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CLIENT BULLETIN

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SUBJECT: FURTHER UPDATE REGARDING STABILIZATION LAWS RESPONDING TO COVID-19 CRISIS: KEY PROVISIONS APPLICABLE TO FRANCHISING

We provide updates below to our March 29, 2020, April 5, 2020, and April 24, 2020 client bulletins regarding the stabilization laws passed by the U.S. federal government to offer some relief for the millions of laid off workers and the nation’s small businesses suffering as a result of the novel coronavirus known as COVID-19. Our updates are geared toward the interests of franchisors and franchisees and are limited to a high-level summary of changes.

I. Changes to Paycheck Protection Program

Recall that the Paycheck Protection Program (“PPP”) was created when the Coronavirus Aid, Relief, and Economic Security (CARES) Act¹ was signed into law on March 27, 2020, and was supplemented when the Paycheck Protection Plan and Health Care Enhancement Act was signed into law on April 24, 2020.² On June 5, 2020, the PPP was further modified by the Paycheck Protection Program Flexibility Act (the “PPP Flexibility Act”).³ The main changes to the PPP program under the PPP Flexibility Act are the following:

- The “forgiveness period” of the PPP loan (that is, the time period used for purposes of calculating loan forgiveness) is now 24 weeks, instead of 8 weeks, after disbursement of the loan. However, in no event will the forgiveness period go past December 31, 2020. For existing PPP borrowers prior to June 5, the borrower has a choice of whether to have the period be the original 8 weeks or instead be the new 24 week period.⁴ Note that the PPP ~~is~~ was still scheduled to stop originating PPP loans (i.e., stop accepting new loan applications) after June 30, 2020 – but that aspect has ~~not~~ changed. The deadline to apply is now extended to August 8, 2020.⁵

¹ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (the “CARES Act”). The final version of this public law’s text is edited and made available by the U.S. Government Publishing Office at www.govinfo.gov and the enrolled version of the bill as passed by the House of Representatives is available at <https://www.congress.gov/bill/116th-congress/house-bill/748/text>. The CARES Act, together with the Families First Coronavirus Response Act (the FFCRA) which was signed into law on March 18, 2020, the Paycheck Protection Plan and Health Care Enhancement Act, the PPP Flexibility Act, and other laws passed to spur vaccine development, comprise the main federal laws passed thus far in response to the coronavirus pandemic.

² A copy of the enrolled bill, H.R. 266, Paycheck Protection Program and Health Care Enhancement Act, which became Public Law 116-139, is available at <https://www.congress.gov/bill/116th-congress/house-bill/266/text>.

³ A copy of the enrolled bill, H.R. 7010, Paycheck Protection Program Flexibility Act, is available at <https://www.congress.gov/bill/116th-congress/house-bill/7010/text/enr>.

⁴ PPP Flexibility Act, Secs. 3(b)(1) and (2).

⁵ The CARES Act was amended by Senate Bill 4116, signed into law by the President on July 4, 2020, extending the PPP application deadline to August 8, 2020. The ~~is~~ earlier June 30, 2020 deadline to apply for PPP loans ~~is~~ was based on statements

