Here We Go Again: Congress Again Amends the Paycheck Protection Program in Response to Criticism, but Is It the Last Time?

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As detailed in several prior alerts, the Paycheck Protection Program (PPP)—Congress's signature small business relief program in the historic Coronavirus Aid, Relief, and Economic Security Act (CARES Act)—was rolled out in early April to immediate, overwhelming demand and weeks of questions and controversy. Borrowers quickly soaked up its initial $349 billion, leading Congress to authorize an additional $310 billion in funding in late April with the enactment of the Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act).[1] Recently, PPP lending slowed as criticism grew over the Small Business Administration's (SBA) implementation of the program, to the point that on some days more money is being paid back by borrowers who no longer want to participate in the program than to applicants seeking loans. Chiefly, critics have noted that the program's rigid rules requiring how the funds had to be used in order to obtain loan forgiveness, along with the short window in which the funds had to be expended, were a poor fit for the current crisis. As a result, many expressed concerns that a program intended to lift up small businesses could result in saddling them with debt that will be difficult to repay.[2]

In response, on June 5, 2020, Congress enacted the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act),[3] addressing some of those criticisms, and making numerous other tweaks to broaden how borrowers can use and repay PPP funds. For example, the Act reduces the requirement for using funds on payroll expenses from the 75% level originally mandated by the SBA to 60%, and extends the time that borrowers must use PPP funds to obtain forgiveness from eight to 24 weeks. The Flexibility Act also extends the deferral period so that some borrowers may be able to avoid making payments on their loans, if not forgiven, for up to nearly 16 months, and broadens exceptions to forgiveness reductions. It further extends the term of loans issued after June 5, 2020, to five years, but with the window for loan applications currently scheduled to close at the end of June, this provision may have limited impact unless lenders agree to modify the terms of PPP loans made before that date. Although the SBA issued updates to the program rules in accordance with the Flexibility Act on June 11, 2020, the update only touched on some of the revisions contained in the Flexibility Act and we expect additional guidance to be forthcoming shortly.[4]

This client alert summarizes the key provisions of the Flexibility Act, as informed by recent regulatory guidance. It builds on our prior alerts (available here, here, and here) about the program. What follows below is a summary of the currently available information, which will soon be further updated by the SBA. As a result, we encourage you to follow up with any questions.

Jenner & Block offers a wide array of resources and lawyers with experience necessary to help our clients navigate the implications of these important new programs, led by our COVID-19 Response Team. This team, features lawyers who played key, leading roles in the country's response to the last economic crisis and who have been recognized nationally for their insight into this one. It includes government veterans whose senior positions meant that they were intimately involved in the design of many of the government's most recent bailout programs, oversaw the loan application and distribution processes that were a key part of them, and ran and responded to the investigations that followed. It also includes transactional lawyers who are engaged with clients seeking to avail themselves of aspects of the current government programs.

I. Forgiveness

A. Forgiveness Period

As originally implemented, in order to take full advantage of the forgivable nature of PPP loans, borrowers had to spend the funds predominantly on maintaining their payroll levels within an eight-week period of time,[5] reflecting the apparent belief that the economic dislocation caused by shutdown orders would be relatively brief. Yet, as businesses continue to suffer, even in those parts of the country which are reopening, it has become apparent that many borrowers were unable to sufficiently reestablish their employment levels during that period to qualify for forgiveness to the extent that Congress originally contemplated. The Flexibility Act responds to this reality by tripling the forgiveness period to now allow borrowers to apply for forgiveness for funds spent within the 24 weeks following receipt of the funds (or through December 31, 2020, if earlier).[6]

In addition to extending the forgiveness period, the Flexibility Act extends the PPP's "covered period" from June 30, 2020, to December 31, 2020. Although somewhat ambiguous, this appears to extend the period that borrowers can use PPP funds, while leaving untouched the June 30, 2020 cutoff date for approval of applications. The SBA's implementing rule confirms that the "SBA's authority to guarantee loans expires on June 30, 2020."[7]

B. Qualifying Expenses – Reduction in the Payroll Threshold

Only certain expenses are forgivable under the PPP, including payroll costs,[8] covered mortgage interest payments, rent or lease payments, and utility payments. Although the CARES Act did not specify how much money a borrower had to allocate to payroll, the SBA nonetheless initially imposed its own requirement that at least 75% of loan proceeds needed to be spent on payroll. With regard to forgiveness, borrowers who came in under this 75% threshold during the preexisting eight-week forgiveness period would still be eligible for partial forgiveness, depending on the amount they spent on payroll costs.

In response to criticism that the 75% percent rule was overly restrictive and unrealistic given the length of the shutdowns in parts of the country, Congress relaxed this rule in the Flexibility Act. The Act now specifies that to "receive loan forgiveness under this section, an eligible recipient shall use at least 60% of the covered loan amount for payroll costs, and may use up to 40% of such amount for" covered mortgage, rent, or utility obligations.

