

Congress Approves Major Changes to the Paycheck Protection Program, But Questions Remain

On June 3, 2020, the Senate passed the Paycheck Protection Program (PPP) Flexibility Act of 2020 (the Flexibility Act) by unanimous consent. The Flexibility Act has received large bipartisan support and President Trump is expected to sign the Flexibility Act in the coming days.

The Flexibility Act makes the following changes to the PPP:

- Extends the “Covered Period” for borrowers from 8 weeks to 24 weeks. However, borrowers may still elect to use the 8 week period for forgiveness purposes);
- Extends the safe harbor date from June 30, 2020 to December 31, 2020 for the restoration of employee and salary reductions made prior to April 26, 2020;
- Amends the requirement for borrowers to use a percentage of PPP funds towards payroll expenses, decreasing the threshold from 75% to 60%. Therefore, to remain eligible for forgiveness, borrowers may now use up to (but not more than) 40% of the total PPP funds on permissible non-payroll expenses;
- Extends the repayment term of the non-forgivable portions of the loan from 2 years to 5 years, and extends the interest deferral period from 6 months to 1 year; and
- Eliminates the ineligibility of borrowers who receive PPP loan forgiveness for a delay of payment of employer payroll taxes under Section 2302(a) of the CARES Act.

The Flexibility Act also states that borrowers who have not applied for forgiveness 10 months after the end of their Covered Period will be required to start making payments on their PPP loan.

Additionally, the Flexibility Act includes major changes to exemptions to the loan forgiveness reductions and full-time equivalent headcounts. A borrower’s reduction in the number of full-time equivalent employees will not affect forgiveness if the borrower, in good faith:

1. Is able to document:
 - a. An inability to rehire individuals who were employees of the borrower on February 15, 2020; and
 - b. An inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or
2. Is able to document an inability to return to the same level of business activity as such business was operating at or before February 15, 2020 due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, Director of the CDC, or OSHA during the period beginning on March 1, 2020 through December 31, 2020, related to the maintenance standards for sanitation, social distancing, or any other worker or customer safety requirements related to COVID-19.

These new exemptions are in addition to the de minimis exemptions that are currently available to borrowers under the SBA guidance. For information on the de minimis exceptions, visit our prior information memo available [here](#).

While the Flexibility Act provides relief that many borrowers have been asking for, the changes have created new questions along with the many questions that remain unanswered. For example:

- If a borrower elects the extended 24 week period instead of the 8 week period, it is unclear whether the full-time equivalent headcounts need to be maintained for the entirety of the 24 week period.
- If a borrower restores FTE by, for example, October and applies for forgiveness, it is unclear whether they can lay off employees after the submission of their forgiveness application, but before December 31, 2020, and not receive a forgiveness reduction penalty. Further, what if an employee has been rehired by the borrower, but later furloughed again before December 31, 2020?
- It is unclear whether the PPP Loan Forgiveness Application will be revised to reflect the changes made in the Flexibility Act.
- It is unknown whether the limit of cash compensation per employee will increase in proportion to the increase in the Covered Period from \$15,385 to \$46,153. Further, it is unclear what impact the changes will have on forgivable compensation to owner-employees and self-employed taxpayers.
- It is unclear whether a borrower could cut the extended 24 week period short and apply for forgiveness early if they have used all of their PPP funds prior to the expiration of the 24 week period.

We expect the SBA to issue additional guidance with respect to the Flexibility Act which will address these questions, as well as provide clarification on many other aspects of the Paycheck Protection Program and Forgiveness Application. We will continue to provide updates on these new developments as appropriate.

The attorneys at Bond, Schoeneck & King can help by answering your questions regarding the changes to the PPP and how it effects your business. Please contact [Jeffrey B. Scheer](#), any of the [attorneys](#) in the [Business and Transactions practice](#), or the attorney at the firm with whom you are regularly in contact.



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