

Paycheck Protection Program Amended to Provide Additional Flexibility Under the Program

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Client Advisory

This article was updated on June 10th.

On June 5th, 2020, President Trump signed into law a bill modifying the Paycheck Protection Program (PPP) to provide additional flexibility to borrowers.[1] The PPP loan program was enacted as part of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). The program is designed to provide economic relief to small businesses nationwide adversely impacted by the coronavirus by facilitating government-backed loans that are eligible for forgiveness if used for specified purposes (with the majority used to maintain payroll).[2]

Since its implementation, the PPP has continually been modified through regulation by the Department of the Treasury and the Small Business Administration through (sometimes conflicting) guidance.[3] The latest act provides additional flexibility sought by PPP loan recipients, who maintain that it is unrealistic to use 75% of the funds for payroll under the program during the eight-week period the Treasury Department established through regulation.

The act amends the PPP program by (1) extending the time period during which proceeds may be spent and still be eligible for forgiveness, (2) modifying the formula enacted by the Treasury Department and the SBA for calculating how funds must be used, (3) extending the safe-harbor provisions for re-hiring furloughed employees, (4) extends the period of repayment for portions of the PPP loan not forgiven, and (5) allowing recipients of PPP funds to also defer payroll taxes under different provisions of the CARES Act even if they are seeking forgiveness of the PPP loan.

1. Extending the Proceed Use Window

Under the CARES Act, loan forgiveness is available for loan proceeds used for approved purposes during the "covered period." The new act extends the covered period from the eight-week period beginning on the date of the origination of the loan, as provided in the CARES ACT, to the earlier of the 24-week period beginning on the date of the origination of the loan or December 31, 2020.

The extension will allow PPP loan recipients to better allocate loan proceeds as needed throughout the remainder of 2020. It will likely be a relief to companies that have struggled, due to coronavirus related hardships, to reopen and rehire employees within the previously applicable eight-week window during which loan proceeds needed to be used.

2. Lowering the Payroll Threshold to 60% from 75%

The SBA's Interim Final Rule implementing the PPP provides that not more than 25% of a PPP loan forgiveness amount may be attributable to non-payroll costs. To potentially receive full forgiveness of the loan 75% of the PPP loan proceeds must be used for payroll costs, and the

remaining 25% for other enumerated costs. Other requirements, included maintaining pre-coronavirus levels of employment and as described in Section 3 below, must also be met to receive complete PPP loan forgiveness.

The new act lowers the threshold of proceeds to be used for payroll costs to 60% in order to “to receive loan forgiveness.” While the new act lowers the threshold of loan proceeds that must be used on payroll costs from 75% to 60% before affecting loan forgiveness, the language of the new act appears to apply the threshold as a gating item to receive any forgiveness, rather than a mechanism to reduce forgiveness. Though senators have indicated that the 60% threshold is meant to act as a sliding scale to reduce forgiveness rather than qualify for it, technical tweaks may need to be applied to the act to clarify the intent of the provision.[4]

On June 8, 2020, the SBA and U.S. Treasury released a joint statement that included a clarification that in the event a borrower spends less than 60% of the loan proceeds on payroll costs, they will still be eligible for partial loan forgiveness, “subject to at least 60 percent of the loan forgiveness amount having been used for payroll costs.”[5] The statement also indicates that the SBA and U.S. Treasury plan to promptly issue rules and guidance, a modified borrower application form, and a modified loan forgiveness application to implement the amendments to the PPP created by the new legislation. The coming PPP materials may provide further clarifications regarding loan forgiveness.

3. Expanding the Furloughed Employee Safe Harbor

Under the CARES Act employers that, prior to June 30, 2020, restore their number of employees to the number of employees they had on February 15, 2020, are not subject to a reduction in their loan forgiveness. The new act extends this safe harbor period from June 30, 2020, to December 31. The safe harbor extension also applies to the time by which employers may restore a reduction in employees’ salaries without causing a reduction in the borrower’s loan forgiveness amount.

In addition to extending the safe harbor for rehiring employees to December 31, 2020, the new act also introduces exemptions from the need to rehire employees to avoid a reduction in loan forgiveness. The exemptions are available if the borrower is able to document either (i) an inability rehire an employee or similarly qualified employee, or (ii) an inability to return to a similar level of business as before February 15, 2020, as a result of compliance with governmental guidance related to the coronavirus.

4. Extending the Repayment Period

Under the SBA’s Interim Final Rule, PPP loans carry a two-year maturity date applicable to any portion of the loan not forgiven (for any purpose, including failure to maintain pre-coronavirus level of employment or a decrease in employee salaries). The new act extends the maturity date to five years. New PPP loan recipients will receive a five-year maturity period, and existing loans may be modified to extend the maturity period to five years.

5. Allowing Deferral of Payroll Taxes

Finally, prior to this amendment, the CARES Act did not allow the deferral of employment taxes to January 1, 2021, to PPP loan recipients. The new act amends the CARES Act to extend the deferment of employment taxes to PPP borrowers that receive loan forgiveness.

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For more information concerning the matters discussed in this publication, please contact the authors **Bryan J. Hall**, (212-238-8894, hall@clm.com), **Alexander G. Malyshev**, (212-238-8618, malyshev@clm.com), **Matthew J. Schwartz**, (212-238-8692, schwartz@clm.com), or your regular Carter Ledyard attorney.

[1] A copy of the Paycheck Protection Program Flexibility Act of 2020 is available at <https://www.congress.gov/bill/116th-congress/house-bill/7010/text>.

[2] For our previous coverage of the PPP program see "Congress Replenishes Two Important Small Business Assistance Programs, While State and City Level Programs Remain Oversubscribed" available at <https://www.clm.com/publication.cfm?ID=5713>; "Paycheck Protection Program Loans: Certification, Forgiveness and Return of Funds" available at <https://www.clm.com/publication.cfm?ID=5721>.

[3] Carter Ledyard has discussed several modifications and issues related to the PPP. See "Treasury Department and SBA Issue Interpretative Guidance Clarifying Affiliation Rules and Certain Other Provisions of the Paycheck Protection Program," available at <https://www.clm.com/publication.cfm?ID=5708>; "Congress Replenishes Two Important Small Business Assistance Programs, While State and City Level Programs Remain Oversubscribed," available at <https://www.clm.com/publication.cfm?ID=5713>; and "Paycheck Protection Program Loans: Certification, Forgiveness and Return of Funds," available at <https://www.clm.com/publication.cfm?ID=5721>.

[4] See "PPP forgiveness changes coming as Senate passes House bill," available at <https://www.journalofaccountancy.com/news/2020/jun/ppp-loan-forgiveness-changes-coming.html> and "Extension of Paycheck Protection Loan Program Hits Senate Snags," available at https://www.washingtonpost.com/business/on-small-business/extension-of-paycheck-protection-loan-program-hits-senate-snags/2020/06/03/e0bfbce-a5cb-11ea-898e-b21b9a83f792_story.html

[5] The joint statement is available at <https://home.treasury.gov/news/press-releases/sm1026>.

*Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, boxer@clm.com), **Judith A. Lockhart** (212-238-8603, lockhart@clm.com), **Bryan J. Hall** (212-238-8894, hall@clm.com), **Alexander G. Malyshev** (212-238-8618, malyshev@clm.com), **Melissa J. Erwin** (212-238-8622, erwin@clm.com), and **Leonardo Trivigno** (212-238-8724, trivigno@clm.com). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.*

related professionals

Bryan J. Hall / Partner

D 212-238-8894

hall@clm.com

Alexander G. Malyshev / Partner

D 212-238-8618

malyshev@clm.com