Although the language of the statute appears to explicitly foreclose borrowers who spend less than 60% on payroll from receiving *any* forgiveness, the SBA's June 11, 2020 guidance indicates that it will grant partial forgiveness for borrowers who fall below this threshold. Specifically, it stated that the 60% threshold is a "proportional limit on nonpayroll costs as a share of the borrower's loan forgiveness amount, rather than as a threshold for receiving any loan forgiveness."[9] Thus, borrowers will have their forgiveness reduced but not eliminated based on the 60% threshold. Using an example provided by the SBA, assume a borrower with a $100,000 PPP loan spends $54,000 on payroll costs during the forgiveness period. This borrower's maximum forgiveness would be reduced from $100,000 to $90,000 (as $54,000 is 60% of that amount), subject to meeting the program's other requirements.

More detailed guidance on loan forgiveness is expected soon.

C. Exceptions to Rules Limiting Forgiveness when FTEs are Reduced

In order to obtain full forgiveness of a PPP loan, the CARES Act initially required borrowers to maintain employment levels at their pre-pandemic level[10] and to maintain salary levels at 75% during the covered forgiveness period. The SBA's implementing regulations detailed that a borrower's forgiveness amount would usually be reduced by *any* reductions in the borrower's number of employees (calculated using Full Time Equivalents (FTE)), and by reductions in salaries in excess of 25% during the covered forgiveness period. Recognizing that this may be a challenge for some borrowers, the CARES Act applied safe harbors for both types of reductions. A borrower could still qualify for full forgiveness if they restored their FTEs (to their pre-pandemic levels) or salary levels (to at least 75%) by June 30, 2020. The Flexibility Act extends this safe harbor by giving borrowers until December 31, 2020, to eliminate any headcount or salary reductions below the relevant thresholds that would otherwise reduce their eligibility for forgiveness. In other words, even if a borrower has a greatly reduced payroll through December 2020, so long as it reestablishes its payroll by the end of the year, it will still qualify for full forgiveness if it meets the program's other requirements.

The Flexibility Act has further relaxed some of the rules that prohibit full forgiveness when a business reduces its payroll due to unavailability of employees or the impact of restrictions on their businesses due to government-mandated safety requirements. Specifically, forgiveness will be determined without considering a reduction in FTE where the borrower can in good faith document:

- An inability to (1) rehire individuals who were the borrower's employees on February 15, 2020; and (2) hire similarly qualified employees for unfilled positions on or before December 31, 2020;[11] or

- An inability to return to the same level of business activity as the borrower was at before February 15, 2020, due to compliance with requirements or guidance related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19 established by the HHS Secretary, the CDC Director, or OSHA between March 21, 2020 and December 31, 2020.

These new exemptions will be further explained in future guidance, as the Flexibility Act does not explain how borrowers should apply these rules, including a lack of detail on what materials a borrower is required to submit to sufficiently "document" its eligibility for the exemptions. Testifying before the Senate Small Business Committee, Treasury Secretary Steven Mnuchin said he expects most borrowers to receive the benefit of these new exemptions, and that the revised forgiveness guidance and forms will make it substantially easier for borrowers to check their eligibility and complete the forgiveness application.

This future guidance will be crucial for many businesses who were forced to greatly reduce the number of employees on their payroll, who will now presumably be able to receive full forgiveness if they meet the criteria described above.

II. Payment Deferral

The CARES Act required lenders to give borrowers at least six months, and up to one year, of complete payment deferral on their PPP loans. The SBA subsequently chose the bottom of this range, setting the deferral period at just six months.[12] The Flexibility Act extends this period so that borrowers' payments now must be deferred until after they receive loan forgiveness from the SBA, or for borrowers who do not seek forgiveness, until 10 months *after* the end of the 24-week forgiveness period.[13]

III. Other Changes

A. Maturity of Non-Forgiven Loans

The CARES Act set a maximum maturity of 10 years for PPP loans with a remaining balance after forgiveness. The SBA nonetheless set the maturity for these loans at just two years. The Flexibility Act increases the minimum maturity to five years, but only for loans made after the Act's enactment. The

SBA has adopted this minimum, setting the maturity for these loans at five years.[14]

The Flexibility Act also provides that lenders and borrowers are not prohibited from modifying existing PPP loans to conform to this new requirement. Borrowers who do not anticipate receiving full forgiveness of their loans should therefore contact their lenders to see if they would be willing to allow such a modification.

B. Employer Payroll Tax Deferral

Under Section 2302 of the CARES Act, all employers were permitted to defer paying certain payroll taxes into 2021 and 2022, but PPP loan recipients were ineligible for this deferral once they received forgiveness under the program. This exception forced borrowers to choose between payroll tax deferral and forgiveness. The Flexibility Act resolves this situation by eliminating the exception. Borrowers who receive PPP loan forgiveness are now eligible for the payroll tax deferral.

