

Flexibility Act Significantly Improves the Paycheck Protection Program

Coronavirus Legal Advisory

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UPDATE: On June 5, 2020, the [Paycheck Protection Program Flexibility Act \(H.R. 7010\)](#) (the Flexibility Act) was signed into law, and on June 11, 2020, the Small Business Administration (SBA) released a revised [interim final rule](#) (Revised Rule) to address changes made by the Flexibility Act.

The Flexibility Act and the Revised Rule expand the following key provisions of the Paycheck Protection Program (PPP) loan.

1. Increases Amount of Time to Spend PPP Funds

The amount of time PPP loan recipients have to spend PPP loan proceeds would be extended from eight weeks to 24 weeks starting at the origination of the loan but ending no later than December 31, 2020. This addresses concerns that the current eight-week forgiveness period is not enough time for businesses (particularly bars, restaurants and salons) to reopen and spend their received funding and recover financially, particularly in light of the safety restrictions these businesses face because of COVID-19. PPP loan recipients that already have received their PPP loans have the option to extend their covered period to 24 weeks or to continue with the original eight-week period.

2. Reduces Required Payroll Costs From 75% to 60%

After the PPP was created by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the SBA established a rule requiring no less than 75% of loan proceeds be spent on payroll costs during the relevant covered period in order to qualify for forgiveness. If payroll costs were less than 75% of the total permitted costs spent during the covered period, then the total loan amount to be forgiven would be lowered "to force" payroll costs to comprise 75% of the forgiveness amount. The Flexibility Act lowers the amount required to be spent on payroll costs from 75% to 60% and correspondingly increases the amount that may be used for other approved costs, such as mortgage interest payments, rent and utilities, from 25% to 40%. This change allows businesses to spend more of their received loan amount on other business operating expenses without sacrificing the amount of the loan that may be forgiven. The extension of time to use the loan and the amount of the loan that can be used for non-payroll costs will significantly increase the likelihood that PPP loan recipients will have the entire PPP loan forgiven. Of course, those loan recipients that used the loan to pay employees even though they

were not open for business will likely require additional relief to restart and ramp up their businesses.

3. Extends Exemption Based on Employee Availability and Provides Additional Safe Harbor for FTE Reductions

The deadline for rehiring employees and receiving loan forgiveness reductions under the PPP is extended six months, from June 30, 2020, to December 31, 2020. The additional six-month period should eliminate most loan forgiveness reductions resulting from a workforce reduction. In addition, the loan forgiveness amount will no longer be decreased due to a reduction in the number of full-time equivalent (FTE) employees from February 15, 2020, through December 31, 2020, if the loan recipient can document: (a) its inability to rehire individuals employed on February 15, 2020, and hire qualified replacements by December 31, 2020, **or**

(b) the company's inability to return to its activity level before February 15, 2020, due to COVID-19-related restrictions, guidance or requirements imposed by the government between March 1, 2020, and December 31, 2020. This, in conjunction with the reduced percentage of the PPP loan required to be spent on payroll and the new deadline for rehiring employees, significantly increases a small business's ability to maximize the impact of its PPP funding and obtain complete loan forgiveness.

4. Extends Loan Maturity to Five Years

The maturity date for loans made after June 5, 2020, will be five years instead of two years. While this change will apply to all PPP loans made on or after June 5, 2020, the Flexibility Act and the Revised Rule specifically state that any recipient of a PPP loan funded prior to the law's enactment and its lender may "mutually agree" to extend the term of the loan. A borrower so situated can request its lender to retroactively extend the maturity terms of the loan to five years. Given this express language, one would expect lenders to be receptive to such a request.

5. Extends Payment Deferral Period

Originally under the CARES Act, payments of principal and interest on PPP loans were deferred until six months after the borrower received the loan proceeds. The Flexibility Act requires a borrower to request forgiveness no later than ten months after the end of the applicable covered period and extends the deferral period until the loan forgiveness application is acted upon and the SBA remits the applicable amount to the lender. It can take up to 90 days for loan forgiveness to be processed and funded by the SBA. Accordingly, although a borrower likely will apply for forgiveness as soon as possible after the end of the applicable covered period, if a borrower waits the full ten months to submit its forgiveness application, the resulting deferral period would continue until (a) July 2021, in the case of a covered period ending June 30, 2020, and (b) January 2022, in the case of a 24-month covered period.

6. Delays Employee Taxes

Any loan recipient now can access the CARES Act deferral for its portion of Social Security payroll taxes up to 6.2% for payments required to be made between March 27, 2020, and December 31, 2020, regardless of whether any portion of its PPP loan is forgiven. Previously, a loan recipient could not continue to defer its portion of Social Security payments after any of its PPP loan was forgiven.

7. Borrower Certifications

The Revised Rule emphasizes that borrowers must make the following additional certifications in connection with their PPP loan application:

1. The funds will be used to retain workers and maintain payroll or make mortgage interest payments, rent and lease payments for personal property and utility payments. The

federal government may hold such borrower legally liable for using the funds for other purposes and press charges, such as for fraud.

2. Borrowers will provide to their respective lenders documentation verifying the number of FTE employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments and covered utilities for the loan forgiveness covered period.
3. Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utility payments. No more than 40% of the loan's proceeds may be used for non-payroll costs.

Warning: The June 30, 2020, PPP application deadline has not changed under the Flexibility Act and remains in effect.

The Flexibility Act puts some power back in employers' hands by granting greater spending and rehiring flexibility. With more time to use the funds, more time to rehire employees, and a decrease in the mandatory minimum funds to be spent on payroll costs, more borrowers will be able to meet the loan requirements and guarantee complete loan forgiveness for themselves.

McCarter & English, LLP can assist you with maximizing loan forgiveness and completing the loan forgiveness application. Let us help you figure out how the Flexibility Act could help your business secure loan forgiveness.