- The percentage of the PPP loan that must be spent on payroll costs (as defined in the CARES Act) is now 60% instead of 75%.⁶ Supplemental documents issued soon after the PPP Flexibility Act was passed provide clarification on what this percentage means. The PPP Flexibility Act states, whether intentionally or not, that in order to be eligible for any forgiveness, a PPP borrower must spend at least 60% of its total PPP loan proceeds towards “payroll costs.” However, the Joint Statement and Seventeenth Interim Final Rule clarify that the SBA interprets the 60% requirement as a proportional limit on eligible nonpayroll costs as a share of the borrower’s loan forgiveness amount, rather than as a threshold for receiving *any* loan forgiveness. The Joint Statement and Seventeenth Interim Final Rule state that if a PPP borrower uses less than 60% of the loan amount for payroll costs during the forgiveness period, the PPP borrower will continue to be eligible for *partial* loan forgiveness, subject to at least 60% of the loan forgiveness amount having been used for payroll costs.⁷
- For purposes of PPP loan forgiveness, recall that forgiveness will be reduced if a borrower reduces the salaries/wages of its employees by more than 25% during the covered period, or reduces its headcount of full-time employees (defined as 40 hours per week, although fractional counting is permitted). Previously, the requirement was to rehire employees to the same headcount level, and/or raise compensation to the same level, before June 30, 2020. Now, the deadline for rehiring workers and restoring wage levels is December 31, 2020 instead of June 30, 2020.⁸
- For PPP loan amounts that are not forgiven, recall that the loan would yield 1% interest over a 2-year term, with a 6-month deferral of initial payments. The 2-year term has now been increased to be a minimum of 5 years⁹ on any new PPP loans – that is, PPP loans where the borrower is assigned a U.S. Small Business Association (“SBA”) number after June 5, 2020. For PPP loans disbursed prior to the enactment of the PPP Flexibility Act, PPP borrowers and lenders may mutually agree to modify the existing maturity terms to conform with the new minimum of 5 years maturity for any remaining outstanding balance of a PPP loan after determination of forgiveness. In addition, the repayment deferral period has been extended until the SBA compensates the lender for the forgiven amounts, or, if the borrower fails to apply for forgiveness within 10 months after the last day of the “covered period” (whether that is an 8-week covered period or a 24-week covered period), after such 10 months have passed.¹⁰
- The payroll tax deferral for PPP borrowers, covering the employer portion of social security taxes, which was provided in Section 2302 of the CARES Act, is extended so that PPP borrowers may, if they choose, continue to defer such payroll tax payments until December 31, 2020.¹¹
- Exemptions are now allowed from meeting the forgiveness requirements, if a borrower/employer can document in good faith their inability to rehire certain workers who were employees as of February 15, 2020, or similarly qualified workers, before December 31, 2020.¹²
- PPP borrowers are also allowed an adjustment to the headcount numbers used in calculating forgiveness of their loan if they can document that they are unable to restore business operations to pre-pandemic levels because of COVID-19 related restrictions or guidelines from the Department of Health and Human Services, the Centers for Disease Control & Prevention, or the Occupational Safety

made in certain supplementary documents that followed swiftly after the PPP Flexibility Act’s passage: (i) the Joint Statement, issued on June 8, 2020 by U.S. Treasury Secretary Steven T. Mnuchin and Small Business Administration (SBA) Administrator Jovita Carranza (the “Joint Statement”); and (ii) the Seventeenth Interim Final Rule, issued by the SBA on June 11, 2020. These supplemental documents state that the SBA will not accept PPP applications after June 30, 2020.

⁶ PPP Flexibility Act, Secs. 3(b)(2)(b).

⁷ The Joint Statement is available at <https://home.treasury.gov/news/press-releases/sm1026> and the all of the Interim Final Rules are linked to below.

⁸ PPP Flexibility Act, Sec. 3(b).

⁹ PPP Flexibility Act, Sec. 2(a).

¹⁰ PPP Flexibility Act, Sec. 3(c).

¹¹ PPP Flexibility Act, Sec. 4.

¹² PPP Flexibility Act, Sec. 3(b)(2)(B).

and Health Administration between March 1, 2020 and December 31, 2020 related to the maintenance of standards for sanitation, social distancing, or worker or customer safety requirements.¹³

In relation to the CARES Act’s Paycheck Protection Program, the SBA has at this point issued ~~more than twenty~~~~no less than nineteen~~ (19) “Interim Final Rules” on various aspects of the program, all of which are available for viewing here: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>. The Interim Final Rules are on the following subjects (we include a link to each rule):

