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The Paycheck Protection Program Flexibility Act – A Happily Ever After?

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by Nancy A. D. Hancock

Once upon a time, maybe as recently as March 27, 2020, the president signed an artful and rather astounding bill into law—the Coronavirus Aid, Relief, and Economic Security Act. The CARES Act included the Paycheck Protection Program (PPP), a Daedalian-designed loan and forgiveness puzzle calculated to stimulate the economy by hitching up the resources of the Department of the Treasury, the U.S. Small Business Administration (SBA) and U.S. banks—large and small—with U.S. employers, in a manner intended to encourage those employers to keep their employees on the payroll or to hire them back promptly when the economy reopens.

What has emerged so far, after this propitious start, has been two months of confusion (although many business structures and jobs appear to have held together, based on everyone's good faith that this story is not yet over). The dissection of each word of the PPP performed by professionals locked in their homes due to the COVID-19 pandemic has no doubt added to the muddle. Some 12 sets of Interim Final Rules, 48 Frequently Asked Questions, and multiple versions of SBA-approved forms later (but who's counting?), each promulgation has borne more questions with each answer.

Has Congress cut the Gordian knot with the Paycheck Protection Program Flexibility Act?

House Bill 7010, The PPP Flexibility Act of 2020, a bipartisan bill signed into law on June 5, 2020, reveals Congress' return to the bold intentions of the Program. With a few exceptions, the PPP Flexibility Act should give America's small businesses and their employees an opportunity to enjoy the benefits Congress intended in passing the Paycheck Protection Program in the first place.

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The PPP Flexibility Act of 2020 provides critical amendments designed to end much of the wasted energy spent haggling over whether, for example, rent paid in advance would qualify for forgiveness. For many borrowers under the PPP, with a few words and a few broad strokes, Congress has amended the PPP in favor of loan forgiveness. What are they?

- The PPP, which was designed as a temporary modification of the SBA 7(a) loan program, has been extended from June 30, 2020 to December 31, 2020.
 - This amendment is currently not viewed as intended to extend the date through which PPP loans may be funded to December 31, 2020. A letter requesting clarification that the loans will not be permitted to be made after June 30, 2020 was a condition of one senator's vote.
 - This amendment could clear up confusing language in the PPP. The loan eligibility section contains one definition of the "covered period" that originally began on February 15, 2020 and ended on June 30, 2020. But the "forgiveness" section defines a different "covered period" as the 8- week period after the eligible loan recipient receives the loan proceeds. Because PPP loans are permitted to be made after May 4, 2020 (and are still being made today), what does it mean to have the "covered period" under Section 1102 of the CARES Act expire on June 30, 2020? If you obtain your loan after May 5, 2020, the covered period for your loan spending will end *after* June 30, 2020.
 - Extending the "covered period" for the PPP through December 31, 2020 is extremely helpful to loan recipients, whether or not they seek to apply for forgiveness, because it confirms that they do not have to spend all of the money they borrowed by June 30, 2020.
- In the "forgiveness section" of the CARES Act, the "covered period" during which an eligible loan recipient may spend PPP loan proceeds on permitted "costs incurred and payments made" (payroll costs and allowable mortgage, rent and utility obligations) in order for those expenditures to be eligible for forgiveness was extended from 8 weeks to the earlier of 24 weeks after the origination of the loan, or December 31, 2020.
 - This amendment should assure many employers, who borrowed the maximum loan amount of 2.5 times the monthly average of a designated period of allowable employee "payroll costs", to have the entire loan forgiven.
 - With the forgiveness period extended to 24 weeks, many employers will be able to throw away the spread sheets on which they were calculating the covered rent, mortgage interest and utilities and just rely on payroll records!
- An eligible recipient that received a covered loan before the date the PPP Flexibility Act was signed may elect for the covered period to end 8 weeks after the date of origination of such covered loan.
 - Some eligible loan recipients may be just about ready to apply for forgiveness under the old statute, and so they may.

