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## UPDATE ON THE PAYCHECK PROTECTION PROGRAM

The Coronavirus Aid, Relief and Economic Security Act (the “CARES Act”) established the Paycheck Protection Program (the “PPP”) to provide small businesses with loans to cover payroll costs and certain other expenses for an eight (8) week period. In addition, the CARES Act permits employers to defer the deposit and payment of the employer’s share of Social Security tax on wages paid during the period from March 27 through the end of 2020. The purpose of this Client Alert is to provide an update on the PPP and the relationship between the PPP and the payroll tax deferral provision of the CARES Act.

- We understand that PPP loan applications are being approved and the funding of approved loans has begun. **If you have not yet submitted an application for a PPP loan you should do so immediately.** The existing funding for PPP loans is likely to be quickly exhausted and there is no assurance that Congress will provide additional funding.

- Since the SBA has not issued an official form of promissory note, some lenders have started using their own forms for approved loans. Signing the a promissory note provided by your lender is appropriate so long as it includes some acknowledgement that the loan is subject to forgiveness under the CARES Act. We are happy to quickly review a proposed note before you sign. Once a PPP loan has been approved and the loan documentation signed by the borrower, funding is made directly to the borrower’s account without any further action or any closing.

- We do not believe there is any way to defer the disbursement of the proceeds of a PPP loan or the commencement of the eight (8) week period for use of such proceeds, even if a loan applicant is unable to restart its business activities immediately because it has been deemed a non-essential business (and is prohibited from operating) or it does not expect immediate demand for its products or services. Although a loan applicant could discuss with its bank the possibility of deferring disbursement of loan proceeds, such action may be unwise since the bank may determine that other loan applicants have more pressing needs for funding.

- In order to obtain maximum loan forgiveness and maximize the ability to use PPP loan proceeds for approved non-payroll expenses, a borrower should ensure its employee roster is up to the level used to determine the amount of the loan at the time the loan is disbursed or as quickly thereafter as possible. Because the timing of disbursement is unpredictable, this may pose practical challenges, especially for borrowers who have laid off substantial numbers of employees. Borrowers should plan for this uncertainty.

- The CARES Act provides that the deferral of payroll taxes is not available to a business that receives a PPP loan which is subsequently forgiven. It has not been entirely clear whether a business that applies for and receives a PPP loan can take advantage of the payroll tax deferral during the period *prior to* the forgiveness of that loan. However, the IRS has published guidance that makes clear that a business that receives a PPP loan may nevertheless defer the employer’s share of Social Security tax **during the period from the date of the loan until a decision has been reached by the lender that the loan will be forgiven.** Once that decision is made, the borrower can no longer defer the deposit and payment of payroll taxes, but payment of the amounts previously deferred will not be required until the payment dates specified in the CARES Act.

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