

Paycheck Protection Program (PPP) Flexibility Act

On June 5, 2020 the President signed the Paycheck Protection Program Flexibility Act of 2020 (the “Act”), which amends the Paycheck Protection Program (“PPP”) created under the April 2020 Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) and later amended under the Paycheck Protection Program and Health Care Enhancement Act. The PPP has weathered intense criticism since its inception. The passage of this new amendment is intended to address some of those criticisms and arrives as many states are entering their twelfth week of shelter-in-place orders and as unemployment claims exceed 40 million.

The changes made to this program that *are* retroactive include:

- Extending the period within which to use the loan proceeds from June 30, 2020 to December 31, 2020.
- Extending the period for PPP loan forgiveness from eight weeks from the date of fund disbursement to the earlier of (i) 24 weeks from date of disbursement; or (ii) December 31, 2020. This provides businesses, such as those that were operationally suspended due to the shelter-in-place orders, more time to spend the funds and still qualify for loan forgiveness.
- Extending the deadline for the rehiring exception from June 30, 2020 to December 31, 2020.
- Codifying that the amount of loan forgiveness will not be reduced by a reduction in the number of full-time equivalent employees if the borrower can document a good faith inability to (i) rehire employees who had been employed on February 15, 2020 and hire similarly-qualified employees for unfilled positions by December 31, 2020, or (ii) return to the same level of business activity at which the borrower was operating before February 15, 2020 due to compliance with specified federal governmental requirements or guidance relating to COVID-19.

This change provides employers with more flexibility regarding the full-time equivalent headcount requirement for loan forgiveness. The SBA previously had advised that employers who are unable to rehire employees because they wish to remain on unemployment or were subsequently hired elsewhere would not be punished with non-forgiveness so long as they provided documentation of their rehiring efforts. The amendment expands on this by protecting employers who were unable to find qualified employees to fill vacant positions or could not return to the pre-COVID-19 level of business activity due to social distancing requirements.

- Lowering the percentage required to be spent on payroll requirements from 75% to 60% in order to receive loan forgiveness. This provides allows more flexibility for companies who have significant non-payroll costs while they try to reestablish their businesses. The Treasury Department and SBA issued a joint statement on June 8, 2020 that clarified spending less than 60% of the PPP funds on payroll costs will result in partial forgiveness rather than no forgiveness.
- Deferring loans until the date on which the amount of loan forgiveness is remitted to the lender. However, if an eligible recipient fails to apply for loan forgiveness within 10 months of the last day of the covered period (the earlier of 24 weeks from date of funds disbursement or December 31, 2020), then such deferral period will automatically end.
- Allows businesses full payroll tax deferral for all taxpayers, regardless of whether they receive a PPP loan.

The changes made to this program that are *not* retroactive include:

- Extending the minimum maturity timeframe for the loans from two to five years, aiming to ensure adequate time to recover and repay PPP loan balances that are not forgiven. This lengthened payback period applies to loans made on or after the enactment date (not loans issued before this date). However, lenders and borrowers may agree amongst themselves to modify the maturity terms of PPP loans disbursed prior to this Act.

While the Act addresses many pressing concerns with the PPP program, issues remain. For example, the Act also does not provide clarity as to the audibility of the loans by the SBA in light of SBA FAQ 46¹ and the May 22, 2020 Interim Final Rules.²

As with the CARES Act and its subsequent amendment, borrowers should expect the SBA and Treasury Department to provide further guidance via frequently asked questions and further regulations with interim final rules.

¹ PPP Loan FAQ 46 (May 13, 2020): “SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: Any borrower that, together with its affiliates,²⁰ received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.”

² 85 Fed. Reg. 33014 (May 22, 2020): “SBA may begin a review of any PPP loan of any size at any time in SBA’s discretion.”