

June 4, 2020

Congress Approves the Paycheck Protection Program Flexibility Act

Key Takeaways

- On June 3, 2020, Congress passed the “Paycheck Protection Program Flexibility Act” (the “Act”)¹ in order to give borrowers additional time and flexibility to use loan proceeds borrowed under the Small Business Administration’s (“SBA”) Paycheck Protection Program (“PPP”),² which was established under the CARES Act.³ The Act has garnered overwhelming bipartisan support and is expected to be signed into law by President Trump.
- The Act makes several changes to the terms of PPP loans and forgiveness for such loans, including by extending the covered period during which borrowers’ eligible expenses may qualify for loan forgiveness to up to 24 weeks; requiring at least 60% (rather than the original 75%) of loan proceeds to be used on payroll costs; extending the loan repayment deferment period during which borrowers cannot be required to make any loan payments; and increasing the minimum loan maturity date to five years.
- The Act also reverses a provision in the CARES Act that prohibited PPP borrowers who receive loan forgiveness to also avail themselves of the CARES Act’s payroll tax deferment opportunities.

Loan Forgiveness Terms and Conditions

Among the most anticipated changes in the Act are those relating to the terms and conditions of loan forgiveness, including an extension of the covered period during which qualified uses of loan proceeds entitle borrowers to forgiveness of such amounts and the relaxation of criteria that reduce forgiveness amounts.

Covered Period for Forgiveness

Prior to the Act, the PPP offered forgiveness to the extent loan proceeds are used by borrowers to pay certain payroll and nonpayroll costs during an eight-week covered period beginning on the loan disbursement date,

¹ To see the full text of the Act, please click [here](#).

² For more information on the PPP, please click [here](#) and [here](#).

³ For more information on the CARES Act generally, please click [here](#).

subject to an optional alternative payroll covered period (also eight weeks in duration) intended to align with a borrower's normal payroll cycle. The Act extends this covered period such that it begins on the loan disbursement date and ends on the earlier of (i) 24 weeks after disbursement or (ii) December 31, 2020. Borrowers that received a loan before the date of enactment of the Act may elect for the covered period to end on the date that is eight weeks after the date of origination of the loan.⁴

Forgivable Expenses Ratio

Up to now, PPP interim final rules have required that borrowers use at least 75% of loan proceeds for payroll costs,⁵ and borrowers failing to satisfy this requirement would have their loan forgiveness amount reduced such that not less than 75% of the total forgiven amount is in respect of payroll costs. Under the Act, this threshold has been reduced to 60%, allowing up to 40% percent of loan proceeds to be used for nonpayroll costs (e.g., mortgage interest (excluding prepayment and payment of principal), rent and utilities).

However, while prior guidance provided for a proportionate reduction in forgiveness for failure to comply, the Act appears to create a "cliff" scenario in which borrowers who do not comply with the 60% payroll cost requirement are entirely ineligible for forgiveness. A number of U.S. Senators have expressed concern with this aspect of the Act and some inquired of the SBA and U.S. Treasury ("Treasury") whether this could be modified in their rulemaking to implement the Act. At present, it appears that the SBA and Treasury have not responded to such inquiry.

FTE Restoration

Borrowers now have until December 31, 2020 to restore any reductions in the amount of full-time equivalent employees ("FTE") without being subject to a proportionate reduction in their loan forgiveness amounts, rather than the previous deadline of June 30, 2020.

In addition, the Act expands the limited safe harbor from such reduction that the SBA previously included in its interim final rules. A borrower is now exempt from a reduction in loan forgiveness amount due to its inability to restore FTE levels by December 31, 2020 if, in good faith, the borrower is able to document (i) its inability to rehire former employees or similarly qualified persons or (ii) its inability to return to the same level of business activity as before February 15, 2020, due to compliance with COVID-19 regulatory requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control and Prevention or the Occupational Safety and Health Administration between March 1, 2020 and December 31, 2020.

⁴ Presumably, the SBA will exercise its rulemaking authority as it did before to offer such borrowers the option of the alternative payroll covered period.

⁵ For more information regarding the definition of payroll costs, please click [here](#).

Other Loan Terms

The Act also modifies the terms of both outstanding and subsequently issued PPP loans, including by extending the minimum repayment deferral period and maturity date.

Loan Repayment Deferral Period

Up to now, PPP interim final rules have required that lenders provide complete deferment of all payments to all borrowers for six months from the date of loan disbursement. The Act now extends the required deferment period to the date on which the loan forgiveness amount is remitted to the lender (i.e., borrowers entitled to forgiveness in any amount will not be required to make any payments of unforgiven amounts, or ordinary payments while a forgiveness application is pending, until after the forgiveness amount has been finally determined).

However, because forgiveness must be requested by a borrower, the Act further provides that if a recipient fails to apply for forgiveness within 10 months after the last day of the covered period for forgiveness (described above), the recipient shall begin to make payments of principal, interest and fees beginning as soon as such 10-month period expires.

Maturity

Loans made on or after the date of the enactment of the Act with a remaining balance after loan forgiveness will have a minimum maturity of five years and a maximum maturity of 10 years. Borrowers and lenders may, but are not required to, mutually agree to modify maturity terms on existing loans to be in accordance with the Act.

Payroll Tax Deferment

Taxpayers with indebtedness forgiven under the PPP are no longer ineligible for the employer payroll tax deferral afforded by Section 2302 of the CARES Act, which delayed the due date for payment of certain employer payroll taxes for the period between March 27, 2020 (the date on which the CARES Act was enacted) and December 31, 2020, until December 31, 2021 and December 31, 2022, with 50% of such taxes payable by each such date. This change applies retroactively and covers all loans made under the PPP.

Ongoing Updates

Once the Act is signed into law, the SBA and Treasury are expected to issue additional rules and guidance to implement the Act's changes to the PPP. We will continue to provide updates on further developments.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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