

Practice Update

Paycheck Protection Program Flexibility Act of 2020: Forgiveness Flexibility

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On June 5, 2020, President Trump signed into law the [Paycheck Protection Program Flexibility Act of 2020](#) (Flexibility Act), which amends the Paycheck Protection Program (PPP) created by the Coronavirus Aid, Relief and Economic Security Act (CARES Act). The Flexibility Act revises certain terms and provisions of the PPP to address issues raised by eligible borrowers adversely impacted by the ongoing COVID-19 pandemic.

The U.S. Small Business Administration (SBA) published a [revised loan forgiveness application](#) effective June 16, 2020, implementing the Flexibility Act, and also published an [EZ version of the application](#) for certain borrowers, as explained further below.

The provisions of the Flexibility Act take effect retroactively, as if they were included in the CARES Act.

The following is a summary of the Flexibility Act:

- **Extension of Covered Period.** The Flexibility Act revised the definition of “covered period” for which a borrower must spend PPP loan proceeds to be eligible for PPP loan forgiveness from an eight (8) week covered period to the earlier of the date that is twenty-four (24) weeks from the date

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of the loan origination or December 31, 2020.

There is no prohibition on submitting a PPP loan forgiveness application if the borrower spends its PPP funds before the end of the revised covered period. Borrowers who have already received a PPP loan prior to June 5, 2020 may elect for the covered period to end on the date that is 8 weeks after the date of origination of the PPP loan.

- **Extension of PPP Loan Term and Payment Deferral.** Instead of a two (2) year PPP loan term, PPP loans issued to borrowers on or after June 5, 2020 will now have a minimum PPP loan term of five (5) years. Lenders and borrowers of PPP loans prior to June 5, 2020 which provide PPP loan terms of 2 years, are not prohibited from mutually agreeing to modify PPP loan terms to match the Flexibility Act's minimum five (5) year PPP loan term. Additionally, the Flexibility Act eases repayment terms on PPP loan amounts not forgiven by deferring payment of principal, interest and other fees until the date on which the SBA determination of PPP loan forgiveness is remitted to the lender (or, if the borrower does not apply for loan forgiveness, 10 months after the end of the borrower's loan forgiveness covered period). Previously, the deferral period was at least 6 months and no more than 1 year. Per recent SBA guidance, following the borrower's PPP loan forgiveness application to the lender, the lender has 60 days to make an initial determination for forgiveness of the PPP loan, and SBA has 90 days to review and approve or deny the lender's determination.
- **Payroll Spending Now at 60%.** Originally, borrowers were required to spend at least 75% of PPP loan proceeds on payroll to remain eligible for PPP loan forgiveness. This is now reduced to 60%, allowing borrowers to spend up to 40% of such PPP loan forgiveness amounts for mortgage interest, rent or utility payments. Moreover, SBA and Treasury Secretary Mnuchin clarified in a joint statement on June 8, 2020 (Joint Statement) that borrowers are eligible for partial PPP loan

forgiveness, provided that at least 60% of the PPP loan forgiveness amount is spent on payroll costs. In other words, if a borrower meets the 60% rule of the forgiveness amount but that amount is less than 60% of the total PPP loan amount, the borrower is still eligible for PPP loan forgiveness.

- **Extension of Rehire Date.** Borrowers will now have until December 31, 2020 to rehire full time equivalent employees and restore employee salaries in order to avoid a reduction of PPP loan amount forgiveness. Calculation of salaries and headcount for purposes of PPP loan forgiveness reductions remain unchanged.
- **Additional Exemptions for Reduced Headcount.** In addition to extending the rehire date to December 31, 2020, borrowers can receive PPP loan forgiveness on payroll without regard to a proportional reduction in the number of full-time equivalent employees if they are to document that they were:
 - unable to rehire an employee who was an employee on February 15, 2020;
 - unable to hire similarly qualified employees for unfulfilled positions by December 31, 2020; or
 - unable to return to the same level of business activity prior to February 15, 2020 due to compliance with sanitation, social distancing and other worker or customer safety requirement related to COVID-19 during the period between March 1, 2020 and December 31, 2020 issued 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.
- **PPP Loan Availability.** Pursuant to the Joint Statement, the new rules will confirm that June 30, 2020, will be the last date on which a PPP loan application can be approved.
- **Payroll Tax Deferral.** The Flexibility Act no longer prevents borrowers from taking advantage

of the payroll tax deferral under Section 2302 of the CARES Act after a PPP loan is forgiven as borrowers can now take advantage of the payroll tax deferral from March 27, 2020 to December 31, 2020.

In addition to the revised forgiveness application, the SBA posted an EZ version of the forgiveness application for certain eligible borrowers as follows:

- (i) a borrower that is a self-employed individual, independent contractor, or sole proprietor who had no employees at the time of the PPP loan application and did not include any employee salaries in the computation of average monthly payroll in the PPP loan application form; or
- (ii)(A) a borrower that did not reduce annual salary or hourly wages of any employee by more than 25 percent during the covered period or the “alternative payroll covered period” (borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the 24-week (168-day) period or for PPP loans received before June 5, 2020 at the election of the borrower, the eight-week (56-day) period that begins on the first day of their first pay period following their PPP loan disbursement date, which in no event extends beyond December 31, 2020) compared to the period between January 1, 2020 and March 31, 2020 AND (B) such borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the covered period (disregarding (a) reductions that arose from an inability to rehire individuals who were employees on February 15, 2020 if the borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020 and (b) reductions in an employee’s hours that the borrower offered to restore and the employee refused); or
- (iii)(A) a borrower that did not reduce annual salary or hourly wages of any employee by more

than 25 percent during the covered period or the alternative payroll covered period compared to the period between January 1, 2020 and March 31, 2020 (“employees” for this provision means only those employees that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) AND (B) such borrower was unable to operate during the covered period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 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, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.

We anticipate further SBA guidance, FAQs and rules will provide direction as to how a borrower can demonstrate the inability to rehire similarly qualified employees and inability to return to previous level of business activity.

The Flexibility Act does not modify the list of allowable and forgivable expenses, eligibility or certification requirements.

If you need assistance with the Paycheck Protection Program or other aspects of the recent legislation surrounding COVID-19, contact your Akerman attorney.

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