CAPINCROUSE LLP

Unpacking the Paycheck Protection Program Flexibility Act

By Ted R. Batson, Jr., Partner and Tax Counsel

On June 3, 2020, the Senate passed H.R. 7010, the Paycheck Protection Program Flexibility Act of 2020 (the Act), clearing the way for the bill to be signed into law by President Trump. This bipartisan bill passed in the House by a vote of 417-1 and in the Senate by a unanimous voice vote.

So what does this mean for organizations that received a Paycheck Protection Program (PPP) loan? This article reviews the major changes to be aware of.

Summary

The Act makes the following key changes to the PPP loan program:

- Extends the minimum maturity of loans entered into after enactment from the two years set forth by the Small Business Administration (SBA) to five years.
- Extends the PPP loan program from June 30, 2020 to December 31, 2020.
- Expands the eight-week Covered Period for capturing forgivable PPP loan expenses to 24 weeks.
- Extends the time to rehire workers from June 30, 2020 to December 31, 2020.
- Creates a new exemption to the application of the proportional reduction in loan forgiveness arising from a reduction in full-time equivalent employees.
- Replaces the SBA's 75% payroll cost requirement with a new statutory 60% payroll cost requirement.
- Extends the period of loan deferral to coincide with the date of loan forgiveness.
- Permits recipients of a PPP loan to defer the payment of payroll taxes as otherwise allowed by CARES Act section 2302(a).

Now let's review each of these changes in further detail.

Extension of the Minimum Loan Maturity

In its First Interim Final Rule, the SBA exercised its authority to set the minimum maturity for PPP loans at two years. As noted above, the Act extends the minimum loan maturity on any loan entered into after enactment to five years.

While the Act only directly affects new loans, Congress made it clear that nothing in the Act, the CARES Act, or the Paycheck Protection Program and Health Care Enhancement Act (the act that provided the second tranche of funding for PPP loans) is to "be construed to prohibit lenders and borrowers from mutually agreeing to modify the maturity terms of a [previously issued PPP loan] to conform with requirements of this section." Thus the minimum maturity of existing loans may be modified by mutual agreement of the lender and the borrower to have a five-year minimum maturity and still meet the definition of a PPP loan.

The Act makes several key changes to the PPP loan program.

Extension of the PPP Loan Program

The PPP loan program as it was originally envisioned in the CARES Act only contemplated making loans through June 30, 2020. The program was to no longer authorize new loans after that date. The Act extends the PPP loan program through December 31, 2020. News reports indicate that despite this change, new PPP loans are not to be granted after June 30, 2020.

Expansion of the Loan Forgiveness Covered Period

The CARES Act created an eight-week Covered Period during which forgivable expenses are captured. The Act redefines the Covered Period to be the period that begins on the date the PPP loan originates (which the SBA has interpreted to be the date the loan funds are distributed) and ends on the earlier of:

1. the date that is 24 weeks later; or
2. December 31, 2020.

Note that this change notwithstanding, if your organization received a PPP loan prior to the enactment of the Act you may choose to use the original eight-week Covered Period.

Extension of Time to Rehire Workers

The CARES Act provided an exemption to the application of the full-time equivalent (FTE) employee reduction quotient for employers who rehired employees by June 30, 2020. The Act now extends the time to rehire employees until December 31, 2020. While this gives employers more time to restore their workforce, it also creates a potential delay in applying for loan forgiveness for employers seeking to use this exemption, as they will not be able to apply for loan forgiveness until after December 31, 2020.

New Exemption from Proportional Reduction in Loan Forgiveness Amount

The CARES Act includes a provision that reduces loan forgiveness by a fraction that compares an employer's FTE headcount during the Covered Period to its FTE headcount during one of two reference periods:

1. February 15, 2019 through June 30, 2019; or
2. January 1, 2020 through February 29, 2020.

Seasonal employers are permitted to select either of the above reference periods or any 12-week consecutive period between May 1, 2019 and September 15, 2019. The CARES Act provided an exemption from this reduction if an employer restored its FTE headcount by June 30 (now December 31; see section above) to the same level or higher.

