

CONGRESS PASSES THE PAYCHECK PROTECTION PROGRAM FLEXIBILITY ACT FOLLOWING RECENT SBA GUIDANCE ON LOAN FORGIVENESS

On June 5, 2020, the president signed into law the Paycheck Protection Program Flexibility Act, which amends key portions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to make it easier for borrowers under the Paycheck Protection Program (PPP) to obtain full forgiveness of their PPP loans.

The new legislation makes the following changes to the PPP:

- The “covered period” during which PPP loan proceeds spent on allowable uses will be eligible for forgiveness has been extended from eight weeks to 24 weeks.
- The maximum amount of PPP loan proceeds that may be used on non-payroll costs (i.e., mortgage interest, rent, and utilities) and remain eligible for full forgiveness has been increased from 25% to 40%, reducing the amount of PPP loan proceeds required to be spent on eligible payroll costs from 75% to 60%.
- The deadline for using PPP loan proceeds has been extended from June 30, 2020 to December 31, 2020. However, the PPP Flexibility Act does not extend the period for new PPP loans beyond June 30, 2020.
- The maturity date for PPP loans (to the extent not fully forgiven) has been extended from two years to a minimum of five years for all PPP loans originated on or after June 5, 2020. For existing PPP loans outstanding as of June 5, 2020, the maturity date may be extended from two years to up to five years only upon the mutual agreement of the lender and borrower.
- The six-month period for deferring payments under a PPP loan has been replaced with a deferral until the date on which the forgiveness application has been submitted to the lender. If the borrower fails to apply for forgiveness within 10 months after the end of the covered period, the borrower must then begin to make payments under the PPP loan.
- PPP loan forgiveness will not be reduced for borrowers who are able in good faith to document that they (i) could not re-hire or find qualified employees by December 31, 2020 or (ii) were unable to restore business operations to February 15, 2020 levels due to governmentally imposed COVID-19 related operating restrictions.
- Borrowers that receive PPP loan forgiveness are no longer prohibited from also deferring payment of their employer payroll taxes for the period beginning on March 27, 2020 and ending before January 1, 2021.

On June 11, 2020, the SBA issued an interim final rule revising the SBA's interim final rule released on April 2, 2020 to implement the changes to the PPP pursuant to the PPP Flexibility Act. The June 11 interim final rule clarifies that although the PPP Flexibility Act could be read to suggest that a borrower will be ineligible for any loan forgiveness if it spends less than 60% of its PPP loan on payroll costs, in fact a borrower using less than 60% of its PPP loan proceeds on payroll costs will have its forgiveness amount reduced to an amount such that its actual amount of PPP loan proceeds spent on eligible payroll costs would be 60% of its final forgiveness amount. The June 11 interim final rule also revises the April 2 interim final rule to reflect the increased flexibility of allowing up to 40% of PPP loan proceeds spent on non-payroll costs to be eligible for forgiveness.

This guidance came shortly after the SBA released its [Loan Forgiveness Application](#) for PPP borrowers in late May. The application included the following guidance for PPP borrowers:

- PPP lenders have 60 days after borrowers submit the Loan Forgiveness Application (SBA Form 3508) to issue a forgiveness decision to the SBA and request payment from the SBA for the forgiveness amount. Subject to its review of the application, the SBA will remit the appropriate forgiveness amount (with interest to the date of payment) within 90 days of receiving the request from the lender.
- Bonuses and hazard pay are eligible for loan forgiveness, in addition to salary, wages, and commission payments to furloughed employees, in each case capped at \$100,000 for each employee with an annual salary above \$100,000.
- Borrowers with payroll cycles that are bi-weekly or more frequent may use an eight-week covered period beginning on the date they receive the PPP loan or the first day of the pay period after the loan is funded. However, the 24-week covered period under the PPP Flexibility Act provides even more flexibility for borrowers than the alternative eight-week period under the recent guidance.
- Borrowers must check the indicated box in the Loan Forgiveness Application if they have PPP loans in excess of \$2 million. Applications with this box selected will be subject further review by the SBA to confirm whether the borrower's certification as to the necessity of the PPP loan was made in good faith. The Treasury Secretary and the SBA Administrator had previously announced in a [joint statement](#) that the SBA would review all PPP loans in excess of \$2 million following the lender's submission of the borrower's Loan Forgiveness Application.
- Non-payroll costs such as mortgage interest, rent, and utilities, must be paid during the covered period or incurred during the period and paid on or before the next regular billing date, even if that date is after the covered period. The guidance also provides that advance payments on mortgage interest are not eligible for loan forgiveness.

- The interim final rule and Loan Forgiveness Application provide additional details and clarifications to assist in calculating any reductions in forgiveness based on a reduction in the number of employees or a reduction in employee compensation. The guidance also clarifies that PPP borrowers will not be penalized twice for reductions in both hours and wages for the same employee.
- The guidance reiterates that in calculating any reduction in the number of full-time equivalent employees, PPP borrowers can exclude any employees who decline a good faith offer to return at the same pay and hours as before they were laid off or furloughed. However, the guidance includes a requirement for PPP borrowers to notify the state unemployment office of an employee's rejected offer within 30 days of that rejection.

Given the frequency of changes to the CARES Act and the PPP, borrowers are encouraged to check the SBA website regularly for the latest guidance.

If you have any questions concerning this alert, please contact:

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