JUNE 2020

Aflac Federal Relations
ADVISORY FOR SMALL BUSINESS

New PPP Flexibility Act

provides relief for loan forgiveness requirements

Alston & Bird LLP and Aflac

The Paycheck Protection Program Flexibility Act of 2020 (the “Flexibility Act”), signed into law June 5, 2020, makes a number of important changes to the requirements for Paycheck Protection Program (PPP) loans that will be helpful for many small businesses. These changes provide additional flexibility and opportunity for loan forgiveness compared to the original provisions in the Coronavirus Aid, Relief and Economic Security Act (CARES Act) as implemented by the Small Business Administration (SBA).

On June 11, the SBA issued initial guidance on the Flexibility Act. Their guidance answers a number of questions about the new law. The SBA may issue additional guidance on other related issues in the future, so be sure to check the SBA website to ensure you’re looking at the most recent guidance.

This article provides a **high-level** summary of the Flexibility Act and the SBA’s new guidance for borrowers.

Loan forgiveness covered period expanded from 8 weeks to 24 weeks

Under the CARES Act, the covered period for determining the forgiveness amount for a PPP loan is eight weeks from when the loan was disbursed. The Flexibility Act extends the covered period to 24 weeks after the date of loan disbursement, but no later than Dec. 31, 2020, providing more time for businesses to qualify for loan forgiveness. Borrowers that received a loan before June 5, 2020, may instead use a covered period of eight weeks from the loan disbursement rather than 24 weeks. This could be a better option for some businesses, for example, depending on how reductions in full-time equivalent employees (FTEs) or salary and wages impact loan forgiveness.

Only 60% of forgivable expenses must be for payroll costs

The Flexibility Act stipulates that only 60% of a PPP loan must be used for payroll costs to qualify for full forgiveness, compared to 75% under original SBA rules. Related to this, partial loan forgiveness is available if less than 60% of the loan is used for payroll costs, provided that at least 60% of the amount forgiven is used for payroll costs.

For example: A borrower received a $100,000 PPP loan and during the covered period spends $54,000 (54%) of the loan on payroll costs and the remaining amount on other qualified expenses. A proportionate amount of the loan qualifies for forgiveness, provided other requirements for forgiveness are met. Specifically, $90,000 may be forgiven. The $54,000 of payroll costs is 60% of $90,000, leaving $36,000 in qualifying non payroll costs as the other 40% of the forgiveness amount.

Additional safe harbor protection from reductions in loan forgiveness based on reductions in FTEs

The CARES Act provides that the amount of loan forgiveness is proportionately reduced if the borrower fails to maintain the average number of full-time equivalent employees, FTEs, and pay employees at least 75% of prior salary or wages. This reduction does not apply if employment and compensation levels are restored before June 30, 2020. Additional exceptions are provided in SBA guidance.

The Flexibility Act includes two additional circumstances in which a reduction in FTEs will not reduce the amount of loan forgiveness:

1. The borrower is unable to rehire individuals who were employees on Feb. 15, 2020, and is also unable to hire similarly qualified employees for unfilled positions on or before Dec. 31, 2020; or

2. The borrower is not able to return to the same level at which the business was operating before Feb. 15, 2020, due to compliance with COVID-19 guidance related to standards for sanitation, social distancing or worker or customer safety. The guidance must be issued by the Department of Health and Human Services (HHS), the Centers for Disease Control and Prevention (CDC), or the Occupational Safety and Health Administration (OSHA) between March 1, 2020, and Dec. 31, 2020.

The borrower will need to provide good-faith documentation that an exception applies.

Extension of loan maturity and deferral period

PPP loans made on or after June 5, 2020, have a maturity of five years. The date that a loan is made is the same date that the SBA assigns a loan number. Loans made before June 5, 2020, have a maturity of two years, but the borrower and lender may agree to extend the maturity date to five years.

If a business applies for loan forgiveness within 10 months of the covered period for the loan, payment of principal and interest is deferred until after the SBA remits the loan forgiveness amount to the lender or notifies the lender that no loan forgiveness is allowed. The lender must notify the borrower of the amount of loan forgiveness and the date the first payment, with respect to an unforgiven amount, is due. Interest accrues during the deferment period. Of course, no payments are required if the loan is forgiven in full.

If a loan forgiveness application is not submitted within 10 months of the covered period, payment of principal and interest must begin at that time.

For example: A borrower's PPP loan is disbursed on June 25, 2020, and the 24-week covered period ends on Dec. 10, 2020. If the borrower does not submit a loan forgiveness application to the lender by Oct. 10, 2021, the borrower must begin making payments on or after Oct. 20, 2021.

PPP borrowers may take advantage of payroll tax deferral

The CARES Act allows businesses to defer the employer portion of Social Security taxes for 2020, with 50% due in 2021 and the remainder in 2022. Previously, this deferral was not available for employers that had a PPP loan forgiven. The Flexibility Act eliminates this restriction.

What hasn't changed

The Flexibility Act makes important, but limited, changes to the PPP, so other provisions remain the same. For example, the maximum amount of a permitted PPP loan has not changed, June 30, 2020, remains the last date on which a PPP loan application can be approved and, as before, borrowers may obtain only one PPP loan.

Effective date

The provision relating to the five-year maturity date is effective for loans made on or after June 5, 2020. The other provisions in the Flexibility Act apply as if included in the CARES Act and therefore apply to existing and new loans.

Conclusion

The Flexibility Act lives up to its name and provides PPP borrowers with additional flexibility. The SBA has answered some questions, but additional guidance will be coming. Borrowers should check the SBA website for updates and confer with their advisers and lenders to determine how the changes apply to them and what will work best for their situation, including whether to use a covered period of eight or 24 weeks.

Aflac | Aflac New York | WWHQ | 1932 Wynnton Road | Columbus, GA 31999

Aflac. | Federal Relations