

# SBA Issues New Forms, Guidance to Implement the Flexibility Act

By Peter E. Cooper

## INTRODUCTION

In early June 2020, Congress adopted and the President signed the Payroll Protection Program (“PPP”) Flexibility Act of 2020 (“Flexibility Act”), which was designed to ease some of the strictures and address some of the confusion arising from the PPP. In particular, the Flexibility Act expanded the Covered Period for loan forgiveness from eight weeks to 24 weeks, reduced the percentage of PPP financing that must be used for payroll costs to obtain loan forgiveness, extended base loan maturity from two years to five years, and expanded the deferral period for loan repayment. Adoption of the Flexibility Act required the Small Business Administration (“SBA”) and Department of the Treasury, which administer the PPP, to update and revise the forms and regulations that they had adopted to implement the PPP. Set forth below are some notable revisions to the relevant regulations and forms.

## AMENDMENTS TO INTERIM FINAL RULE

The Department of the Treasury and SBA published its First Interim Final Rule on April 2, 2020, implementing the PPP provisions of the CARES Act. Since then, the SBA has posted additional Interim Final Rules clarifying the procedures both for seeking PPP loan funding and forgiveness. While these new Interim Final Rules largely mirror the language of the Flexibility Act, they contain certain significant provisions and interpretations that may affect PPP borrowers.

1. **Selection of “Covered Period”:** As originally passed, the CARES Act provided that PPP borrowers were potentially entitled to loan forgiveness for certain expenditures made during the “Covered Period,” which the SBA defined as the eight weeks following funding of the PPP loan. In the Paycheck Protection Program Loan Forgiveness Application (“Forgiveness Application”), first posted on May 15, 2020, the SBA permitted certain borrowers to adopt an “Alternative Payroll Covered Period” to account for biweekly payroll schedules. The Flexibility Act has now expanded the Covered Period for obtaining loan forgiveness to 24 weeks after a borrower receives the disbursement of loan proceeds. A borrower that obtained its funding prior to June 5, 2020, may still elect to use the shorter eight week Covered Period or “Alternative Payroll Covered Period.” A borrower that obtained funding on June 5, 2020 or later must use the 24-week Covered Period in seeking loan forgiveness. The revised forgiveness application requires the borrower to indicate whether it is seeking forgiveness under the eight-week or 24-week “Covered Period.”

- 2. Expansion of the Deferral Period:** The CARES Act provides that payments of interest and principal on PPP loans are deferred for six months following the issuance of the loan. The Flexibility Act expanded that six month deferral to 10 months. In reality, however, the deferral is even longer. Under the Flexibility Act, the deferral period runs 10 months after the end of the loan forgiveness Covered Period—which is the 24-week period beginning on the date the PPP loan is disbursed—and not from the issuance of the loan.

A borrower that does not submit a loan forgiveness application within 10 months after the end of the loan forgiveness Covered Period will have to begin paying principal and interest at the conclusion of that 10-month deferral. Thus, for example, for a borrower whose loan is disbursed on June 25, 2020, the 24-week Covered Period for loan forgiveness ends on December 10, 2020.

Moreover, for a borrower that submits a loan forgiveness application, the deferral is even longer. The borrower will not have to make any payments of principal or interest on the PPP loan until after the SBA remits the loan forgiveness amount to the lender. Under the example above, the borrower could wait until October 10, 2021, to submit a loan forgiveness application or to begin making payments on the PPP loan. If the borrower submits a loan forgiveness application, it will not have to begin making payments on the PPP loan until after the SBA has remitted loan forgiveness payments to the lender. Prior SBA guidance suggests that the loan forgiveness and remittance process may take up to 150 days. Thus, the deferral period will not begin to run for an additional period of up to five months after submission of the loan forgiveness application. Under the hypothetical June 5, 2020 funding scenario described above, a PPP borrower who seeks at least partial loan forgiveness conceivably may not have to begin making payments on the unforgiven portion (if any) of a PPP loan until March 2022.

- 3. Calculation of Maximum Wages for Loan Forgiveness:** The PPP allows for loan forgiveness for certain eligible expenses, such as payroll costs including salary, wages, and tips, up to \$100,000 of annualized pay per employee. Under the CARES Act and its initial eight week “Covered Period,” the maximum eligible salary expenditure per employee was \$15,385. With the Flexibility Act’s expansion of the Covered Period to 24 weeks, the maximum eligible salary expenditure is now \$46,154 per individual.

PPP also permits loan forgiveness for owner compensation replacement for self-employed or independent contractor PPP loan recipients. The SBA has limited the forgiveness of owner compensation replacement for individuals with self-employment income who file a Schedule C or Schedule F to either a) eight weeks’ worth (8/52) of 2019 net profit (up to \$15,385) for an eight-week Covered Period, or b) 2.5 months’ worth (2.5/12) of 2019 net profit (up to \$20,833) for a 24-week Covered Period, per owner in total across all businesses.

- 4. Abandonment of Loan Forgiveness “Threshold”:** The Flexibility Act amended the requirements concerning forgiveness of PPP loans to reduce the amount of loan proceeds that must be used

for payroll costs in order to secure loan forgiveness. As originally adopted and enforced, the PPP required at least 75 percent of the PPP loan be used for payroll costs in order to obtain forgiveness. The 75 percent “floor” served as a “threshold” for obtaining forgiveness. The Flexibility Act reduced the required payroll cost usage to 60 percent, and the SBA now interprets that requirement to be a proportional limit on nonpayroll costs as a share of the borrower’s loan forgiveness amount, rather than as a threshold for receiving any loan forgiveness. Thus, a borrower that seeks PPP loan forgiveness, but has used less than 60 percent of the PPP loan proceeds for payroll costs, will see its forgiveness reduced *proportionately* by the percentage its payroll costs are below the 60 percent, instead of being denied forgiveness for being below the threshold.

## NEW FORMS AND APPLICATIONS

The SBA has now issued and posted a revised SBA [Form 2483 Paycheck Protection Program Borrower Application Form](#) (Rev. 6/20) and a revised SBA [Form 3508 Paycheck Protection Program Loan Forgiveness Application](#) (Rev. 6/16/20), which largely incorporate the changes described above and in the Flexibility Act. While these revised applications are similar to the earlier versions, they vary materially, and borrowers should not use the superseded forms either to apply for funding or loan forgiveness.

If you have questions about SBA PPP Loans, please contact your Lawrence Kamin attorney.

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