions throughout the country.

The banking group includes partner **Pat Gill**, who represents financial institutions in connection with re-documenting troubled loans and structuring, negotiating, documenting, and closing commercial finance transactions. Attorneys in the group also advise financial institutions regarding under-performing and distressed loans. The group routinely handles loan modifications, workouts, restructurings, short and long-term forbearance agreements, and bankruptcy litigation. Because the group has extensive experience in the origination of loans and in workout situations, it is prepared to provide efficient representation at every stage in the lending process.

With decades of experience in the banking industry, Mr. Foley and the firm's other seasoned banking attorneys appreciate the potential hazards facing clients in the commercial loan process, and strive to protect lenders' interests throughout the lifecycle of the loan.

# THE PAYCHECK PROTECTION PROGRAM FLEXIBILITY ACT

By Pat Gill and Wes Parker

On June 3, 2020, Congress passed the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act), which has since been signed into law. As indicated by its name, the Flexibility Act implements several key changes to the Paycheck Protection Program (PPP) which provide borrowers increased flexibility with respect to PPP loan forgiveness. The Flexibility Act should result in more PPP loans being forgiven in full, thus reducing the servicing burden imposed on PPP lenders post-forgiveness application. As outlined below, there are several key features under the new law of which lenders should be aware.

### Maturity Dates for PPP Loans

For any PPP loan made after the enactment of the Flexibility Act, the maturity for any unforgiven portion thereof is extended from two years to five years. Lenders and borrowers may mutually agree to modify the maturity of PPP loans previously issued.

### Extension of the "Covered Period"

Under the original terms of the PPP, a borrower's eligible forgiveness amount was calculated based on the amount spent on payroll and other eligible expenses actually paid or incurred during the eight-week period following the disbursement of the PPP loan (i.e. the "covered period"). The Flexibility Act extends the covered period to the earlier of (i) the date that is 24 weeks from the disbursement of the PPP loan or (ii) December 31, 2020.

### Reduction of Amount Spent on Payroll

To be eligible for the maximum amount of loan forgiveness, the rules issued by the Small Business Administration (SBA) previously required that at least 75% of the PPP loan proceeds be used on the borrower's payroll costs. The Flexibility Act decreases the minimum amount that must be spent on payroll costs to 60%, and the remaining loan proceeds (i.e. 40%) may be used for eligible non-payroll costs.[1]

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[1] Refer to this Firm's newsletter, dated May 26, 2020, for a discussion of "eligible non-payroll costs". *See* https://www.shapirosher.com/news/the-paycheck-protection-program-loan-forgiveness

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### Extension of the Deadline for Full-Time Equivalent Employees (FTEs) and Salary Restoration

The PPP requires that the borrower's loan forgiveness amount be offset by certain reductions in (i) employee salaries or wages in excess of 25% and/or (ii) the borrower's overall number of FTEs. However, so long as the borrower has restored such reductions to the amounts effective as of February 15, 2020 by the end of June 2020, the borrower can avoid the corresponding reductions in the loan forgiveness amount. The Flexibility Act extends the time for a borrower to restore any reductions in wages or FTEs from June 30, 2020 to December 31, 2020.

### Exemptions for FTEs

Pursuant to the Flexibility Act, a borrower will not experience an offset in the forgiveness amount due to a reduction in the number of its FTEs if the borrower is able to document: (i) an inability to rehire individuals who were employees on February 15, 2020; (ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or (iii) an inability to return to the level of business activity that existed for the borrower before February 15, 2020 due to compliance with requirements or guidance established by the Department of Health and Human Services, the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020 and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement of Covid-19.

### Extended Deferred Payment Period

The Flexibility Act extends the payment deferral under PPP loans from six months to the date on which the amount of loan forgiveness is remitted to the lender by the SBA—*provided however*, that if the borrower fails to apply for forgiveness within ten months after the covered period ends, the borrower will be required to commence making principal and interest payments at such time.

### Supplemental Rules and Guidance

On June 8, 2020, the SBA and the Department of Treasury issued a joint release stating that new rules and guidance will be promptly issued to address the modifications to the PPP loan forgiveness process implemented by the Flexibility Act. Lenders should continue to monitor for the forthcoming guidance, which will likely include, among other things, an updated loan forgiveness application form.

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