

## PPP Update: Passage of Paycheck Protection Program Flexibility Act

On Wednesday, June 3, the Senate passed the Paycheck Protection Program Flexibility Act (“Flexibility Act”), a bill that loosens the restrictions for obtaining loan forgiveness under the Paycheck Protection Program (“PPP”). The bill passed by unanimous voice vote and was signed into law by President Trump on Friday, June 5.

The Flexibility Act provides much needed relief to bars, restaurants, hotels, and other borrowers who received a PPP loan but have struggled to meet the loan forgiveness requirements of the PPP as developed due to the impact of COVID-19 and governmental orders. Importantly, the Flexibility Act revises PPP loan forgiveness requirements by implementing the following changes:

1. Extension of the “Covered Period” for Forgivable Expenditures. Prior to the Flexibility Act, forgiveness was only available for eligible expenditures made in the eight-week period after the date that the loan funds were disbursed. Under the Flexibility Act, this eight-week “covered period” for forgivable expenses is extended to the earlier of 24 weeks after the loan is disbursed or December 31, 2020. As a result, borrowers will now have six months to spend their PPP loan funds and obtain full forgiveness. However, borrowers that have already received a PPP loan can elect to have an eight-week covered period for purposes of forgiveness. An eight-week covered period may be beneficial for PPP borrowers that are approaching the end of their original covered period and have already spent the majority of their funds.
2. Allocation of Payroll vs. Non-Payroll Costs. To maximize the amount of forgiveness, borrowers were previously required to attribute 75% of the total amount of loan forgiveness to payroll costs, while only 25% of the amount forgiven could be applied towards non-payroll costs like rent and utilities. The Flexibility Act alleviates the burden on borrowers to allocate funding toward payroll by now requiring that only 60% of the PPP funds be used for payroll, and allowing 40% to be attributed to non-payroll expenses. It is important to note, however, that under the current terms of the Flexibility Act, PPP borrowers who fail to spend 60% of their loan on payroll costs will not receive any loan forgiveness.
3. Extension of Safe Harbor for Restoring Headcount. A borrower’s forgiveness amount can still be reduced based on headcount levels during their covered period as compared to a prior baseline period. Under the CARES Act, a borrower was able to avoid any such forgiveness reduction if they restored the number of full-time equivalent employees to pre-pandemic levels by June 30, 2020. The Flexibility Act extends the date of this safe harbor to December 31,

2020, so borrowers will now have an additional six months to restore their headcount level to avoid a potential reduction in forgiveness.

4. Additional Safe Harbors for Headcount Reduction. The Flexibility Act also codifies two additional safe harbors that allow borrowers to avoid a reduction in forgiveness based on decreased headcount levels:
  - a. The forgiveness amount will not be reduced if the borrower can document (i) that they attempted, but were unable, to rehire individuals who had been employees on February 15, 2020 and (ii) that they have been unable to hire “similarly qualified employees” before December 31, 2020.
  - b. Forgiveness will also not be reduced if the borrower, in good faith, can document an inability to return to the “same level of business activity” commensurate with the business’s activity level as of Feb. 15, 2020, due to sanitation, social distancing, and worker or customer safety requirements. This safe harbor will be particularly helpful for bars, restaurants, and other businesses that are unable to operate at full capacity due to the pandemic.

In addition to the changes outlined above, PPP loan recipients may also (i) defer their 2020 Social Security payroll tax obligations regardless of whether any amount is forgiven, and (ii) mutually agree with their lender to extend the term of the loan from two to five years.

The Small Business Administration will undoubtedly need to revisit its recently issued [form loan forgiveness application](#) and follow-up [Interim Final Rule on Loan Forgiveness](#) to reflect the new legislative changes and provide additional guidance.

The latest changes to the PPP are a victory for many borrowers and will allow them to maximize their loan forgiveness to seek to survive the pandemic.

If you have any questions regarding your PPP loan, [contact](#) your primary Tonkon attorney.

Tonkon Torp corporate finance attorneys Jeff Cronn (503.802.2048, [jeff.cronn@tonkon.com](mailto:jeff.cronn@tonkon.com)), Ferdie Ruplin (503.802.2029, [ferdie.ruplin@tonkon.com](mailto:ferdie.ruplin@tonkon.com)), Drea Schmidt (503.802.5703, [drea.schmidt@tonkon.com](mailto:drea.schmidt@tonkon.com)), and Betsy Judd (503.802.5769, [betsy.judd@tonkon.com](mailto:betsy.judd@tonkon.com)) are also available to answer your questions on these matters.