IV. Disclosure of Loan Recipients and Amounts

There has been considerable interest in the identities of the entities who have received PPP loans and the amounts they have received. While some companies have disclosed their loans, as of yet the SBA has not disclosed any individual data.[15] In a Congressional hearing on June 10, 2020, Secretary Mnuchin stated that the SBA will not be releasing information about individual loans, as he believes it “proprietary” and “confidential.” The Government Accountability Office (GAO) had moreover reported that the SBA was currently withholding PPP loan data the agency had requested, though the Secretary stated that the SBA was working with the GAO and the issue would be resolved soon.[16] Despite the actions by Treasury and the SBA, members of Congress continue to demand greater transparency, and may include disclosure requirements in subsequent legislation. Borrowers would therefore still be well advised to assume that their identities will eventually be disclosed.

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[1] According to the SBA, through June 8, 2020, 4.5 million PPP loans totaling over $511 billion were approved by 5,458 lenders as part of the program, leaving over $120 billion left for new borrowers. *See Paycheck Protection Program*, US Small Bus. Admin., https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program. (last visited June 9, 2020).

[2] Mark Niquette, *Trump Administration Keeps Payroll Requirement for PPP Loans*, Wash. Post (May 17, 2020), https://www.washingtonpost.com/business/on-small-business/trump-administration-keeps-payroll-requirement-for-ppp-loans/2020/05/15/f888fd88-9724-11ea-87a3-22d324235636_story.html.

[3] Pub. L. No. 116-142 (2020).

[4] Congress declined to make any changes to eligibility provisions, even as litigation across the country has challenged various aspects of the SBA’s rules and guidance on eligibility.

[5] CARES Act, Pub. L. No. 116-136, § 1106(a)(3), (b) (2020).

[6] Borrowers who received PPP loans before the Flexibility Act’s enactment can still elect to use the

eight-week period for forgiveness instead of the expanded period. This carve-out may help borrowers who have spent their PPP funds at the end of eight weeks and prefer to more quickly receive forgiveness.

[7] According to a letter entered into the Congressional Record by the Act's lead sponsors, the "intention of the extension of the covered period in H.R. 7010 is to allow borrowers who received PPP loans before June 30, 2020 to continue to make expenditures for allowable uses until December 31, 2020," and that "when the authorization of funds to guarantee new PPP loans expires on June 30, 2020, the SBA and participating lenders will stop accepting and approving applications for PPP loans."

[8] This includes pay to furloughed employees, hazard pay, and bonuses.

[9] US Small Bus. Admin., Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to First Interim Final Rule (June 11, 2020), https://home.treasury.gov/system/files/136/PPP-IFR-Revisions-to-First-Interim-Final-Rule.pdf.

[10] A borrower's average employment during the forgiveness period is compared to its employment level during either, at the election of the borrower, (1) February 15, 2019 to June 30, 2019, or (2) January 1, 2020 to February 29, 2020.

[11] This exemption appears to build on recent SBA guidance that eases forgiveness reductions based on the realities of current economic conditions. The SBA previously promulgated a rule that certain employees who refuse written rehire offers, were fired for cause, voluntarily resign, or request and receive an hours reduction would still count as employed for determining the forgiveness thresholds despite no longer employed by the business.

[12] US Small Bus. Admin, Interim Final Rule: Business Loan Program Temporary Changes; Paycheck Protection Program (April 15, 2020), https://www.sba.gov/sites/default/files/2020-04/PPP Interim Final Rule_0.pdf

[13] The earlier of 10 months plus 24 weeks after loan origination, or 10 months after December 31, 2020. The lender must notify the borrower "remittance by SBA of the loan forgiveness amount (or notify [the borrower] that SBA determined that no loan forgiveness is allowed) and the date [the borrower's] first payment is due. Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to First Interim Final Rule, *supra* n.9.

[14] *Id.*

[15] Jessica Silver-Greenberg, David Enrich, Jesse Drucker & Stacy Cowley, *Large, Troubled Companies Got Bailout Money in Small-Business Loan Program*, New York Times (May 13, 2020), https://www.nytimes.com/2020/04/26/business/coronavirus-small-business-loans-large-companies.html?action=click&module=Spotlight&pgtype=Homepag.

[16] Zachary Warmbrodt & Aubree Eliza Weaver, *Mnuchin Ready To Deal on New Economic Package*, Politico (June 11, 2020), https://www.politico.com/newsletters/morning-money/2020/06/11/mnuchin-ready-to-deal-on-new-economic-package-788431; *Implementation of Title I of the CARES Act before the S. Comm. on Small Bus. & Entrepreneurship*, 116th Cong. (June 10, 2020, 10:00 AM), *available at* https://www.sbc.senate.gov/public/index.cfm/2020/6/implementation-of-title-i-of-the-cares-act.

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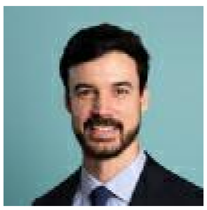

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