Congress Makes PPP Loans More Flexible for Borrowers | Insights | Holland & Knight

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On June 3, 2020, Congress sent bipartisan legislation to modify the U.S. Small Business Administration (SBA) Paycheck Protection Program (PPP) to President Donald Trump for his signature. The PPP is a popular loan program that was a key feature of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act), which passed the U.S. House of Representatives on May 28 by a 417-1 vote and the Senate on June 3 without objection, includes several significant updates affecting both borrowers and lenders participating in the program.

The Flexibility Act makes key changes to the program, including lengthening the timeline of availability for PPP loans, providing more flexibility for loan forgiveness recognizing the extended impact of COVID-19; making the safe harbor for maintaining or rehiring employees more flexible, allowing PPP borrowers to defer payroll taxes for employees whose payroll costs are covered by the loan, and providing more flexibility in the term of the loan and repayment timing. SBA will now have to adjust its Interim Final Rulemakings, Frequently Asked Questions and Loan Forgiveness Application to come into conformance with the Flexibility Act. These changes are outlined in greater detail below.

Timeline for Availability of PPP Loans

The CARES Act provided the SBA with the authority to provide PPP loans until June 30, 2020. The Flexibility Act amended the CARES Act to extend the timeline for availability of PPP loans until Dec. 31, 2020.

Loan Forgiveness Flexibility

On April 3, the SBA issued an Interim Final Rulemaking implementing the PPP and within its discretion determined that "at least 75 percent of the PPP loan proceeds shall be used for payroll costs" by PPP borrowers. The Flexibility Act by law changes the percentage split between payroll costs and non-payroll costs from 75/25 to 60/40 to be eligible for full loan forgiveness.

The CARES Act provided that a PPP borrower must spend its loan proceeds within an eight-week covered period following the PPP loan disbursement date. The Flexibility Act extends the PPP loan covered period from eight weeks to 24 weeks (or until Dec. 31, 2020, whichever is earlier). The Flexibility Act allows PPP borrowers that already received a PPP loan before enactment of the Act to elect an eight-week covered period. An eight-week covered period may be beneficial for PPP borrowers that are approaching the end of their original covered period and have already spent the majority of their funds.

The Flexibility Act allows PPP borrowers up to 10 months from the date their covered period ends to apply for loan forgiveness (at which time, absent an application, the loan would commence amortization).

Safe Harbor for Maintaining or Rehiring Employees

The CARES Act required that PPP borrowers maintain the average full-time equivalent employees as they had prior to the COVID-19 pandemic and pay employees at least 75 percent of the salary or wages they received in the last fiscal quarter before applying for a PPP loan. The CARES Act included a safe harbor if the PPP borrower restored employment or salary/wages prior to June 30, 2020.

The Flexibility Act extends the CARES Act safe harbor for restoring average FTE and salaries/wages from June 30, 2020 to Dec. 31, 2020. The Flexibility Act also prevents a PPP borrower from having its loan forgiveness reduced if the borrower can establish in good faith that it was unable to:

- rehire an individual that was laid off after Feb. 15, 2020
- hire similarly qualified employees for unfilled positions, or
- return to the same level of business activity it was at before Feb. 15 due to compliance with U.S. Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC) or Occupational Safety and Health Administration (OSHA) guidance.

The Flexibility Act provides significant accommodations that should make it less likely that a PPP borrower has its loan forgiveness reduced as a result of a reduction in full-time equivalent employees or salaries/wages. However, given the uncertainty that the COVID-19 pandemic creates from a public health and economic perspective, PPP borrowers should consider weighing the benefit of a longer forgiveness period against the uncertainty of the future should they wait to reach the safe harbor.

Payroll Taxes for Employees Whose Payroll Costs Are Covered by the Loan

The CARES Act allowed employers and self-employed individuals to delay the deposit of the employer-portion of the social security tax (the 6.2 percent tax on wages) and 50 percent of the tax imposed on the self-employment income, respectively. However, the CARES Act also prohibited employers from taking advantage of the payroll tax deferral after a PPP loan is forgiven. The Flexibility Act removes this restriction, allowing PPP borrowers to take advantage of the payroll tax deferral from March 27 to Dec. 31, 2020.

Term of the Loan and Repayment Timing

The SBA's April 3 Interim Final Rulemaking implementing the PPP set the loan maturity term at two years. The Flexibility Act requires that loan maturity term for any loan balance that is not forgiven is a minimum of five years for new loans. The Act allows existing PPP borrowers and lenders to mutually agree to modifications to the term of PPP loans that were already distributed at the two-year maturity term.

The CARES Act required that PPP lenders provide a deferment on payments of PPP principal, interest and fees for at least six months and not more than one year. The Flexibility Act allows for the deferral of all payment of principal, interest and fees until the date on which the amount of the loan forgiven is remitted to the lender by the SBA.

What Did Not Change

It is important to note there is no change in the maximum loan amount that can be borrowed under the program; it remains 2.5 times a borrower's one-month average payroll cost (as determined in accordance with existing rules). Borrowers are also still allowed only one PPP loan, and they may not apply for or receive a second loan.

Remaining Issues

Although the Flexibility Act included significant changes to the program, it will leave some issues open and will raise a few new issues, including:

- If PPP lenders and borrowers do mutually agree to extend existing PPP loan maturity term beyond two years, what is the deadline to implement these extensions, and will extensions for less than the full five years be permitted?
- Will the concept of an "Alternate Covered Period" provided for in the SBA Loan Forgiveness Application be removed given the 24-week covered period in which to spend loan proceeds and seek forgiveness?
- The SBA Loan Forgiveness Application made clear that if a PPP borrower failed to spend at least 75 percent of its loan proceeds on payroll costs, it could still receive partial loan forgiveness. With the 60/40 test now included as part of the statute, will borrowers still be able to obtain partial forgiveness if they spend less than 60 percent of all of their loan proceeds on payroll costs?
- Will an application for forgiveness outside the 10-month window be rejected on its face?

- Given the change to the date on which payments of existing loans will commence (from six months to the date the lender receives forgiveness), will existing loan documents need to be restructured to adjust monthly amortization amounts?
- Although SBA's April 3 Interim Final Rule required that PPP borrowers must use 75 percent of the total loan proceeds on payroll costs overall, the Flexibility Act requires only 60 percent on payroll costs in order to be forgiven and does not address the mixture of spending on total loan proceeds that are not forgiven. Does a borrower have to use at least 60 percent of the total loan proceeds on payroll costs overall or can a borrower elect to use 100 percent of the loan proceeds for allowable purposes other than payroll costs knowing that it will not then be eligible for forgiveness?
- Are employees who made over $100,000 in any pay period in 2019 still capped at $15,385 (eight weeks of cash payroll) or are they now capped at $46,155 (24 weeks of cash payroll)?
- If the $15,385 cap remains in place for those who earned over $100,000 in any pay period in 2019, is that cap also in effect for all other employees (i.e., if an employee's weekly pay is $1,000, is that employee capped at $15,385 or can the employer use $24,000 of cash payroll in its forgiveness calculation for that employee)?

Holland & Knight will be closely monitoring the President's signature of the Flexibility Act and the steps taken by the U.S. Department of the Treasury and the SBA to implement the Act in a way that may resolve some of the remaining issues.