

NEW ACT PROVIDES MORE FLEXIBILITY TO PPP BORROWERS

Today President Trump signed the Paycheck Protection Program Flexibility Act of 2020 (the “Act”) to amend certain provisions of the CARES Act related to the forgiveness of loans under the Paycheck Protection Program (“PPP”) and for a number of other purposes.

Here are some of the key takeaways:

- **Deadline to Use the Loan Proceeds:** Borrowers can now use their PPP loan over a period of 24 weeks, tripling the current covered period of eight weeks.[1]
- **Forgivable Uses of the Loan Proceeds:** Borrowers must use at least 60% of their PPP loan on payroll costs, amending the previous rule that required borrowers to use 75% of their PPP loan for payroll costs. The remaining 40% may be used for allowable non-payroll expenses.
- **Extension of Time for Rehiring Workers:** The period to rehire employees has been extended from June 30, 2020 to December 31, 2020.
- **New Exemptions from Rehiring Workers:** Two exemptions were added to the PPP’s loan forgiveness reduction penalties.
 1. The forgiveness amount will not be reduced due to a reduced full time employee count if the borrower can document that it attempted, but was unable, to rehire individuals who had been employees on February 15, 2020.
 2. The forgiveness will not be reduced due to a reduced full time employee count if the borrower, in good faith, can document an inability to return to the “same level of business activity” as prior to February 15, 2020 due to sanitation, social distancing, and worker or customer safety requirements.
- **Payroll Tax Deferral:** The payroll tax deferral is now available to a borrower that has its loan forgiven. Previously, the deferral was available only to borrowers that did not have their loan forgiven.
- **Loan Deferral Period:** The loan deferral period has been changed to (i) whenever the amount of loan forgiveness is remitted to the lender, or (ii) 10 months after the applicable forgiveness covered period if a borrower does not apply for forgiveness during that 10 month period. Previously, a borrower’s deferral period was to be between six and 12 months.
- **Loan Maturity Date:** The maturity date for the payment of the unforgiven portion of the PPP loan has been extended from two years to five years.[2]

Borrowers are now able to spend their PPP loan proceeds in a more flexible manner than previously permitted. As with the initial rollout of the PPP, it will be up to the Department of the Treasury and the Small Business Administration to provide regulations with respect to the Act.

O’Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For

questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the authors of this article, attorneys [Jason Scoby](#) and [Pete Faust](#).

[1] If the borrower would like, it can still elect to have the eight week period apply.

[2] This provision of the Act only affects borrowers whose PPP loan is disbursed after its enactment. With respect to an already existing PPP loan, the Act states specifically that nothing in the Act will “prohibit lenders and borrowers from mutually agreeing to modify the maturity terms of a covered loan.”

GRANT KILLORAN PARTICIPATE IN 14TH ANNUAL STATE BAR OF TEXAS BILL OF RIGHTS CONFERENCE

Attorney [Grant Killoran](#), a shareholder in [O’Neil, Cannon, Hollman, DeJong and Laing’s](#) Litigation Practice Group, recently co-presented a speech entitled “The Tenth Amendment: The Sword and the Shield of the States” at the 14th Annual State Bar of Texas Bill of Rights: Cutting Edge Controversies in Constitutional Law Conference. Grant also co-presented another speech at the seminar entitled “The Free Exercise and Establishment Clauses: Is Anything We Learned in Law School Still the Law.”

The State Bar of Texas Annual Bill of Rights Conference brings together attorneys and law professors from around the country each year to speak on emerging issues in constitutional law.

ATTORNEY JIM DEJONG FEATURED ON WISN AM 1130

Attorney [Jim DeJong](#) will be featured on *Money Sense* presented by [Ellenbecker Investment Group](#) on **WISN AM 1130**. On the show, Jim provides an overview of the implications of the

COVID-19 pandemic on the M&A market. He discusses what a business owner planning to sell a business should be doing now to prepare the business to attract qualified buyers and to obtain the best price. Jim also discusses the importance of business succession planning.

Tune in to hear the show in its entirety on **Saturday, June 6th at 2:00 pm.**

The recording can be accessed [here](#).

TAX AND WEALTH ADVISOR ALERT: PLANNING FOR SUCCESS WITH A BUSINESS SUCCESSION PLAN (PART I)

Many closely held businesses involve family members. The owner of such a business may wish to sell the business to some third party on or prior to death, or, more likely, may desire to transfer the business to the owner's children. Although some business owners may believe little or no planning is required for this type of transaction to take place, the opposite is true. To successfully transfer a family business to the next generation, the owner should commence planning for succession as soon as the owner has a good indication of which family members may be interested in succeeding to the ownership of the business, and more importantly, which of them will best be able to lead the business into the future.

