

## Enactment of Paycheck Protection Flexibility Act of 2020

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On June 5, President Trump signed the Paycheck Protection Program Flexibility Act of 2020 (the Flexibility Act). The act revised, in certain important respects, elements of the Paycheck Protection Program (PPP) that had appeared in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as supplemented by a series of interim final rules and FAQs published by the Small Business Administration (SBA). Below is a summary of the changes.

### ***Extension of Covered Period***

Under the CARES Act, there was an eight-week measurement period following the disbursement date of the loan. That measurement period was used for multiple purposes in the PPP, including for determining those permitted expenditures that could be applied for loan forgiveness and for determining comparative headcounts and wage continuation for purposes of determining whether the amount of loan forgiveness granted would be reduced.

Borrowers now have the right to elect a 24-week covered period (or a covered period ending on Dec. 31, 2020 if shorter than a 24-week covered period) instead of an eight-week covered period, the effect of which is to allow for borrowers to continue to pay permitted costs out of loan proceeds over the extended period and obtain loan forgiveness for those additional expenditures.

For borrowers that have already spent the bulk of their funds borrowed under the PPP to maximize loan forgiveness during the original eight-week period, this will be a concession of modest value. The primary beneficiaries of this provision would appear to be companies that were unable to spend the bulk of their funds borrowed under the PPP to maximize loan forgiveness during the original eight-week period because they required more time to restore their workforce or business operations to pre-COVID-19 levels.

The legislation does not indicate that a company can choose an intermediate covered period between eight and 24 weeks in duration or apply for loan forgiveness prior to expiration of the 24-week covered period.

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Further, the CARES Act limits cash compensation that qualifies as eligible payroll costs for each employee to 8/52 of \$100,000. However, the Flexibility Act does not indicate that such limit on eligible payroll costs for an employee is increased to 24/52 of \$100,000 if the borrower elects a 24-week covered period.

### ***Introduction of New Standard for Minimum Expenditures on Employee Compensation***

The CARES Act did not require that a specific percentage of a PPP loan had to be spent on qualifying payroll costs. Instead, it took the approach that the amount of total loan forgiveness would be subject to reduction based on a comparison of employee headcount or employee compensation during the pre- and post-loan periods. A borrower that was willing to suffer a reduction of loan forgiveness in order to spend its borrowed funds in permitted ways that did not maximize the amount of loan forgiveness could do so. However, in a subsequent published interim final rule, the SBA took the position that at least 75% of any loan amount forgiven had to be spent on qualifying payroll costs and the amount of loan forgiveness was reduced to the extent necessary to result in the amount of qualifying payroll costs equaling 75% of the loan forgiven.

The Flexibility Act struck a middle position by statutorily imposing a minimum requirement that 60% of the borrowed funds must be used for qualifying payroll costs. Joined with the extension of the covered period to 24 weeks, this may give more companies the opportunity to realize maximum loan forgiveness. However, subsequently, the Department of the Treasury and the SBA issued a [joint statement](#) clarifying that, notwithstanding the language in the statute, loan forgiveness would still be available to the extent that payroll costs constituted not less than 60% of the amount for which loan forgiveness was sought. This subsequent guidance alleviated concerns that the 60% test set forth in the statute constituted a “cliff” that could result in the loss of the entirety of the loan forgiveness if a borrower were not able to meet the 60% threshold.

### ***Extension of Loan Term for Loans Made on or After June 5***

For any loans made on or after June 5, 2020 (the date the Flexibility Act was enacted), the minimum loan term is extended to five years. Under the CARES Act, the loan term was two years, and the Flexibility Act did not extend that term for loans made prior to its enactment, although the Flexibility Act permits lenders and borrowers of such loans to agree to a loan extension to five years.

### ***Extension of Date to Restore Employee Compensation or Headcount to December 31, 2020***

Under the CARES Act, employers had the ability to avoid a cutback in the level of loan forgiveness based on reduced headcount or compensation reductions if they restored the headcount or compensation fully by June 30, 2020. The Flexibility Act has extended that date until December 31, 2020. However, the Flexibility Act does not indicate whether borrowers may continue to use June 30, 2020 for this “safe harbor.”

### ***Forgiveness if Employee Headcount Cannot Be Restored***

The Flexibility Act has created certain safe harbors for employers that have been unable to restore headcount because (i) employees who were employed as of February 15, 2020 will not return to work; (ii) the employer is unable to hire qualified employees; or (iii) governmental action has impeded

operations in a way that has interfered with hiring.

### ***Extension of Principal and Interest Deferral Period***

The CARES Act provided that no payments of principal or interest were due on a loan before six months after the loan origination date. The Flexibility Act extends this deferral period until the date on which the amount of loan forgiveness is determined. However, if the borrower does not apply for loan forgiveness within 10 months after the end of the borrower's covered period, the borrower must begin making payments of principal and interest after expiration of that 10-month period.

### ***Elimination of Exclusion for Payroll Tax Deferment***

Under the CARES Act, once companies received loan forgiveness, the companies could no longer take advantage of a provision that allows employers to defer their share of Social Security employment taxes that would otherwise have to be deposited during the period from March 27, 2020 to December 31, 2020, to 2021 and 2022. Under the Flexibility Act, qualifying borrowers can now take advantage of the payroll tax deferral provisions in the CARES Act without regard to whether the borrowers receive loan forgiveness.

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