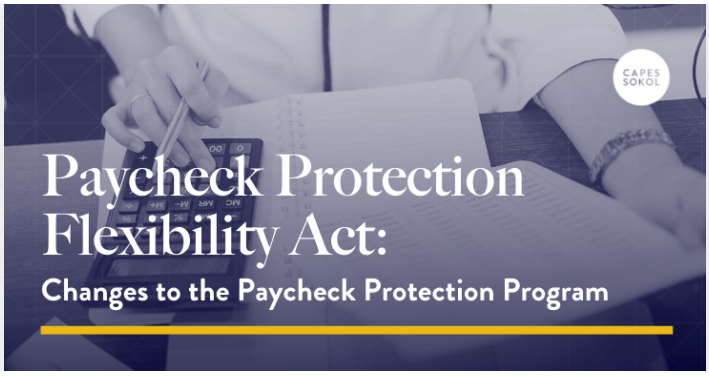
PAYCHECK PROTECTION FLEXIBILITY ACT: CHANGES TO THE PAYCHECK PROTECTION PROGRAM

Posted on June 5, 2020 by Michelle F. Schwerin



Tags: CARES Act, COVID - 19, COVID - Business, Danielle Durban, Michelle Schwerin

On **June 5, 2020,** President Trump signed into law the **Paycheck Protection Program Flexibility Act** (the "**Act**"), to amend sections of the Paycheck Protection Program ("PPP"). The Act:

- Prospectively extends PPP loan maturity from two years to five (lenders and borrowers may mutually agree to modify the terms of existing loans to a five-year maturity);
- Extends the Covered Period from June 30 to December 31;
- Changes rules with respect to forgivability:
    - Implements a deadline for borrowers to apply for forgiveness within 10 months of the last day of the Covered Period;
    - Imposes a requirement that 60% of the forgiveness amount must be expended on eligible payroll costs as a threshold to obtaining forgiveness;
    - Extends the safe harbor to cure full-time equivalent employee ("**FTE**") and salary/wage reductions to December 31, 2020;
    - Adds a new exemption for borrowers to avoid a proportional reduction of forgivability based on reductions in FTE;
- Extends deferral of payments on PPP loans to the date the lender receives forgiven funds from

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the SBA; **and**

- Allows PPP borrowers to take advantage of the CARES Act payroll tax deferral program.

While many are celebrating the increased flexibility, we will really see how these changes come into play when the Small Business Administration ("**SBA**"), in consultation with the Treasury, provide further guidance through FAQs and/or Interim Final Rules. It is this forthcoming guidance that will truly allow borrowers to make informed decisions with respect to the utilization of PPP loan proceeds and their decisions of when and how to apply for forgivability.

While we play the waiting game, we put together the chart below to illustrate the before-and-after:

New Lending Program	Priority Lending Program	Expanded Lending Program

Lenders may apply their own underwriting process and eligibility thresholds, subject to the minimum requirements set forth above.

While the Act will certainly be beneficial to some borrowers, many unanswered questions remain. For example, if a borrower elects to retain its 8-week Covered Period, does it have a December 31, 2020 date to cure any FTE and Salary/Wage? The language in the statute requires borrowers to remedy FTE counts and/or salary levels "*not later than*" the June, then December, date. In its initial rules, SBA set June 30 as the date of measurement. The SBA could follow suit here and require Borrowers wait until December 31 if they intend to take advantage of the opportunity to cure or could enact a more flexible rule, allowing borrowers to demonstrate they cured the reduction at some point before December 31.

Many borrowers who are near the end of their 8-week period have been told for months that June 30, 2020 is such date. But if that is now changed to December 31, 2020, is the borrower stuck in limbo for the next six months before applying for forgiveness? Will there be an alternative? And what does "an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020" mean exactly? Does it mean "inability to rehire individuals" because the former employees refuse offers? Or because the borrower doesn't have work for them to do? Or maybe something else entirely?

The Act does not address these questions, but hopefully forthcoming SBA Interim Final Rules and/or FAQs will provide some clarity and answers, which we will be sure to update you on accordingly.

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