
LEGAL UPDATES AND NEWS

The SBA's Paycheck Protection Program, The PPP Flexibility Act and New Interim Final Rule

On June 11, 2020, the U.S. Small Business Administration ("SBA") issued an interim final rule (the "Interim Final Rule") implementing the changes made to the SBA's Paycheck Protection Program (the "PPP") by the Paycheck Protection Program Flexibility Act of 2020 (the "PPP Flexibility Act") signed into law on June 5, 2020. The PPP Flexibility Act changed many aspects of the PPP, most significantly: (1) extending the covered period for loan forgiveness purposes; (2) lowering the amount required to be spent on payroll costs from 75% to 60% of the PPP loan funds; (3) extending the loan maturity period; and (4) revising the loan deferral period.

Below is a summary of key provisions of the Interim Final Rule. The Interim Final Rule was effective immediately, except that the provisions related to loan forgiveness and deferral periods are retroactive to March 27, 2020 and the provision relating to the loan maturity period is effective for loans made on or after June 5, 2020. The SBA and the U.S Department of the Treasury have indicated that they will continue to provide guidance on the PPP. Luse Gorman is closely monitoring these developments and will provide updates as appropriate.

1. Covered Periods for PPP Loans and Loan Forgiveness.

Generally. The definition of a "covered period" governing eligibility to participate in the PPP and allowable uses of PPP loan funds is amended to begin on February 15, 2020 and end on December 31, 2020 (instead of June 30, 2020). Although the PPP Flexibility Act extends the PPP program until December 31, 2020, the SBA subsequently clarified that the PPP application deadline currently remains June 30, 2020.

Loan Forgiveness. The definition of "covered period" regarding loan forgiveness begins on the date the PPP loan is disbursed to the borrower (the "disbursement date") and ends on the date that is 24 weeks (instead of eight weeks) after the disbursement date or, if earlier, December 31, 2020. The Interim Final Rule refers to this period as the "loan forgiveness covered period." If a borrower's disbursement date was before June 5, 2020, the borrower may elect to keep the loan forgiveness covered period at eight weeks.

2. Maturity Period for PPP Loans.

PPP loans made on or after June 5, 2020 will have a five-year loan term. PPP loans made prior to June 5, 2020 will have a two-year loan term; however, borrowers and lenders may mutually agree to extend the maturity for such loans to five years.

3. Deferral Period for PPP Loans.

The applicable deferral period for PPP loans is dependent upon whether the borrower submits a loan forgiveness application within ten months after the end of the loan forgiveness covered period (the "ten-month period"). Specifically, if the application is submitted within the ten-month period, no payments of principal or interest would be made on the PPP loan until the date on which the SBA remits the loan forgiveness amount to the borrower's lender or, alternatively, notifies the lender that no forgiveness is allowed. The lender must notify the borrower of the remittance by the SBA of the loan forgiveness amount (or that the SBA determined that no loan forgiveness is allowed) and the date the first loan payment is due. If the application is not submitted during the ten-month period, the borrower would begin paying principal

and interest on the PPP loan immediately after the ten-month period. In either circumstance, interest will continue to accrue during the deferral period.

4. Loan Forgiveness.

Determining Loan Forgiveness Amount. The actual amount of the PPP loan that is forgiven will depend, in part, on the total amount of payroll costs and qualifying non-payroll costs incurred by the borrower over the loan forgiveness covered period. To receive full loan forgiveness, a borrower must use at least 60% (reduced from 75%) of the PPP loan for payroll costs, and not more than 40% (increased from 25%) of the loan forgiveness amount may be attributable to qualifying non-payroll costs. Partial forgiveness is available for a borrower who spend less than 60% of its PPP loan for payroll costs; in which case, the amount eligible for loan forgiveness would be reduced so that payroll costs incurred by the borrower are 60% of the loan forgiveness amount requested. For example, the Interim Final Rule provides that if a borrower receives a \$100,000 PPP loan, and during the loan forgiveness covered period the borrower spends \$54,000 (or 54%) of its loan on payroll costs, then because the borrower used less than 60% of its loan on payroll costs, the maximum loan forgiveness amount is \$90,000 (with \$54,000 in payroll costs and \$36,000 in qualifying non-payroll costs constituting 60% and 40% of the loan forgiveness amount, respectively).

FTE and Compensation Reductions - Extension of Existing Safe Harbor Period and New Employee Reduction Penalty Exemptions. The loan forgiveness amount will be reduced if there is either a reduction of full-time equivalent (“FTE”) employees or salary or wages during the loan forgiveness covered period. However, FTE employee reductions or salary or wage reductions would not reduce the loan forgiveness amount if a borrower restores reductions made to the number of FTE employees or the level of employee salaries and wages by December 31, 2020 (which was extended from June 30, 2020).

The PPP Flexibility Act added two new employee reduction penalty exemptions, which would allow borrowers who do not fully restore their workforce to receive their full loan forgiveness amount if it can be documented in good faith that they are: (1) unable to rehire individuals who were employees on February 15, 2020 and/or hire similarly qualified employees for unfilled positions by December 31, 2020; or (2) unable to return to the same level of business activity as existed before February 15, 2020 due to compliance with the safety requirements related to COVID-19 imposed by Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC) or the Occupational Safety and Health Administration (OSHA) during the period beginning on March 1, 2020 and ending on December 31, 2020.

The SBA will be issuing revisions to its interim final rules on loan forgiveness and loan review procedures to address amendments made by the PPP Flexibility Act to the loan forgiveness requirements.

5. New Borrower and Lender PPP Application Forms.

The SBA has released a new PPP borrower application form (SBA Form 2483, available [here](#)) and a new PPP lender guaranty application form (SBA Form 2484, available [here](#)). These updated application forms incorporate new eligibility guidelines for borrowers with past felony convictions (which reduces from five years to one year the look-back period for applicants with non-financial crimes) and should be used for new PPP loan applications going forward.

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