1. [Paycheck Protection Program](#)
2. [Affiliation Rules](#)
3. [Additional Eligibility Criteria and Requirements for Certain Pledges of Loans for the Paycheck Protection Program](#)
4. [Promissory Notes, Authorizations, Affiliation, and Eligibility](#)
5. [Seasonal Employers](#)
6. [Disbursements](#)
7. [Requirements – Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders](#)
8. [Nondiscrimination and Additional Eligibility Criteria](#)
9. [Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request](#)
10. [Requirements for Loan Increases for Partnerships or Seasonal Employers](#)
11. [Eligibility of Certain Electric Cooperatives](#)
12. [Treatment of Entities with Foreign Affiliates](#)
13. [Second Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan and Lender Reporting](#)
14. [Requirements – Loan Forgiveness](#)
15. [SBA Loan Review Procedures and Related Borrower and Lender Responsibilities](#)
16. [Eligibility of Certain Telephone Cooperatives](#)
17. [Interim Final Rule on Revisions to the First PPP Interim Final Rule](#) (published June 16, 2020)
18. [Additional Revisions to First PPP Interim Final Rule](#) (published ~~yesterday~~ June 18, 2020)
19. [Interim Final Rule on Revisions to the Third and Sixth Interim Final Rules](#) (published ~~today~~ June 19, 2020)
20. [Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures Interim Final Rule](#) (published June 26, 2020)
21. [Additional Eligibility Revisions to First PPP Interim Final Rule](#) (published June 26, 2020)
- ~~19-22.~~ [Interim Final Rule on Certain Eligible Payroll Costs \(Fishing Boat Owners\)](#) (published June 30, 2020)

In addition, the U.S. Treasury Department has updated its information sheet on the PPP. The information sheet is in the form of [Questions and Answers](#) supplemented from time to time, most recently updated on ~~June 25~~~~May 27~~. So far, the information sheet comprises a total ~~4948~~ questions and answers. Many, but not all, of the questions and answers overlap with material contained in the SBA’s Interim Final Rules.

On June 17, a part of implementing the PPP Flexibility Act, in order to streamline the forgiveness process for smaller borrowers, the Treasury Department and the SBA released a simplified forgiveness application for PPP borrowers. In addition to revising the full forgiveness application form, the SBA also published a new EZ version of the forgiveness application that applies to borrowers that are self-employed and have no employees; or did not reduce the salaries or wages of their employees by more than 25%, and did not reduce the number or hours of their employees; or, experienced reductions in business activity as a result of health directives related to COVID-

¹³ PPP Flexibility Act, Sec. 3(b)(2)(B).

19 and did not reduce the salaries or wages of their employees by more than 25%. The EZ application requires fewer calculations and less documentation for such borrowers. Details regarding the applicability of these provisions are available in the instructions to the new EZ application form. Both the longer forgiveness application form, and the EZ application form, give borrowers the option of using the original 8-week covered period (if their loan was made before June 5, 2020) or an extended 24-week covered period. The forgiveness application forms are available here:

- [EZ Forgiveness Application](#)
- [Full Forgiveness Application](#)

II. Update on Economic Injury Disaster Loan (EIDL) and Advance Program

Recall that the CARES Act designated funds for COVID-19 stabilization loans under the SBA’s existing EIDL loan program; and the loans are up to \$2 million to each borrower, with low interest rates. For a time, the SBA stopped taking new applications for such loans except from agricultural businesses. The overall focus of the EIDL program appears to have shifted to agriculture-related businesses. However, on June 15 the SBA opened up its application process again for loans to small businesses with less than 500 employees, as well as for the emergency advance grants under the EIDL program that were set up by the CARES Act. The maximum amount for such an emergency advance grant is \$10,000. The SBA is requiring that any franchise applicants to its EIDL program have the name of the franchise brand on the SBA’s franchise directory in order to be eligible. The application is made directly to the SBA and is available here: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loan-emergency-advance>. According to the SBA’s ~~latest~~ public report, as of June 12, over 1.3 million EIDL COVID-19 loans were approved, constituting over \$90 billion.¹⁴

