Goodwin Alerts

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U.S. Paycheck Protection Program Loan Modifications: Summary of Key Changes

Today the President signed into law the “Paycheck Protection Program Flexibility Act of 2020” (H.R. 7010), which makes several substantial modifications to the U.S. Small Business Administration’s Paycheck Protection Program. The bill was passed late Wednesday, June 3, 2020, by the U.S. Senate and on May 28, 2020, by the U.S. House of Representatives. Below is a summary of the key changes this bill makes to the Paycheck Protection Program (or “PPP”) loans.

CHANGES TO PPP LOAN FORGIVENESS

Forgiveness Spending Window	PPP loans are eligible for forgiveness based on the amount of PPP loan proceeds spent on certain forgiveness-eligible purposes during the specified “covered period” as defined in Section 1106 of the CARES Act (which we call the ‘forgiveness spending window’ in order to distinguish it from the separate “covered period” defined in Section 1102 of the CARES Act). Under the original CARES Act, that forgiveness spending window opened the date the PPP loan is made and closed 8-weeks later. The Paycheck Protection Program Flexibility Act extends the closing date of that forgiveness spending window for all PPP loans (regardless of their funding date) to the earlier of (a) the date that is 24 weeks after the date of funding and (b) December 31, 2020. Borrowers with PPP loans made prior to the date of enactment of the Paycheck Protection Program Flexibility Act, however, are able to opt back into their original 8-week forgiveness spending window.
Safe Harbor Deadline	The forgivability of PPP loans is subject to reduction to the extent the borrower has made certain reductions either in employee headcount or employee salaries. However, the CARES Act provides certain safe harbors from those reductions of forgivability to the extent the borrower reverses the applicable headcount or salary reductions on or prior to June 30, 2020. The Paycheck Protection Program Flexibility Act extends this safe harbor deadline to December 31, 2020 for all PPP loans (regardless of their funding date).
Employee Reduction Exemptions	Under the existing Paycheck Protection Program, per the regulations published by the SBA in its Interim Final Rule on Loan Forgiveness (85 FR 33004, available here), borrowers were exempted from any impact on the forgivable amount of their PPP loans based on employee headcount that resulted from employees who: • Were fired for cause; • Were terminated and subsequently refused good faith offers of rehire; and • Voluntarily resigned or voluntarily requested a reduced workload. The Paycheck Protection Program Flexibility Act creates for all PPP loans (regardless of their funding date) an exemption under which a borrower is permitted to exclude any full-

	time equivalent reductions for which the borrower documents that it is unable to rehire the individuals who were employees on February 15, 2020 and it is unable to hire "similarly qualified employees" to fill such positions on or before December 31, 2020. This legislative exemption seemingly narrows the second safe harbor exemption afforded under the SBA's Interim Final Rule on Loan Forgiveness noted above. In addition, the Paycheck Protection Program Flexibility Act adds an additional new exemption for all PPP loans (regardless of their funding date). A borrower may exclude full-time equivalent reductions if it is able to document, in good faith, its inability to return to pre-COVID (i,e., before February 15, 2020) business levels due to compliance with federal safety requirements regarding the maintenance of standards of sanitation, social distancing or any other worker or customer safety requirement related to COVID-19, to the extent such requirements were imposed by certain federal agencies (i.e., the Secretary of HHS, the Director of the CDC or OSHA) between March 1, 2020 and December 31, 2020.
Minimum Payroll Spend	Through its initial Interim Final Rule regarding PPP (85 FR 20811, available here) the SBA required that (a) 75% of the entire balance of a PPP loan be used for 'payroll costs' (as defined in the CARES Act), and (b) at least 75% of the portion of any PPP loan for which a borrower seeks forgiveness have been used for 'payroll costs.' The Paycheck Protection Program Flexibility Act changes this regime for all PPP loans (regardless of their funding date) to instead require that, as a condition to receiving forgiveness of any amount, the borrower must use at least 60% of the entire balance of a PPP loan on 'payroll costs.' Note that this change in phrasings was raised as a point of concern during the legislative process and may be further revised by SBA regulations to address those issues.

OTHER CHANGES TO PPP

PPP Issuance Period	The CARES Act initially provided that PPP loans could be issued during (and certain related spending requirements would be measured based on) a period running from February 15, 2020 to June 30, 2020. The Paycheck Protection Program Flexibility Act extends this period to now run from Feb 15, 2020 to December 31, 2020 for all PPP loans. Note, however, that there have been strong objections to this extension and so there could yet be further developments on this point.
Payment Deferral	Under the existing Paycheck Protection Program, per the SBA's initial Interim Final Rule regarding PPP (85 FR 20811, available here), payment of principal and interest on all PPP loans had been deferred for 6 months. The Paycheck Protection Program Flexibility Act extends for all PPP loans (regardless of their funding date) this deferral period until the date on which the forgivable amount of the PPP loan is paid to the lender (which remittance is made by the SBA), with the one key caveat below.

	To the extent the borrower has not applied for forgiveness on or prior the date that is 10 months after the end of its forgiveness spending window, the payment deferral period will end on a date "not earlier than" the date that is 10 months after the end of its forgiveness spending window.
Maturity Date	The SBA previously mandated in its initial Interim Final Rule regarding PPP (85 FR 20811, available here) that all PPP loans have a 2-year maturity. The Paycheck Protection Program Flexibility Act mandates that any ***new*** PPP loans issued on or after the date of its effectiveness have at least a 5-year (and no more than a 10-year) maturity. It further allows existing lenders and borrowers the option to extend the maturity of existing PPP loans to match that 5-10 year range, but does not require it.
Employment Tax Deferral	The Paycheck Protection Program Flexibility Act eliminates the requirement currently existing under Section 2302(a)(3) of the original CARES Act that an employer is not eligible to claim the deferral of employment taxes if it has had a PPP loan forgiven. This amendment is retroactively effective as if it were included in the original CARES Act.

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