

Paycheck Protection Program Flexibility Act Headed to President's Desk

June 5, 2020

Congress has passed the Paycheck Protection Program Flexibility Act, which eases some of the requirements of the Small Business Administration's (SBA) Paycheck Protection Program (PPP). The four most significant changes were (i) increasing the minimum loan term to five (5) years (instead of two years), (ii) allowing up to 40% of loan proceeds to be spent on non-payroll costs (instead of 25%), (iii) extending the forgivable period for spending loan funds to 24 weeks (instead of 8 weeks), and (iv) extending the rehire "safe harbor" deadline to December 31, 2020 (instead of June 30, 2020).

Background

The Coronavirus Aid, Relief, and Economic Security (CARES) Act created the PPP to provide short-term, forgivable loans to small businesses, sole proprietors and certain non-profit organizations. Since its inception, SBA and the Treasury Department have issued rolling guidance regarding the program, including concerning eligibility criteria, authorized uses, and forgiveness criteria.

The PPP Flexibility Act

The PPP Flexibility Act, which is expected to be signed into law soon by President Trump, will make several important changes to the PPP program:

- **Maturity Date Extension**: The minimum maturity date for new PPP loans is five years. The term for loans entered into prior to the effective date of the PPP Flexibility Act are not affected, but the legislation states that borrowers and lenders of existing PPP loans may "mutually agree" to extend their loan terms.

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- **Payroll Cost Requirement Loosened**: SBA previously issued regulations requiring that at least 75% of PPP loan proceeds be used to cover payroll costs. This was problematic for many businesses that had relatively significant overhead expenses. The new law now requires that at least 60% of the loan be used for payroll costs, so up to 40% can be used for mortgage interest, rental payments, and utility costs.
 - As written, the PPP Flexibility Act seems to require that if 60% of the loan is not spent on payroll, then the borrower is not eligible for any forgiveness. Under the previous SBA regulation, if the 75% threshold was not met, then the loan forgiveness simply would have been reduced proportionately. This may have been a drafting oversight by the House (and the Senate could not change the text of the bill for procedural reasons). It is possible that there will be subsequent legislation to fix this language, or the SBA may issue interim guidance interpreting this provision.
- **Covered Period Extension**: The PPP had allowed borrowers to seek forgiveness for eligible “costs incurred and payments made” during the 8-week period after the loan proceeds were received. That timeframe was impracticable for many businesses that have not been able to operate at full (or in some cases any) capacity as a result of stay-at-home orders and general economic conditions. Under the PPP Flexibility Act, the “covered period” will be extended to 24 weeks. Borrowers may, however, still choose to apply the funds to the original 8-week period.
- **Re-hire Safe Harbor**: The forgivable amount of PPP loans will be reduced if borrowers have reduced employee headcount or compensation since February 15, 2020. The PPP had provided for a safe harbor – such that there would be no reduction of the forgivable amount – if borrowers restored employee headcount and compensation to previous numbers by June 30, 2020. The PPP Flexibility Act has extended the safe harbor deadline to December 31, 2020.
 - The PPP Flexibility Act also provides that loan forgiveness will be not be impacted by a reduction in employee headcount if the borrower is able to document, in good faith, that, during the revised covered period, the borrower was unable to:
 - rehire employees employed on February 15, 2020, or hire similarly qualified employees for unfilled positions, by December 31, 2020; or
 - return to the same level of business activity the borrower was operating before February 15, 2020, due to compliance with federal requirements or guidance issued 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.”
- **Additional Changes**
 - The legislation changes the deferral period for PPP loan payments (which had been 6 months) to be the date on which the amount of loan forgiveness is paid to the lender. There is an outside deferral date of 10 months after the covered period if the borrower has not applied for loan forgiveness by that time.
 - The legislation also eliminates the restriction in the CARES Act that had prohibited employers whose PPP loans were forgiven from deferring payroll taxes.

It is expected that President Trump will sign the PPP Flexibility Act soon, and that – shortly thereafter – SBA and the Treasury Department likely will issue guidance (in the form of interim final rules and FAQs) on these new legislative provisions.

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