The New Paycheck Protection Program Flexibility Act: How It Will Impact the Paycheck Protection Program

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Today's Discussion

- Overview of the Paycheck Protection Program Flexibility Act (PPPFA)
- Overview of the Interim Final Rule on Revisions to the First Interim Final Rule

Paycheck Protection Program Flexibility Act

On June 4, President Trump signed the Paycheck Protection Program Flexibility Act of 2020 (PPPFA) into law. The U.S. Senate unanimously passed the bill on June 3, 2020, following passage by the House of Representatives. The PPPFA amends the Small Business Act and the CARES Act with the goal of providing flexibility and increased benefits to the Paycheck Protection Program (PPP).

On June 11, 2020, the SBA posted an Interim Final Rule amending the agency's first Interim Final Rule.

PPPFA – Loan Maturity

Amends the PPP's loan maturity provision:

- The CARES Act institutes a maximum loan maturity date of 10 years from the date on which the borrower applies for loan forgiveness.
- Although the CARES Act prescribed a maximum 10-year term of maturity, SBA guidance subsequently provided by the Small Business Administration (SBA) and the Department of Treasury provided that the loan maturity date would be 2 years.
- The PPPFA amends the CARES Act to require a minimum term of maturity of 5 years. This provision applies only to any PPP loans made after the PPPFA is enacted, but it allows lenders and borrowers to mutually agree to modify existing loan terms (but does not require them to do so).
- The amended IFR confirms that 5-year maturity automatically applies only to loans made after June 5, 2020. But borrowers and lenders may mutually agree to extend the maturity of such loans to five years.

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PPPFA – Deferral and Payment Provisions

Amends the deferral provision:

- The CARES Act requires lenders to defer payment (including principal, interest, and fees) on PPP loans for at least 6 months and up to 1 year.
- The April 3 Interim Final Rule established the deferral period to be 6 months.
- The PPPFA amends that provision to require lenders to defer payments (including principal, interest, and fees) until the date on which the amount of loan forgiveness is remitted to the lender, including for PPP loans which are sold on the secondary market.
- The amended IFR states that interest continues to accrue during the deferment period.
- The amended IFR confirms that if a borrower submits a loan forgiveness application within 10 months after the end of its loan forgiveness covered period, it will not have to make any payments of principal or interest on its loan before the date on which SBA remits the loan forgiveness amount on the loan to borrower's lender (or notifies the borrower's lender that no loan forgiveness is allowed).

Imposes a deadline for borrowers to seek forgiveness or begin making payments:

- The PPPFA requires borrowers to apply for forgiveness within 10 months after the last day of the Section 1106(a) forgiveness covered period; otherwise the borrower must begin making payments on the loan.
- The amended IFR confirms that if a borrower does not submit a loan forgiveness application within 10 months after the end of its loan forgiveness covered period, it must begin paying principal and interest after that period.
- "For example, if a borrower's PPP loan is disbursed on June 25, 2020, the 24-week period ends on December 10, 2020. If the borrower does not submit a loan forgiveness application to its lender by October 10, 2021, the borrower must begin making payments on or after October 10, 2021."

PPPFA – Changes to Covered Periods

Extends the PPP’s “covered period”:

- Under the CARES Act, the PPP's covered period ends on June 30, 2020.
- The PPPFA extends that date to December 31, 2020.
- Members of Congress later stated that the “intention of the extension of the covered period … is to allow borrowers who received PPP loans before June 30, 2020 to continue to make expenditures for allowable uses until December 31, 2020," but that "[t]he extension of the covered period does not authorize the Small Business Administration (SBA) to issue any new PPP loans after June 30, 2020, as this date remains fixed by section 1102(b) of the CARES Act.”
- The amended IFR confirms that the last day on which a lender can obtain an SBA loan number for a PPP loan is June 30, 2020.

PPPFA – Changes to Covered Periods

Enlarges the forgiveness period:

- The CARES Act requires PPP funds to be spent in the 8 weeks following the loan origination in order to be eligible for forgiveness.
- The PPPFA amends the CARES Act to replace the 8-week loan forgiveness period with the earlier of 24 weeks after the origination of the loan or December 31, 2020.
- Borrowers who received loans before the PPPFA was enacted may retain the original 8-week loan forgiveness period.
- The amended IFR clarifies that the loan forgiveness covered period begins on the date of disbursement (not date of origination, as the statute reads).
- The amended IFR does not clarify whether a borrower may use a loan forgiveness covered period that falls between 8-weeks and 24-weeks (e.g., submit a forgiveness application at week 12).

