Paycheck Protection Program Flexibility Act passes Senate

David M. Kall, Adam Grais, Christian D. Sorensen | Friday, June 5, 2020

On June 3, 2020, the Senate approved legislation the House passed on May 28, 2020, making significant changes to the Paycheck Protection Program (PPP) designed to make it easier for borrowers to obtain PPP loan forgiveness. President Donald Trump is expected to sign the bill within the next few days.

The PPP was created and funded as part of the $2.2 trillion CARES Act passed in March and was supplemented by an additional $320 billion of funding in April after the initial funding ran out while demand remained strong. The Paycheck Protection Flexibility Act of 2020 (H.R. 7010) (PPFA) is intended to relax requirements and increase access for small businesses seeking emergency funding under the PPP. The most significant changes are:

- The CARES Act allowed PPP loans to have a term of up to 10 years after the date loan forgiveness was requested, but the Small Business Administration (SBA) limited the loan term to two years. Under the PPFA, new PPP loans must have a minimum term of five years from the date on which the borrower requests forgiveness and a maximum maturity of 10 years from the date of that request. For PPP loans that have already been funded, borrowers will have to get agreement from their lenders to extend the current two-year maturity date.
- The PPFA extends the deadline for funding a PPP loan from June 30, 2020, to December 31, 2020. While the legislation also appears to extend the date for applying for a PPP loan to December 31, Sen. Ron Johnson held up the bill in the Senate to obtain clarification that only the funding date, and not the

application date, was extended. Consequently, additional guidance will be needed to confirm the meaning of the legislation.

- The CARES Act only allowed borrowers eight weeks (the covered period) to spend PPP funds to have those amounts included in their forgiveness application, which was creating problems for many businesses that remained shuttered by government stay-at-home orders. The PPFA extends the covered period to the earlier of 24 weeks after the loan funding date or December 31, 2020, but borrowers that received a loan before this legislation becomes law may elect to use the current eight-week period.
- The CARES Act contains complicated rules that limit the amount of loan forgiveness available to borrowers that reduced employee headcount or compensation between February 15, 2020 and April 26, 2020. These rules included an exception if the reductions were eliminated by June 30, 2020. The PPFA extends this deadline to December 31, 2020. However, ambiguities remain as to how this will work and further guidance on how to implement this change will be needed from the SBA. For example, the SBA PPP loan forgiveness application required the borrower to list the number of employees as of June 30, 2020. This suggests that the application could not be made until after June 30, 2020. Whether this extension will require borrowers to wait until after December 31, 2020 to file their SBA loan forgiveness application remains to be seen.
- The SBA guidance on the headcount/compensation restoration rules included exceptions for employees who refused to return to work, were terminated for cause, voluntarily quit or voluntarily requested reduced hours. The PPFA expands these exception for businesses that can show that reductions have not been eliminated due to their inability: to rehire workers employed as of February 15, 2020, and to find similarly qualified workers by December 31, 2020; or to return to the same level of business activity as before February 15, 2020, due to compliance with certain requirements related to the maintenance of standards of sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19. Additional guidance from the SBA will be required to clarify how a borrower can avail itself of these additional exceptions.
- Although the CARES Act did not contain any explicit requirement on the relative amount that a borrower had to spend on payroll costs and non-payroll costs (i.e., mortgage interest, rent, and utilities) to obtain loan forgiveness, the SBA guidance limited the amount of forgivable non-payroll costs to 25% of the overall amount forgiven. The PPFA changed this ratio and now requires that at least 60% of the forgiven loan amount must come from payroll costs. This 60% threshold appears to be a cliff, meaning that borrowers cannot have any amount of their PPP loans forgiven if they spend less than that amount on payroll costs.
- The CARES Act did not include a deadline for borrowers to apply to have their loans forgiven. After amendment by the PPFA, borrowers now must apply for forgiveness within 10 months of the earlier of the last day of their covered period or December 31, 2020. Borrowers who do not meet that deadline must start making payments of principal, interest, and fees on their loans beginning on the day that is 10 months after the last day of such covered period.
- All borrowers applying for forgiveness are now allowed to defer principal and interest payments on PPP loans until the SBA remits the amount of qualifying loan forgiveness to lenders, as opposed to the current six-month deferral period.
- The CARES Act barred borrowers who obtained PPP loan forgiveness from taking advantage of the payroll tax deferral provision of the CARES Act. Under the PPFA, this prohibition has been removed so that employers may defer payment of 50% of 2020 payroll taxes until December 31, 2021 and 50% until

December 31, 2022 and self-employed individuals may defer the payment of 50% of the Social Security tax on their 2020 net earnings from self-employment until December 31, 2021.

We will provide more details once the legislation is enacted. The SBA will need to revise the Forgiveness Application, and both SBA and the Treasury Department will need to issue guidance relating to the provisions of the Paycheck Protection Flexibility Act.

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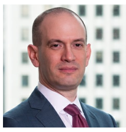

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