In order for a transition to proceed as the owner desires, an effective business succession plan must be in place. When commencing the planning, the business owner should remember four key factors:

1. Succession planning is a process, not an event. Accordingly, the plan should be reviewed as time passes to see if changes to the plan are necessary.
2. Communicating with family members and key employees regarding the plan and involving them in the succession plan may help foster the future good and unity of both the family and the business.
3. While estate tax planning issues must be kept in mind when considering a succession plan, the plan must first fulfill the needs of the owner and the family, as well as those of the business.
4. The retirement income needs of the owner must also be reviewed and considered in determining the proper structure for the succession plan.

In developing a succession plan for the owner and the business, the owner should work with an experienced planner. Together, they will have much "homework" to do, including reviewing a wide variety of information, starting with the historical and proforma financial

statements of the business and the personal financial statements of the owner. In addition, a number of legal documents, including existing wills, trust agreements, buy/sell agreements, employment contracts, leases, corporate documents, partnership or limited liability company agreements, and any pre-nuptial agreements, must be reviewed. Further, they should consider information regarding the business's capital structure, debt and cash flow, the owner's present retirement income needs, the owner's desires as to when and to whom the business should be transferred, and what other assets are available for family members not active in the business.

All of this information is important in determining the "right" succession plan for the owner and the business. Once these and other pertinent facts are analyzed by the owner and the planner, they must then take all of these pieces and combine them to create a customized succession plan or "picture" of what the owner would like to see occur in the future upon the transition of the family business to future generations.

TAX AND WEALTH ADVISOR ALERT: HOW A TRUST CAN PROVIDE ASSET PROTECTION FOR YOUR CHILDREN

Do you want to leave your children with an inheritance, but are worried about creditors taking part of that inheritance? If so, you are not alone. Fortunately, a properly established protective trust can help safeguard the money you leave behind for your children from their creditors, including in a divorce.

Creditors can more easily reach your children's inheritances if it is given to them directly, outside of a trust. However, creditors would have more hurdles to jump through to reach your children's inheritance if it is held in a protective trust. Therefore, many parents add extra protections for their children by directing their children's inheritances to be held in a protective trust.

The trust, acting as its own separate entity, would own the assets on behalf of your children, the beneficiaries of the trust. This way, your children would not technically own the assets which makes it much more difficult for creditors to reach their inheritances. Importantly, your children would still have access to the trust assets and benefit from them. A protective trust would allow your children to be the beneficiaries and receive distributions for their health, support, and maintenance. Also, in some circumstances your children could be the Trustee of their own trust, meaning they could manage the trust assets on their own.

Not only would a protective trust safeguard your children's inheritances from obvious creditors, it would also safeguard their inheritances if they were to get a divorce. If you were to give your children their inheritances directly, they would need to take extra steps and precautions to ensure their inheritance is not comingled with marital property to prevent the inheritance from transmuting into a marital property asset. However, if the inheritance is protected in a trust, then the trust assets would remain classified as individual property under Wisconsin marital property law.

With a proper estate plan in place, you can have peace of mind knowing the money you leave behind for your children will be protected from the many threats your children may come across. If you would like to learn more about asset protection and discuss your estate planning options, please contact attorney Kelly M. Spott.

SBA PUBLISHES PPP LOAN FORGIVENESS APPLICATION

On Friday, the SBA published its Paycheck Protection Program Loan Forgiveness Application, which includes instructions for completing the application. The application can be found [here](#). Of note, the application contains further information with respect to the timing of paying and incurring payroll costs as that relates to calculating the amount eligible for forgiveness. Additionally, the application provides certain borrowers (those with biweekly or more frequent payroll periods) flexibility in terms of when the eight-week "covered period" begins.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the authors of this article, attorneys [Jason Scoby](#) and [Pete Faust](#).

SBA ISSUES FURTHER GUIDANCE ON PPP LOAN REPAYMENT SAFE HARBOR; ALL LOANS UNDER \$2 MILLION DEEMED TO HAVE BEEN RECEIVED

IN GOOD FAITH

This morning, the SBA issued much anticipated additional guidance with respect to the Paycheck Protection Program's repayment safe harbor. The new guidance provides significant clarity with respect to how the SBA will evaluate whether a borrower made the following certification in good faith when submitting its loan application:

"Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

With the new guidance, the SBA makes clear that all borrowers receiving a loan of less than \$2 million will be deemed to have made the certification in good faith. Loans to borrowers and their affiliates will be combined for purposes of calculating this \$2 million threshold.

Moreover, borrowers (including their affiliates) receiving more than \$2 million will still have the opportunity to demonstrate that they made the certification in good faith, and if the SBA determines that they are not able to do so, the SBA will then permit those borrowers to repay the loan without any further penalties.