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- Unanswered is whether an applicant must choose whether to use an 8-week period or a 24-week period, because nothing in between has been offered. However, it would be helpful if borrowers were able to apply for forgiveness at any time, which would spread out the forgiveness applications and provide some borrowers with earlier opportunities to apply for and obtain forgiveness and clean up their balance sheets.
- The PPP Flexibility Act changes the deferral period during which the business would be eligible not to pay interest.
 - The deferral period has been extended until “[t]he date on which the amount of forgiveness determined under Section 1106 of the CARES Act is remitted to the lender.” This could provide an extensive period of deferral on the 1% interest being charged on any portion of the loan that is not forgiven.

Amendments that may be more mixed in their give and take follow:

- The PPP Flexibility Act provides that the loan forgiveness will be calculated without regard to a reduction in the number of full-time equivalent (FTE) employees, if an eligible recipient, in good faith, is able to document both an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020; and an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
- An issue employers have grappled with during the period of uncertainty since the PPP was enacted was that the CARES Act also enhanced the amount of unemployment compensation employees who were laid off could be eligible to receive.
- The additional unemployment compensation made it easier for employees who were worried about the hazards associated with returning to work, to remain safe at home. Employers have reported to the SBA and their legislators that they are having difficulty hiring back employees during the COVID-19 pandemic.
- But the PPP initially contained a proportional reduction in the amount of forgiveness an employer could apply for and receive, based on the employer’s reduced FTE headcount, unless the FTEs were restored to former levels by June 30, 2020.
- An alternative way the PPP Flexibility Act provides for an employer to avoid the proportional reduction in the amount of loan forgiveness due to a proportional reduction in the number of FTE employees, is if the employer is able to document an inability to return to the same level of business activity at which it was operating before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, before the period beginning on March 1, 2020 and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.
- This alternative is an entirely new way to exempt an employer from the reduction in forgiveness based on a reduction in FTE employees. Employers changing their business layout to comply with social distancing in restaurants, manufacturing or food processing facilities might be better able to use this analysis than

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the inability to find qualified employees.

- For an eligible loan recipient to receive forgiveness, at least 60% of the covered loan amount must be used for payroll costs, and up to 40% may be used for the other allowable covered costs.
- For the first time, Congress requires that a minimum percentage of the covered loan amount for which forgiveness is granted must be used for payroll costs.
- Regulations promulgated by SBA and FAQs, as well as SBA's loan forgiveness forms, have previously stated an intention to require that at least 75% of any forgiven amount must consist of payroll costs.
- The required period during which lenders must defer requiring loan recipients from paying principal, interest and fees has been changed. It is now the date on which the amount of forgiveness that has been determined in accordance with the CARES Act is remitted to the lender. This period is well beyond the original 6 months (and more likely exceeds 10 months).
- This assumes the loan recipient has the loan outstanding for 24 weeks and applies for forgiveness just within 90 days after that period ends, and receives a decision on forgiveness within 60 days, as required by the CARES Act.
- If an eligible recipient fails to apply for forgiveness of a covered loan within 10 months after the last day of the covered period, the eligible recipient is required to begin making payments of principal, interest, and fees on the loan beginning on a date that is not earlier than 10 months after the last day of the covered period.
- Loans with a remaining balance after applying forgiveness will have a minimum term of 5 years.
- Finally, a section of the CARES Act that formerly prohibited employers who received forgiveness of a PPP loan from being eligible to defer the deposit of certain employment taxes for as much as two years, has been rescinded.

Congress's amendment renders many of the intricate regulations that have been passed over the past 2 months no longer applicable. Still, anxious employers (still quarantined) look to SBA and Treasury to confirm which of their interpretations no longer apply. Business owners need confirmation from SBA that the calculations and examples that were contained in the FAQs are now superseded by the PPP Flexibility Act. Borrowers need to know that the payroll limitations, translated into actual dollars (as they were in the forms promulgated to date), no longer apply, so that employers can use payroll, rather than the more difficult to manage (and transactionally expensive) other methodologies of proving proper use of funds. This would be our happily ever after. Sweet dreams!