
PPP Flexibility Act of 2020: More Loan Forgiveness But Many Unanswered Questions

On June 3, 2020, Congress passed The Paycheck Protection Program Flexibility Act of 2020 (PPP Flexibility Act), which President Trump signed into law on June 5. The PPP Flexibility Act represents the latest step in the continuing evolution of the Paycheck Protection Program (PPP) since it was initially launched on March 27, when \$349 billion of funding was set aside for small business in the CARES Act. On April 23, the PPP program was increased in size to \$649 billion. As of June 6, over 4.5 million PPP loans had been approved with almost 80% of the total program or \$511 billion in net dollars disbursed. The overall average loan size was \$113,000 with 85% of the loans with a principal amount of \$150,000 or less.¹

The PPP Flexibility Act significantly increases the likelihood of loan forgiveness and extends the deferral period of such loans. For Congress to make such significant changes to the terms of the PPP loans after 80% of the funds have been disbursed illustrates the pressure that policy makers feel to provide relief to small businesses. These loans are now being viewed more as grants to small businesses rather than SBA loans to be collected.

The key changes from the PPP Flexibility Act can be summarized as follows:

- *Longer Deferral Period:*
 - The minimum maturity date for new PPP loans originated after June 5 but before June 30 will be extended to 5 years. For existing PPP loans originated prior to June 5, lenders and borrowers may mutually agree to modify the terms to extend the maturity of existing loans up to 5 years.
 - The covered period for expenses eligible for forgiveness was previously eight weeks from loan origination up to June 30 but now will be the earlier of 24 weeks after origination or December 31.
 - The deferral period for principal, interest and fees was extended from not less than 6 months and not more than 1 year to until the date on which the amount of loan forgiveness is paid to the lender. Provided that if the eligible recipient fails to apply for forgiveness within 10 months after the last day of the covered period (12/31/20), the eligible recipient will be required to begin making payments on the day after the expiration of the 10-month period, unless otherwise approved by the lender.

¹ For more background on the CARES Act, the PPP, and related government programs please see the following Piper Sandler reports: "COVID-19 and the CARES Act Rapid Response to Sustain the Economy During Pandemic Induced Coma" (April 7, 2020); "Revised Information on the PPP: Important Details in Interim Final Rule" (April 7); and the "Fed's \$2.3 Trillion Plan: New and Enhanced Funding Programs" (April 14, 2020) which can be found at <http://www.pipersandler.com/2col.aspx?id=5874>.

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- *Increased Loan Forgiveness:*
 - Eligible loan recipients may be exempt from limitations on the loan forgiveness amount based on a proportionate reduction in the number of full time employees if they can document:
 - Employees as of February 15, 2020 could not be rehired or that they are unable to hire similarly qualified employees for unfilled positions prior to December 31, 2020; or
 - An inability to return to the same level of business activity as before February 15, 2020 (due to requirements established by the Secretary of Health and Human Services, CDC, or OSHA related to sanitation, social distancing or any other worker or customer safety requirement) during the period from March 1 to December 31, 2020.
 - The loan forgiveness amount based on payroll costs is reduced from 75% to 60%. There had been concern that at least 60% of the loan amount had to be devoted to payroll costs. In the worst case, if less than 60% was spent on payroll costs then the borrower would receive no loan forgiveness. *The Treasury Department and SBA have clarified that 60% of the loan forgiveness amount, not the total loan amount, must be spent on payroll in order to qualify for loan forgiveness.* Other permitted costs include covered mortgage, rent or utility payments.
 - Eligible loan recipients can receive loan forgiveness and defer payroll taxes for the portion of the 2020 calendar year beginning at the date of the CARES Act enactment until December 31, 2021 for 50% of such taxes and until December 31, 2022 for the remaining 50% of such taxes. Previously employers whose loans were forgiven were not eligible for employer payroll tax deferral.

These changes clearly make it more likely that eligible loan recipients will have a higher percentage of their PPP loan amount forgiven. There are practical issues on how to document the changes to all loans and the permitted change to the term of existing loans. With over 4.5 million PPP loans now outstanding, documenting these changes is not a small matter. Lenders under the PPP program have begun to ask a number of questions, including:

1. With the potential for new PPP loans to have a 5-year final maturity, such PPP loans are no longer short-term loans. Will the pricing and servicing fees be adjusted for such loans?
2. For existing PPP loans modified with the changes now required for all loans, does the lender have to create a new note or can changes be legally bound by reference to the PPP Flexibility Act revised terms?
3. For existing PPP loans on which a change in maturity is agreed upon by lender and borrower, does a new note have to be created to evidence these revised terms?
4. How will the good faith certification of efforts to achieve hiring goals and level of business activity be documented to support loan forgiveness?
5. Will the terms of servicing be amended to compensate for the longer-term obligation with more qualitative interpretation on the good faith documentation of hiring and change in business activity?
6. How will loans already pledged to the Fed's PPPLF be impacted? Will the Fed have to return the collateral documentation so that it can be modified and returned to the Fed?
7. How will these PPP Flexibility Act changes impact the attractiveness of using the Fed's PPPLF to fund the PPP loans and receive capital relief and collection certainty?
8. It is clear that PPP loan amounts of more than \$2 million will automatically be audited but can the SBA/Treasury provide guidance on the maximum amount of PPP loan amount that will likely automatically be forgiven so that lenders can better focus their efforts on the larger or more problematic exposures?

Hopefully, answers to these and related questions will soon be provided by the SBA. For now, these issues may signal a pause to lenders as they consider whether to lend more under the new PPP terms, pledge their current loans to the Fed or retain their PPP loans on balance sheet and fund with excess liquidity. For the eligible loan recipients, the more lenient loan forgiveness terms and longer payment deferrals provide a badly needed respite from the COVID-19 shutdown that will help ensure their survival until the economy can recovery later this year and into 2021.

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