The SBA's FAQ #46 states in full:

46. Question: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

Answer: When submitting a PPP application, all borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on

their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

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ATTORNEY JOSEPH GUMINA RECENTLY FEATURED IN SUPER LAWYERS

Attorney [Joseph Gumina](#), chair of O'Neil Cannon's labor and employment law group, was recently featured in the *Super Lawyers* article "Can I Lay Off My Furloughed Employees?". In the article, Gumina shares advice regarding legal considerations employers need to be aware of when considering laying off furloughed employees during these unprecedented times. Read full article [here](#).

O'Neil Cannon remains open for its clients and we are here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus.

SBA EXTENDS SAFE HARBOR FOR REPAYING

PPP LOANS TO MAY 14, PROMISES MORE GUIDANCE ON CERTIFICATION ISSUE

The Small Business Administration has given borrowers another week to decide whether to repay loans under the Paycheck Protection Program without the risk of penalties.

On Tuesday night, the SBA extended the safe harbor for repaying PPP loans from May 7 to May 14. In addition, the SBA indicated that it would provide before May 14 more guidance for the certification question that has caused much consternation for some PPP borrowers.

Applicants for PPP loans certified that, given current economic uncertainty, the loan was necessary to support the ongoing operations of the applicant. The CARES Act waived for PPP loans the requirement that borrowers be unable to obtain credit elsewhere; however, subsequent guidance from the SBA in its series of Frequently Asked Questions left some borrowers confused about the certification. In FAQ #31 and #37, the SBA indicated that the PPP certification must be made in good faith after taking into account the applicant's business activity and access to other sources of capital, causing complaints from some borrowers that the SBA may be retroactively changing the rules for PPP loans.

The SBA's FAQ #43, which was issued Tuesday night, is below:

43. Question: FAQ #31 reminded borrowers to review carefully the required certification on the Borrower Application Form that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA guidance and regulations provide that any borrower who applied for a PPP loan prior to April 24, 2020 and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith. Is it possible for a borrower to obtain an extension of the May 7, 2020 repayment date?

Answer: SBA is extending the repayment date for this safe harbor to May 14, 2020. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor. SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.

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TAX AND WEALTH ADVISOR ALERT: IRS SAYS EXPENSES PAID WITH FORGIVEN PPP LOANS NOT DEDUCTIBLE

Yesterday, the IRS released guidance in [Notice 2020-32](#) stating that expenses related to forgivable loans through the Paycheck Protection Program (PPP) will not be tax-deductible.

Under the PPP, a program created by the CARES Act to provide coronavirus relief, small businesses can receive forgivable loans of up to \$10 million as long as the loan goes to essential expenses, such as maintaining payroll, rent, utilities, and mortgage interest.

While it was clear from the CARES Act that PPP loan forgiveness is not taxable income, the CARES Act said nothing about deducting the expenses paid with such loan proceeds. However, the IRS stated in its guidance yesterday that expenses that result in forgiveness of a PPP loan are not tax-deductible—thereby preventing a double tax benefit. This means that small businesses cannot claim tax deductions for expenses that are normally *fully* deductible, such as wages, rent, utilities, etc., if they are paid with PPP funds that are forgiven.

The IRS cited Section 256 of the tax code in its guidance, which states that deductions cannot be taken if they are tied to a certain class of tax-exempt income. If desired, Congress could override the IRS's stance by passing a law that explicitly allows the deductions. Additionally, it is possible a taxpayer may decide to challenge this position in court.

Nevertheless, given the current IRS guidance, small businesses that manage to get their PPP loans forgiven may find themselves losing valuable tax breaks and should plan accordingly.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor federal and state law tax changes. For questions or further information relating to taxation under the CARES Act, please contact attorney [Britany E. Morrison](#).

UPDATE: On May 5th, 2020, Senator John Cornyn (R-Tex.) recently introduced the bipartisan Small Business Expense Protection Act (S. 3612), which moves to essentially nullify Notice 2020-32. Senate Bill 3612 provides that business expenses otherwise deductible under Code Section 162 would still be deductible even if they were funded by forgiven PPP loan proceeds. Currently, the bill has picked up 23 sponsors. Neither Senator Ron Johnson nor Senator Tammy Baldwin have yet to express support. Nevertheless, this bill is strongly supported by the American Institute of Certified Public Accountants (AICPA). It was read twice in the Senate

and referred to the Senate Committee on Finance but has been sitting there since. On May 12th, 2020, the House introduced an identical bill (HB6821) and referred it to the House Committee on Ways and Means. It has been sitting with the House Committee on Ways and Means since referral. The attorneys at O'Neil, Cannon, Hollman, DeJong and Laing will continue to monitor the status of both bills and provide information on any federal and state law changes.