

June 4, 2020

Congress Passes Revisions to the Paycheck Protection Program

Yesterday, Congress passed the Paycheck Protection Program Flexibility Act (“**PPP Flexibility Act**”) that revises the Paycheck Protection Program (“**PPP**”) to provide borrowers with additional time and flexibility to use loans and obtain forgiveness. The bill was adopted in the U.S. House of Representatives by a vote of 417-1 and in the Senate by a voice vote. Authorized by the CARES Act and implemented by the Small Business Administration (“**SBA**”) and Treasury, the PPP has to date supported over 4.5 million loans totaling \$510 billion (out of \$659 billion in capacity) to small businesses affected by the pandemic. Despite its popularity, the PPP has been hampered in part by restrictions on borrowers’ use of proceeds and uncertainty regarding loan forgiveness terms. The bill is designed to reduce those impediments in light of an apparently longer and deeper economic slowdown than Congress anticipated when the Program was initially authorized in late March. The PPP Flexibility Act generally applies retroactively to loans that have already been disbursed. The President is expected to sign the bill.

We set out below a summary of, and our observations on, the changes made by the PPP Flexibility Act.

Summary

- *Use of Proceeds.* Borrowers may now use up to 40% of loan proceeds for non-payroll costs like mortgage interest, rent and utilities and remain eligible for forgiveness (up from 25%). In addition, borrowers now have until December 31, 2020 to use loan proceeds (extended from June 30, 2020).
- *Forgiveness.* Borrowers may receive forgiveness for eligible payroll and non-payroll costs incurred during the period from the loan origination date through the earlier of 24 weeks after the loan origination date or December 31, 2020 (“**Forgiveness Covered Period**”) (up from 8 weeks after the origination date). Borrowers that received a loan prior to the effectiveness of the PPP Flexibility Act may elect to continue to use the 8-week period following the loan origination date as the Forgiveness Covered Period.
- *Maturity.* Loans now have a minimum maturity of 5 years (up from 2 years). The maximum maturity of 10 years remains unchanged. While this change applies only to loans made after enactment, borrowers and lenders may agree to modify the maturity of existing loans.
- *Deferral.* Payments of principal and interest on any unforgiven loan amounts may now be deferred until the date on which the amount of forgiveness is determined (up from a minimum of six months to a maximum of up to one year after origination). If a borrower does not apply for forgiveness within 10 months after the end of the Forgiveness Covered Period, the deferral would end on the date that is 10 months after the end of the Forgiveness Covered Period.

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- *Rehiring.* A borrower now has until December 31, 2020 to rehire employees and restore any reduction in salary or wages, without a reduction in loan forgiveness (extended from June 30, 2020). In addition, forgiveness shall be determined without regard to a reduction in the number of full-time equivalent employees if the borrower in good faith is able to document:
 - An inability to rehire individuals who were employees as of February 15, 2020 and an inability to hire similarly qualified employees for unfilled positions by December 31, 2020; or
 - An inability to return to the same level of business activity due to compliance with requirements established or guidance issued by the Secretary of the Department 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 March 1, 2020 through December 31, 2020 related to maintaining standards for sanitation, social distancing and other worker or customer safety requirements related to the pandemic.
- *Tax.* The PPP Flexibility Act removes a prohibition in the CARES Act on borrowers that receive PPP loan forgiveness also deferring payment of payroll taxes. The bill does not address IRS Notice 2020-32 which provides that a deduction for an expense is not allowed under the Internal Revenue Code if the payment of such expense results in forgiveness of a PPP loan.
- *No Extension for Loan Originations.* A bipartisan bicameral statement from the Chairs and Ranking Members of the primary committees of jurisdiction has clarified that Congress did not intend for the bill to authorize the SBA to continue accepting applications or to issue PPP loans after June 30, 2020. The statement clarifies that the Congressional intent of the PPP Flexibility Act is to support borrowers who receive PPP loans on or prior to June 30, 2020.

Observations

- The changes generally reflect the new economic and public-health realities of the pandemic by permitting additional time for borrowers to use proceeds, rehire employees, restore wages and repay unforgiven loan amounts. In that regard, the PPP Flexibility Act leaves in place the current program architecture, while making modest adjustments designed to relieve pressure points for borrowers.
- The modest approach of the PPP Flexibility Act appears designed to make it easier to channel government assistance to affected employees and businesses, and we expect the bill to generally achieve its aim. However, Congress has left intact the body of SBA and Treasury guidance that has effectively imposed additional eligibility criteria and operated as a practical deterrent to some borrowers, such as public companies and private equity portfolio companies.
- Shifting the required balance of use of proceeds to permit additional spending on non-payroll costs is expected to provide relief for borrowers that may now reopen but operate at reduced levels (e.g., restaurants) or operate in areas where such overhead costs are higher. These borrowers have the option to spend more on costs that remain generally fixed (i.e., rent) and less on costs for which a borrower may have more discretion (i.e., wages).

- For loans that have already been disbursed, borrowers and lenders may need to revise and modify loan-level documentation to conform with a limited set of the updated requirements (e.g., to agree to extend the maturity date). Most of the changes will have to be addressed through updating the form documentation provided by the SBA and Treasury for loan forgiveness (e.g., the forgiveness worksheets).

A blackline showing the relevant provisions of the CARES Act as amended by the PPP Flexibility Act is available [here](#).

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