III. Update on the Federal Reserve’s Main Street Lending Program

Recall that the CARES Act also made additional funds available to the U.S. Federal Reserve (the “Fed”) to expand the business loans it may support in the marketplace. After months of preparation, the Fed just launched, on June 15, its “Main Street Lending Program,” ~~currently~~ involving ~~five~~~~three~~ types of loan facilities. As we described in broad strokes in our April 24 bulletin, the Main Street Lending Program is designed to support lending to small and medium-sized businesses that were in good financial standing before the onset of the COVID-19 pandemic. The Main Street Lending Program will operate through three facilities: the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF) (this second facility is new since our last bulletin), and the Main Street Expanded Loan Facility (MSELF), ~~which are operational, and two other facilities for non-profit organizations~~. Term sheets for each facility providing more information regarding eligibility and conditions, as well as frequently asked questions, are available at the Fed’s website at <https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm> – however, the Fed reserves the right to adjust the loan terms which are currently stated on its website. Additional loan facilities for non-profit organizations are under consideration and the Fed is seeking public comment on them until June 22.

To implement the Main Street Lending Program, the Federal Reserve Bank of Boston has set up a special purpose vehicle (SPV) to purchase participations in loans originated by eligible lenders. Lenders will retain a percentage of the loans, but lenders can sell a majority (approximately 95%) of the loan to the Fed, thereby transferring most of the risk of default to the Fed. As detailed further in the term sheets, U.S. businesses may be eligible for these loans if they meet either of the following conditions: (1) the business has 15,000 employees or fewer; or (2) the business had 2019 revenues of \$5 billion or less. Loans issued under the program would have a

¹⁴ COVID-19 EIDL Loans Report as of June 12, 2020, <https://www.sba.gov/document/report--covid-19-eidl-loans-report-6-12-20>.

five year maturity, deferral of principal payments for two years, and deferral of interest payments for one year. Eligible lenders may originate new loans (under MSNLF and MSPLF) or increase the size of (or “upsized”) existing loans (under MSELF) made to eligible businesses.

Although lender registration opened on Monday, ~~(June 15)~~, various major banks still ~~did~~ not appear to have registered as lenders, and some ~~we~~are reportedly unaware of the program at all.¹⁵ Registration instructions and the form loan participation agreement, form borrower and lender certifications and covenants, and other required form agreements for lenders can be accessed on the [Federal Reserve Bank of Boston’s Main Street Lending Program Forms and Agreements website](#). The Fed states that it is currently working to create the infrastructure necessary to fully operationalize the program. It states that once the program is operational, small and medium-sized businesses interested in the program can apply for program loans by contacting an eligible lender. A description of eligible lenders can be found in the program term sheets. The Fed is not providing form loan documents for eligible lenders to use when making loans to borrowers under this program. Rather, the Fed simply states that the loan documents related to any loans that are participated to the SPV must reflect the terms of the Main Street Lending Program and must include the items set out in the loan document checklist contained in [Appendix A of the Main Street FAQs \(PDF\)](#). It remains to be seen how this program will play out in practice as it just opened.

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Naturally, we hope the foregoing is helpful to you and we stand ready to elaborate on any portions of this summary or assist you in any other way we can. Various complexities of these new laws may apply to your situation. Please note that we do not provide tax counsel nor can we advise on the tax guidance issued by the Internal Revenue Service relating to any COVID-19 stabilization, but we are happy to work with you and your tax advisor to comply with and benefit from the COVID-19 related stabilization laws.

Information contained in this Bulletin is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney. For more information, please contact David B. Ramsey at 212-705-0816 or dramsey@kaufmanngildin.com.

¹⁵ Heather Long, ‘It’s very discouraging’: America’s new \$600 billion rescue program for small businesses is off to a rocky start, Washington Post, June 19, 2020, Business Section, available at: <https://www.washingtonpost.com/business/2020/06/18/fed-main-street-lending/>.