

PRESIDENT SIGNS PAYCHECK PROTECTION PROGRAM FLEXIBILITY ACT

To Our Clients and Friends:

On June 5, 2020, the President signed into law H.R. 7010, the *Paycheck Protection Program Flexibility Act of 2020* (“*PPP Flexibility Act*”), which relaxes a number of requirements of and restrictions on the Paycheck Protection Program (“PPP”) established by the *Coronavirus Aid, Relief, and Economic Security Act* (“*CARES Act*”) and clarified by subsequent guidance from the Small Business Administration (“SBA”) and the U.S. Department of the Treasury.^[i] The bill passed the House by a vote of 417-1 and the Senate by voice vote, reflecting the strong bipartisan support behind the legislation. Below is a summary of the major changes to the PPP instituted by the *PPP Flexibility Act*.

Covered Period

The *CARES Act* established an eight week “covered period”—beginning on the loan origination date and ending no later than June 30, 2020. The portion of the PPP loan equal to the amount of loan proceeds used during this covered period for certain covered obligations, including payroll costs, mortgage interest payments, rent, and utilities, is eligible for forgiveness.

The *PPP Flexibility Act* extends the covered period to 24 weeks—ending no later than December 31, 2020. Borrowers who received a PPP loan prior to the *PPP Flexibility Act* may elect for the covered period to end 8 weeks after the origination of the loan. The *PPP Flexibility Act* does not address whether new borrowers can apply for forgiveness prior to the end of the 24 week covered period.

Covered Obligations

In the First Interim Final Rule published on April 1, 2020, SBA and the Department of Treasury stated that at least 75 percent of PPP loan proceeds “shall be used for payroll costs.” This ratio of payroll costs to other covered obligations was not in the *CARES Act*.

The *PPP Flexibility Act* codifies a new ratio: at least 60 percent of PPP loan proceeds “shall” be used for payroll costs in order to receive full loan forgiveness. Accordingly, up to 40 percent of loan proceeds may go to other covered obligations, including interest on covered mortgage payments, rent, and utilities.

The text of the law appears to create a cutoff precluding loan forgiveness for borrowers that spend less than 60% of PPP loan proceeds on payroll costs—as opposed to a reduction in the amount of forgiveness, as reflected in previous guidance. We expect additional guidance from SBA and the Department of Treasury to prevent this cutoff.

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Loan Terms

For all PPP loan funds that are not forgiven, the *CARES Act* established that the outstanding balance will have a maximum maturity of 10 years and an interest rate not to exceed 4 percent. The First Interim Final Rule instituted a maturity of 2 years and an interest rate of 1 percent.

For new PPP loans originating on or after June 5, 2020, the *PPP Flexibility Act* extends the minimum maturity for outstanding balances to 5 years. Existing PPP loans are unaffected.

Rehiring Employees

Under the *CARES Act*, employers who reduced the compensation or number of full-time equivalent employees could eliminate those reductions by June 30, 2020, and avoid any reduction in loan forgiveness.

The *PPP Flexibility Act* extends the date to eliminate reductions to compensation or number of full-time equivalent employees to December 31, 2020.

Also, SBA and the Department of Treasury [Frequently Asked Question No. 40](#) provided a safe harbor from the reduction in loan forgiveness with respect to laid-off employees who reject a borrower's offer of re-employment. The FAQ states that the borrower must have made a good faith, written offer of rehire, and the borrower must document the former employee's rejection of the offer.

The *PPP Flexibility Act* codifies this safe harbor, stating that loan forgiveness will not be reduced if the borrower can, in good faith, document an inability to rehire former employees or hire similarly qualified employees on or before December 31, 2020. The *PPP Flexibility Act* also provides a safe harbor for borrowers who cannot return to the same level of business activity at which the business was operating before February 15, 2020, due to compliance with standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

The *PPP Flexibility Act* does not articulate what "business activity" means or how it will be measured. We look forward to additional guidance clarifying this issue.

Loan Deferral Period

Under the *CARES Act*, borrowers could defer payment of the principal, interest, and fees of their PPP loans for not less than six months and not more than one year.

The *PPP Flexibility Act* changes this deferral period to end when the PPP loan forgiveness amount is remitted to the lender. Also, if a borrower fails to apply for forgiveness within 10 months after the last day of the covered period, the borrower shall make payments of principal, interest, and fees beginning no earlier than 10 months after the covered period ends.

Payroll Tax Deferral

The *CARES Act* allowed certain companies to defer paying payroll taxes, excepting companies who had their PPP loans forgiven.

The *PPP Flexibility Act* eliminates this exception, allowing companies whose PPP loans are forgiven to also defer payroll taxes.

[i] For additional details about the PPP please refer to Gibson Dunn's Frequently Asked Questions to Assist Small Businesses and Nonprofits in Navigating the COVID-19 Pandemic and prior Client Alerts about the Program: SBA "Paycheck Protection" Loan Program Under the CARES Act; Small Business Administration and Department of Treasury Publish Paycheck Protection Program Loan Application Form and Instructions to Help Businesses Keep Workforce Employed; Small Business Administration Issues Interim Final Rule and Final Application Form for Paycheck Protection Program; Small Business Administration Issues Interim Final Rule on Affiliation, Summary of Affiliation Tests, Lender Application Form and Agreement, and FAQs for Paycheck Protection Program; Analysis of Small Business Administration Memorandum on Affiliation Rules and FAQs on Paycheck Protection Program; Small Business Administration Publishes Additional Interim Final Rules and New Guidance Related to PPP Loan Eligibility and Accessibility; and Small Business Administration Publishes Loan Forgiveness Application.



Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors:

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