Senate Passes House-Backed Paycheck Protection Program Flexibility Act

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The US Senate passed the Paycheck Protection Program Flexibility Act of 2020 on June 3, 2020, after the House of Representatives signed off on the act on May 28, 2020. It now goes to President Donald Trump to be signed into law.

The changes are intended to allow businesses that haven't been permitted to reopen by government mandate the flexibility they need to use loan proceeds and more easily qualify for forgiveness. Restaurants and retail shops are examples of businesses that are expected to particularly benefit from the changes.

What's Changed

The following are the major changes to the Small Business Administration's (SBA) Paycheck Protection Program (PPP).

Safe Harbor Date

This change focuses on the restoration of employee reductions and salary reductions. The date borrowers must restore their workforce and wage levels to pre-pandemic levels was changed from June 30, 2020, to December 31, 2020.

The Coronavirus, Aid, Relief, and Economic Securities (CARES) Act originally provided that loan recipients would have their PPP loan forgiveness reduced if the recipient experienced a reduction in their full-time equivalent (FTE) employees or had a significant reduction in the salary of one or more employees during their covered period, as compared with a base period.

There was also a safe harbor that provided that the recipient wouldn't have their PPP loan forgiveness reduced if they experienced a reduction in FTEs or a significant reduction in the salary of one or more employees during the period beginning on February 15, 2020, and ending April 26, 2020, and subsequently eliminated those FTE reductions or salary reductions by June 30, 2020.

The PPP Flexibility Act extends the date a recipient has to eliminate these FTE or salary reductions from June 30, 2020, to December 31, 2020.

Exemption Based on Employee Availability and Business Activity

Additional options were provided to prevent a reduction to loan forgiveness if a borrower can demonstrate they were unable to rehire employees or return to their prior level of business activity.

The new act allows borrowers to avoid the forgiveness reduction based on the proportional reduction in full-time equivalents (FTEs) during the covered period if the borrower, in good faith, is able to document one of the following two scenarios outlined below.

1. An inability to both:
    - Rehire individuals who were employees on February 15, 2020
    - Hire similarly qualified employees on or before December 31, 2020.
2. An inability to return to the same level of business activity as the business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the US Department of Health and Human Services, Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration. This applies to the maintenance of standards issued during the period of March 1, 2020–December 31, 2020, related to social distancing, sanitation, or any other worker- or customer-safety requirement resulting from the COVID-19 pandemic.

Payroll and Forgiveness

The required payroll portion of forgiveness was lowered from 75% to 60%.

As the PPP Flexibility Act is written, none of a borrower's loan would be forgiven unless 60% of the loan proceeds are used for payroll costs.

This compares to previous rules that allowed for partial forgiveness if less than 75% of the funds were attributable to payroll costs. Some members of Congress have indicated that the elimination of partial forgiveness wasn't intended and that future technical corrections may be made to restore the ability for borrowers to receive partial forgiveness.

For most businesses, concern over using 60% of the loan for payroll costs is expected to be mitigated by the extension of the covered period from eight weeks to 24 weeks.

Covered Period

The PPP Flexibility Act extends the covered period from the original eight-week period provided under the CARES Act to the earlier of the following two dates:

- 24 weeks after the date of loan origination
- December 31, 2020

Election Available

An election is available for those businesses that expect to receive full forgiveness based on the current eight-week period.

Under the election, borrowers who received a PPP loan prior to the enactment of the PPP Flexibility Act may continue to use the eight-week covered period. This may be beneficial for business that want to avoid the uncertainty related to future employment changes.

Loan Maturity

For those who don't receive full forgiveness on their loan, the new act extends the loan maturity to five years for new PPP loans issued after enactment.

Employer Social Security Payments

The act allows business that received loan forgiveness to continue deferring employer social security tax payments even if forgiveness occurs prior to December 31, 2020.

Repayment Deferral Period

The CARES Act originally provided borrowers with a six-month deferral period until the first required payment of principal and interest on a PPP loan. The PPP Flexibility Act extends the repayment deferral period as follows:

- **For recipients receiving loan forgiveness.** Payments begin on the date the amount of forgiveness is remitted to the lender as determined under Section 1106 of the CARES Act.
- **For eligible recipients who fail to apply for forgiveness within 10 months after the last day of the covered period.** Payments begin on a day that isn't earlier than the date that's 10 months after the last day of the covered period.

What Isn't Included

The original CARES Act provided that the amount of PPP loan forgiveness was to be excluded from gross income for income tax purposes.

Subsequently, the IRS issued Notice 2020-32, which held that any expenses related to PPP loan forgiveness weren't deductible under IRC Section 265, effectively negating any benefit from the exclusion from gross income.

Although previous versions of the PPP Flexibility Act contained provisions that would have provided for both the exclusion from gross income and the allowance of corresponding deductions, no such provisions were contained in the final version of the act. As such, expenses related to PPP loan forgiveness remain nondeductible based on existing IRS guidance.

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