

A Robinson+Cole Legal Update

Coronavirus (COVID-19)

June 5, 2020

Paycheck Protection Program Flexibility Act

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On June 5, 2020, the [Paycheck Protection Program Flexibility Act](#) of 2020 (Flexibility Act) was signed into law. The Flexibility Act provides important new flexibility to borrowers under the Paycheck Protection Program (PPP), including with respect to loan forgiveness and payroll tax deferment.

KEY TAKEAWAYS

- **Extension of Covered Period for Forgiveness Purposes:** The Flexibility Act extends the definition of “covered period” with respect to loan forgiveness from 8-weeks to the earlier of (a) 24 weeks after disbursement of the loan^[1], or (b) December 31, 2020. This change means that borrowers now have an extended period of time during which to spend PPP loan proceeds and remain eligible for forgiveness. However, it is important to note that the new definition of “covered period” applies to Section 1106 of the CARES Act in its entirety, and not just the portion with respect to the deadline to spend PPP funds for forgiveness eligibility purposes. As a result, other aspects of forgiveness calculations appear to require the application of this extended covered period. For example, loan forgiveness reductions due to decreased headcounts or wages are calculated based upon the employees and wages maintained during the applicable covered period. Consequently, the application of this extended covered period could result in a borrower being unable to complete its forgiveness analysis (and therefore apply for forgiveness) until after the expiration of the extended covered period, even if the borrower spent its PPP loan proceeds well before that time. Nevertheless, it is important to note that a borrower that received a PPP loan before the enactment of the Flexibility Act may elect to continue to use the original 8-week period. The election to use the original 8-week period seems to apply with respect to all forgiveness calculations, and would therefore permit a borrower to complete its forgiveness analysis upon the completion of such 8-week period.
- **Modification of the 75/25 Rule:** The Flexibility Act (a) decreases the amount of PPP loan proceeds that must be used for payroll costs to qualify for forgiveness from 75% to 60%, and (b) increases the amount of forgivable loan proceeds that can be used for specified non-payroll costs from 25% to 40%. It is important to note that the Flexibility Act does not clarify the open issue of whether failure to use 60% of PPP entire loan proceeds on payroll costs would operate as a bar to any forgiveness, or if it would simply reduce the forgiveness amount.
- **Extension of Forgiveness Safe Harbor for Rehiring or Reversing Wage Cuts:** Under the PPP, loan forgiveness is subject to reduction if a borrower reduces its full-time equivalent employees or reduces wages by greater than 25%. However, there is a safe harbor that provides that the forgiveness amount will not be reduced if a borrower rehires or reverses the wage cuts on or prior to a specified date. The Flexibility Act extended the safe harbor deadline from June 30, 2020 to December 31, 2020.
- **Additional Forgiveness Reduction Exemptions:** The Flexibility Act provides borrowers with an exemption from proportional forgiveness reduction if the borrower, in good faith, is able to document that for the period from February 15, 2020 until December 31, 2020, the borrower was unable to: (a) rehire individuals who were employees on February 15, 2020, and unable to hire “similarly qualified employees” for unfilled positions on or before December 31, 2020; or (b) return to the same level of

business activity as such business was operating at before February 15, 2020, due to compliance with federal requirements or guidance regarding sanitation, social distancing or other employee or customer safety requirements related to the COVID-19 pandemic.

- **Extension of PPP Loan Maturity:** The Flexibility Act extends the maturity date with respect to any portion of a PPP loan that is not forgiven from 2 years to 5 years. It is important to note that this maturity extension only applies to PPP loans issued after the enactment of the Flexibility Act. However, the Flexibility Act states that it does not “prohibit lenders and borrowers from mutually agreeing to modify the maturity terms” of any existing PPP loan to match this extended maturity requirement.
- **Modification of PPP Loan Deferral Period:** The Flexibility Act modifies the deferral period for PPP loans to allow borrowers to defer payments until the amount of their PPP loan that is forgiven is remitted to the lender. Previously, the deferral period was 6 months after the date of disbursement of the PPP loan. Borrowers that do not apply for forgiveness will have 10 months after the program’s expiration (i.e., now December 31, 2020) before they will be required to begin making payments.
- **Extension of the Deadline to Apply for a PPP Loan:** The Flexibility Act extends the deadline to apply for a PPP loan from June 30, 2020 to December 31, 2020.
- **Payroll Tax Deferral:** The Flexibility Act removes the CARES Act provision that restricted PPP loan borrowers from deferring payroll taxes incurred between March 27, 2020 and December 31, 2020.

Robinson & Cole LLP has been tracking government relief programs being offered to help alleviate the economic impact of COVID-19 on businesses in the United States. On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (CARES Act) was signed into law. The CARES Act was intended to distribute capital quickly and broadly to help alleviate the economic impact of COVID-19, including relief opportunities for small businesses through programs administered by the Small Business Administration (SBA). Among other things, the CARES Act (a) appropriated \$349 billion for small businesses as part of an expansion of the SBA’s Section 7(a) loan program under the Payroll Protection Program (PPP), and (b) appropriated \$10 billion for small businesses as part of an expansion of the SBA’s Section 7(b) Economic Injury Disaster Loan Program (EIDL Program). These initial funding amounts were quickly depleted. In response, the Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act) was signed into law on April 24, 2020. The Enhancement Act provided a \$484 billion economic relief package and, among other things, increased funding to both the PPP and EIDL Program. For more information on the PPP, please see our [Primer](#), our [FAQ on the PPP](#), our [article addressing SBA affiliation rules](#), our [article on the Paycheck Protection Program and Health Care Enhancement Act](#), our [article on the “necessity certification”](#) and our [article on the PPP loan forgiveness application](#). This alert is being issued as of June 5, 2020. Please note that future legislation, guidance and regulations could modify certain provisions of the topics discussed above.

ENDNOTES

[1] The Flexibility Act did not address the “Alternative Payroll Covered Period,” which is a concept that was introduced in the loan forgiveness application released by the Small Business Administration, in consultation with the Department of the Treasury, on May 15, 2020.

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