

Senate Passes the Paycheck Protection Program Flexibility Act

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On Wednesday, June 3, the U.S. Senate passed the Paycheck Protection Program ("PPP") Flexibility Act (the "Act"). The Act was approved by the House on Thursday, May 28 and passed the Senate in a unanimous vote.

The Act passed the House and Senate amidst the realization that the one-size-fits-all structure of the PPP has been ineffective for many small businesses across the country. The Act aims to make certain changes to the PPP and is a standalone bill so that it may be pushed through without a delay.

The most significant portions of the Act have been summarized below:

Extension of Covered Period: Extended from 8 weeks to 24 weeks. This change should bring some peace of mind to small businesses who were concerned they would not be able to use all PPP funds in the 8-week period. The extension will allow more businesses to qualify for 100% PPP loan forgiveness.

75% Payroll Threshold Reduced to 60%: The Act changes the ratio of forgivable payroll costs to non-payroll costs from 75%/25% to 60%/40%. This change provides relief to businesses whose rent and utility cost are beyond 25% of their monthly expenses.

Additional Safe Harbor for Full-Time Equivalent Employees (FTEs) Rule: As discussed here, the PPP Loan Forgiveness application provides the following exceptions to the general rule that a reduction in FTEs will reduce the loan amount eligible for forgiveness. These exceptions apply to: (i) employees fired for cause, (ii) employees who voluntarily resigned, and (iii) employees who voluntarily requested and received a reduction of their hours.

The FTE Rule will also not apply if the borrower is able to document: (i) an inability to rehire individuals who were employed on February 15, and (ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.

The Act adds an additional exception and states that forgiveness shall be determined without regard to a proportional reduction in the number of FTE's if the borrower in good faith:

"[i]s able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issues by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning March 1, 2020 and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19"

Extension of Payroll Deferral Program: Prior to this Act, the IRS' interpretation of the Payroll Deferral Program was that borrowers who have received a PPP loan will be permitted to defer deposit and payment of the employer's share of Social Security tax that otherwise would be required to be made beginning on March 27, 2020, until the date the lender issues a decision regarding forgiveness. Employers may defer such payments without incurring failure to pay/deposit penalties.

Currently, amounts deferred up until getting notification that the loan is forgiven are paid 50% on December 31, 2021, and the remainder on December 31, 2022. Meaning, if a company finds out on September 30 that the loan is forgiven, any payroll taxes from before September 30 can be deferred, and any payroll taxes after September 30 have to be paid as normal.

However, if the Act passes the Senate, borrowers will now be able to defer payment of their share of Social Security tax to December 31, 2021, and December 31, 2022, *regardless of the forgiveness status of their loan.*

PPP Loan Term Extended: Under the Act, the repayment term for the portion of PPP proceeds that are not forgiven has been increased from 2 years to 5 years. While the CARES Act originally provided for up to a 10-year term, Treasury and the SBA set the term at 2 years. Additionally, the grace period for repayment is extended from 6 months to 1 year. Borrowers will therefore not be required to make any payment on the loan until 1 year after the origination date.

The modifications to the PPP set forth in the Act are clearly borrower friendly. We encourage borrowers to review their expenditure plans in light of these latest modifications.