

Congress Passes Paycheck Protection Program Flexibility Act of 2020

JUNE 5, 2020

On June 5, 2020, President Trump signed into law the Paycheck Protection Program Flexibility Act of 2020 (the Flexibility Act), which was previously passed by the U.S. House of Representatives on May 28, 2020, and by the U.S. Senate on June 3, 2020. The Flexibility Act extends the availability of loans under the Paycheck Protection Program (PPP Loans) and relaxes certain rules applicable to PPP Loans. A summary of the Flexibility Act and main points of note follow.

Extension of Loan Application Period. To the extent the funds allocated for PPP Loans are not exhausted, the Flexibility Act permits borrowers to apply for a PPP Loan until December 31, 2020. As of June 3, 2020, approximately \$150 billion remains available for PPP Loans.

Extension of Period for Forgivable Use of PPP Loans. The Flexibility Act permits borrowers to extend from eight weeks to 24 weeks the covered period during which uses of PPP Loans may be eligible for forgiveness; provided that the covered period may not extend beyond December 31, 2020. This extension will allow more borrowers to use more of their PPP Loans for forgivable purposes, such as payroll.

Minimum Maturity. The Flexibility Act establishes a minimum maturity of five years for a PPP Loan made after the Flexibility Act is signed into law. A PPP Loan made before the Flexibility Act was signed into law may be extended from the two-year maturity required by existing regulations if agreed to by the applicable borrower and lender.

Reduction of Required Use for Payroll Costs. The Flexibility Act lowers from 75% to 60% the portion of a PPP Loan that must be used for payroll costs in order for the PPP Loan to be eligible for forgiveness. This change allows PPP Loan borrowers to use more of their PPP Loan proceeds on mortgage interest, rent, and utilities. However, based on the language of the Flexibility Act, any borrower that uses less than 60% of its PPP Loan proceeds for payroll costs is not eligible for any forgiveness at all. Existing rules suggest that failure to spend the required percentage of PPP Loan proceeds on payroll costs would result in reduction of forgiveness, not elimination of forgiveness. It is not clear whether such a change was intended, and some reports suggest that this will be addressed in future SBA guidance.

Extension of Period for Restoring Reductions in Employment Levels and Compensation. Under the CARES Act, reductions in full-time equivalent employees, salaries, or wages could reduce PPP Loan forgiveness, but a safe harbor allowed borrowers to avoid a loss of forgiveness on that basis if any reduction in employment, salary, or

wages that occurred between February 15 and April 26, 2020, were reversed by June 30, 2020. The Flexibility Act extends to December 31, 2020, the period for reversing such reductions, giving employers more time to restore employment and compensation levels in light of the continuing nature of the pandemic.

New Exemptions from Forgiveness Reduction. The Flexibility Act provides two new circumstances in which forgivable amount of a PPP Loan shall be determined without regard to a proportional reduction in the number of the borrower’s full-time equivalent employees. The first exemption applies where the borrower, in good faith, is able to document both an inability to rehire individuals who were its employees on February 15, 2020, and an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020. The second exemption applies where the borrower, in good faith, is able to document an inability to return to the level of business activity it was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration from March 1, 2020, through December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirements related to COVID-19. Note, however, that this second exemption does not appear to apply to reduced business activity due to state or local requirements that differ from or exceed those issued by the federal government.

Extension of Deferral of PPP Loan Payments. Under the Flexibility Act, principal and interest payments on a PPP Loan are deferred until the SBA pays the lender the amount of the PPP Loan to be forgiven, extending the existing six-month deferral. Borrowers that do not apply for forgiveness within ten months after the expiration of their eight-week or 24-week covered period must begin making payments at that time.

Restored Eligibility for Payroll Tax Deferral. The Flexibility Act eliminates a provision of the CARES Act that makes a PPP Loan recipient that has had a PPP Loan forgiven ineligible to defer payroll tax payments.

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