PPPFA – Revises the Prior IFR's 75/25 requirements

- The April 3 Interim Final Rule stated that 75% of forgivable funds must be used for payroll costs, although the CARES Act does not include any such restriction.
- The PPPFA's language suggests that at least 60% of the PPP funds must be used for payroll costs for the borrower to be eligible for any loan forgiveness. The remaining 40% may be used for other allowable uses (qualified payments for mortgage interest, rent, or utilities).
- Confirms that although the PPPFA "states that a borrower shall use at least 60 percent of the PPP loan for payroll costs to receive loan forgiveness" (emphasis added), the SBA has interpreted this "as a proportional limit on nonpayroll costs as a share of the borrower's loan forgiveness amount, rather than as a threshold for receiving any loan forgiveness."
  - "For example, if a borrower receives a $100,000 PPP loan, and during the covered period the borrower spends $54,000 (or 54 percent) of its loan on payroll costs, then because the borrower used less than 60 percent of its loan on payroll costs, the maximum amount of loan forgiveness the borrower may receive is $90,000 (with $54,000 in payroll costs constituting 60 percent of the forgiveness amount and $36,000 in nonpayroll costs constituting 40 percent of the forgiveness amount)."

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PPPFA – Headcount Calculations

Expands the exemption for rehires:

- The CARES Act reduces a borrower's eligibility for loan forgiveness if the borrower reduces the number of full-time equivalent employees (FTEs) or reduces the compensation of one or more employees between February 15, 2020 and April 26, 2020, but allows employers to avoid reductions to the forgiveness amount if they restore the number of FTEs or compensation by June 30, 2020.
- The PPPFA extends the deadline in which to rehire employees or restore compensation levels to December 31, 2020.

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PPPFA – Headcount Calculations

Adds additional exemptions to the loan forgiveness reduction:

- The PPPFA also allows borrowers to avoid a reduction in forgiveness amounts if the borrower can:
  - Document an inability to rehire the individuals employed on February 15, 2020 and an inability to hire "similarly qualified" employees for unfilled positions on or before December 31, 2020, or
  - Document an inability to "return to the same level of business activity" that the business experienced before February 15, 2020 "due to compliance with the requirements established or guidance issued" by certain federal agencies from March 1, 2020 to December 31, 2020 "related to the standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19."

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PPPFA – Payroll Tax Deferral

Expands payroll tax deferment eligibility to PPP borrowers:

- The CARES Act excluded borrowers who received loan forgiveness under the PPP from being able to defer employer payroll taxes. The PPPFA eliminates this exclusion.

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The Review Process

- Clarifies that the SBA may review "any PPP loans" at any time at its discretion, and that the SBA may consider in that review whether a borrower correctly calculated the loan amount, properly used the loan proceeds, and/or is entitled to the loan forgiveness amount sought.
- Borrowers must retain PPP documentation for at least 6 years after the date the loan is forgiven or paid in full, and the SBA and SBA Inspector General must be granted these files upon request.
- If the SBA believes a borrower may be ineligible for the loan or for some forgiveness amount, it will require that the lender make a written request for additional information from the borrower, and it may also request information directly from the borrower.
- All information provided by the borrower in response (either directly to the SBA or through the lender) will be considered in the SBA's review. Failure to respond to the SBA's request for information may result in a determination that the borrower is ineligible for forgiveness or for the loan itself.
- The shareholders, members, or partners of a borrower that is deemed ineligible to have received a PPP loan will not be protected by "the CARES Act's nonrecourse provision … which limits SBA's recourse against individual shareholders, members, or partners of a PPP borrower for nonpayment of a PPP loan only if the borrower is an eligible recipient of the loan" (emphasis added).
- Borrowers will be given the opportunity to seek reconsideration and appeal of review decisions. The SBA intends to issue a separate interim final rule on this process.

Preparing for the Audit

- Have a clean file with all calculations and supporting material submitted as part of initial application
- Have a file, including Board resolution and material prepared to support Board decision to keep the money/maintain application. Presume this will be provided as part of the audit
- Segregate loan proceeds
- Prepare a forgiveness model to track forgivable expenditures. Have model reviewed and signed off on by counsel and accounting support
- Track expenditures from segregated funds
- Follow (and document) direction from lender
- Assemble documents relating to expenditures (i.e., leases for lease payments, utility bills, payroll records)
- Prepare backup package in real time

What's next?

We expect:

- Updated forgiveness application to incorporate PPPFA changes
- Additional guidance clarifying open PPPFA questions
- Interim Final Rule on appeal process
- More funding? (Approximately $130 billion remains)

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QUESTIONS?

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