

[UPDATED] Paycheck Protection Program Flexibility Act: Major Changes to the PPP

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On June 5, 2020, the U.S. President signed into law the [Paycheck Protection Program Flexibility Act \(PPP Flexibility Act or Act\)](#) to provide businesses with greater flexibility and more time to maximize forgiveness of loans received under the Paycheck Protection Program (PPP), as enacted under the [Coronavirus Aid, Relief, and Economic Security Act](#) (as amended, supplemented or otherwise modified from time to time, including, without limitation, by the [Paycheck Protection Program and Health Care Enhancement Act](#), applicable federal regulations and interpretive guidance issued by the SBA and Treasury, the CARES Act). The PPP Flexibility Act has been further supplemented by the (i) Joint Statement, issued on June 8, 2020 by U.S. Treasury Secretary Steven T. Mnuchin and Small Business Administration (SBA) Administrator Jovita Carranza (the *Joint Statement*) and (ii) [Seventeenth Interim Final Rule](#)^[1], issued by the SBA on June 11, 2020.

The material changes made to the Paycheck Protection Program by the PPP Flexibility Act, as supplemented by the Joint Statement and Seventeenth Interim Final Rule, are as follows:

I. PPP Application Deadline

On its face, the PPP Flexibility Act extends the period during which prospective PPP borrowers are entitled to apply for PPP loan from June 30, 2020 to December 31, 2020. However, the Joint Statement and Seventeenth Interim Final Rules state that the SBA will not accept PPP applications after June 30, 2020. As of June 6, 2020, there was approximately \$150 billion in committed PPP funds available for businesses to access.^[2]

II. Extension of the Forgiveness Period

Prior to enactment of the PPP Flexibility Act, a PPP borrower could apply for loan forgiveness for up to the amount of PPP loan proceeds expended on authorized uses during the 8-week period immediately following receipt of the loan. The PPP Flexibility Act extends this 8-week “forgiveness

period” to 24 weeks after the date of disbursement of the PPP loan to the PPP borrower, but in no event ending later than December 31, 2020. Although the Act permits a PPP borrower to elect to continue to utilize an 8-week forgiveness period, it is unclear why any PPP borrower would choose to do so as a PPP borrower is not prohibited from applying for, nor is any PPP lender or the SBA prohibited from granting, forgiveness at any time during either of the stated forgiveness periods.

III. Reduction to Minimum Required Use of Proceeds for Payroll Costs

Prior to enactment of the PPP Flexibility Act, a PPP borrower was required to utilize at least 75% of the PPP loan proceeds it used towards “payroll costs” (as such term is defined in the CARES Act). The PPP Flexibility Act has relaxed this requirement by reducing the minimum percentage to 60%. The Act also states, whether intentional or not, that in order to be eligible for any forgiveness, a PPP borrower must spend at least 60% of its *total* PPP loan proceeds towards “payroll costs”. The Joint Statement and Seventeenth Interim Final Rule, however, has clarified that the SBA interprets the 60% requirement as a proportional limit on eligible nonpayroll costs as a share of the borrower’s loan forgiveness amount, rather than as a threshold for receiving *any* loan forgiveness. The Joint Statement and Seventeenth Interim Final Rule states that if a PPP borrower uses less than 60% of the loan amount for payroll costs during the forgiveness period, the PPP borrower will continue to be eligible for partial loan forgiveness, subject to at least 60% of the loan forgiveness amount having been used for payroll costs.

IV. Extension of the Safe Harbor Period for Loan Forgiveness

Prior to enactment of the PPP Flexibility Act, a PPP borrower had until June 30, 2020 to eliminate a reduction in employment, salary and wages that would otherwise reduce the forgivable amount of its PPP loan. The PPP Flexibility Act extends this safe harbor period to December 31, 2020. In addition, the Act provides that PPP borrowers will not experience a reduction in their forgiveness amount due to a decline in the FTE employee count if the PPP borrower, in good faith, is able to document:

(A) (i) an inability to rehire individuals who were employees of the PPP borrower on February 15, 2020; and (ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or

(B) an inability to return to the same level of business activity as such business 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 during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

V. Extension of Payment Deferral

Prior to the enactment of the PPP Flexibility Act, principal and interest payments on each PPP loan were to be deferred until the date that was 6 months after such loan’s funding date. The PPP Flexibility Act extends the deferral period to the “date on which the amount of forgiveness determined under Section 1106 of the CARES Act is remitted by the lender”. The Act further provides that a PPP borrower that fails to apply for forgiveness within 10 months after the last day of the 24-week forgiveness period must begin making principal and interest payments on the date that is 10 months

after the ending date of the forgiveness period.

VI. Extension to Maturity

Finally, the PPP Flexibility Act extends the maturity date to at least a minimum of 5 years for PPP loans disbursed on or after the date of enactment of the Act. For PPP loans disbursed prior to the enactment of the PPP Flexibility Act, the Act explicitly permits PPP borrowers and lenders to mutually agree and modify the existing maturity terms to conform with the new minimum of 5 years maturity for any remaining outstanding balance of a PPP loan after determination of forgiveness.

FOOTNOTES

[1] The Seventeenth Interim Final Rule is effective without advance notice and public comment because Section 1114 of the CARES Act authorizes SBA to issue regulations to implement the PPP without regard to notice requirements.

[2] See Paycheck Protection Program Loan Report Round 2, issued by the SBA, available at <https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf>.

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