

The Paycheck Protection Program Flexibility Act: Helpful Modifications to the PPP, but New Questions Arise

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On Wednesday evening of June 3, 2020, the U.S. Congress enacted material modifications to the CARES Act in the Paycheck Protection Program Flexibility Act of 2020 (the “Act”). The Act, originally introduced by Representative Dean Phillips of the Third Congressional District in the State of Minnesota, revises the Paycheck Protection Program (“PPP”) to, among other things, further assist borrowers with maximizing the amount of the PPP loan that may be forgiven. The Act was signed into law by the President on June 5, 2020. On June 11, 2020, the Small Business Administration (“SBA”) published an Interim Final Rule further clarifying how the Act modified the PPP.

Specifically, the Act modifies the PPP as follows:

1. The minimum maturity date of a PPP loan is now five years (borrowers and lenders of PPP loans funded prior to June 5, 2020 may mutually agree to extend the maturity of such loans to five years).
2. The “Covered Period” during which expenditures of loan proceeds will qualify for forgiveness is no longer 8 weeks starting on the date of funding of a PPP loan, but the earlier of 24 weeks starting on the date of funding or December 31, 2020.
 - a. Though not stated, it is likely the “Alternative Payroll Covered Period” in the PPP loan forgiveness application will also be modified, but a revised loan forgiveness application will need to be published in order to reflect this.
 - b. Note that borrowers with PPP loans funded prior to June 5, 2020 will still be permitted to elect to use the 8 week period if they prefer.
3. The end date of the safe harbor periods in which other actions must be taken (i.e., restoring FTE/salary) has been changed from June 30, 2020 to December 31, 2020.
 - a. It remains unclear if this now means that a borrower can fire/hire at will any time prior to December 31, 2020 provided the requirements of the applicable safe harbor are satisfied by that date.
4. Workforce reductions no longer necessarily result in a proportional reduction of loan forgiveness. Specifically, the full-time employee reduction penalty will now be ignored (i.e., no reduction in the amount of the loan to be forgiven) if a borrower in good faith is able to document an inability to:

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- a. rehire individuals who were employees on February 15, 2020 or 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 borrower 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.”
5. The 75%/25% split for payroll to nonpayroll costs required for forgiveness has been modified to 60%/40%, respectively—this will be applied in the same manner as the 75%/25% split and therefore will act as a proportional reduction in the loan amount to be forgiven as opposed to a required minimum threshold.
6. Regarding deferment:
- a. The deferment of payment of principal/interest/fees (including with respect to covered loans that are sold on the secondary market) to remain in place until the date on which the amount of forgiveness is paid to the lender by the SBA.
 - b. If a borrower fails to apply for forgiveness within 10 months after the last day of the covered period, payments of principal/interest/fees begin on the day that is not earlier than 10 months after the last day of the covered period.
7. PPP loan forgiveness no longer disqualifies a borrower from eligibility under Section 2302 of the CARES Act for deferral of deposits and payments of the 6.2% Social Security portion of the borrower’s share of FICA tax otherwise required to be made from March 27 to December 31, 2020. Section 2302 permits 50 percent of these deposits and payments to be deferred until December 31, 2021, and the remaining 50% of these deposits and payments to be deferred until December 31, 2022.
8. The Act does not, however, address the deductibility of expenses funded with forgiven loan proceeds and therefore such expenses remain nondeductible for income tax purposes. Nevertheless, forgiven loan proceeds do not give rise to taxable income, as provided for in the CARES Act.