The Act now creates a second form exemption. The language of this new exemption reads:

> (7) EXEMPTION BASED ON EMPLOYEE AVAILABILITY.—During the period beginning on February 15, 2020, and ending on December 31, 2020, the amount of loan forgiveness under this section shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if an eligible recipient, in good faith—
>
> (A) is able to document—
>
> (i) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020; and
>
> (ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or
>
> (B) is able to document an inability to return to the same level of business activity as such business was operating at 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 during 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 new exemption sets aside the FTE reduction quotient where an employer can document the inability to rehire workers employed by the employer on February 15, 2020 or the inability to hire similarly qualified replacement workers on or before December 31, 2020. The term "inability" is not yet defined. For example, does this mean the employer is unable because the employer lacks the financial means to pay the workers? Does it mean the workers are unavailable? Or does it mean some combination of these or other factors?

In addition, the Act provides this exemption applies if, during the period of March 1, 2020 through December 31, 2020, an employer is able to document an inability to return to the same business level at which it was operating on February 15, 2020 because of compliance with certain government requirements or guidance related to sanitation, social distancing, or any other worker or customer-safety requirement related to COVID-19. The Act does not define the manner in which an employer's "business level" is to be measured for comparison. The Act also does not address the availability of this exemption to businesses that have not been directly affected by the government-mandated safety standards, but nonetheless have experienced a decline in the level of their business because their customers are impacted by the government-mandated safety levels.

It is possible that this exemption will aid schools, camps, conference and retreat centers, and other similar employers whose activity levels have been impacted by stay-at-home orders and other similar pronouncements.

Reduction of the Payroll Costs Expenditure Threshold to 60%

In its First Interim Final Rule, the SBA announced a requirement that at least 75% of forgivable loan costs be payroll costs. The Act changes this threshold to 60%.

However, the express language of the statute, “To receive loan forgiveness… an eligible recipient shall use at least 60 percent of the covered loan amount for payroll costs,” appears to create a cliff for loan forgiveness eligibility. The prior SBA rule merely required that 75% of the costs submitted for forgiveness be payroll costs. This meant that a borrower could receive partial forgiveness if the borrower did not spend all of the loan proceeds. The new rule ties loan forgiveness to the expenditure of at least 60% of the *loan amount* on payroll costs.

In the end, the expansion of the Covered Period may make this distinction a non-issue for many borrowers. By tripling the length of the Covered Period, many borrowers will be able to accumulate more forgivable costs in total and more payroll costs specifically, thereby fully expending their PPP loan amount and reaching the 60% threshold.

Extension of the Loan Deferral Period to Coincide with the Date of Loan Forgiveness

The Act replaces the reference in the CARES Act to a loan deferral period of not less than six months or longer than one year. The new loan deferral period begins with the disbursement of the loan funds and ends with “the date on which the amount of forgiveness… is remitted to the lender.”

In addition, because the loan forgiveness application process may now extend much further into the future, the Act provides that if a borrower fails to apply for loan forgiveness “within 10 months after the last day of the covered period defined in section 1106(a) of the CARES Act,” the borrower must begin making payments of principal, interest, and fees. The reference to “section 1106(a) of the CARES Act” appears to start the 10-month clock at the end of the original eight-week Covered Period instead of the new 24-week Covered Period. We must wait for the SBA to confirm this point.

Deferral of Payroll Taxes

CARES Act section 2302(a) permits employers to defer the payment of 2020 employer payroll taxes. Fifty percent of the deferred taxes are then due in 2021, with the balance due in 2022. The CARES Act specifically denied this deferral opportunity to employers who received forgiveness of a PPP loan. The Act removes this barrier and now permits all employers to qualify for the deferral of employer payroll taxes. The IRS has posted a set of frequently asked questions regarding employer payroll tax deferral on its website. Note that these frequently asked questions do not yet reflect the enactment of the Act.

Please contact us online or at info@capincrouse.com with any questions. We will continue to provide updates as they become available. We encourage you to check the COVID-19 Resources section of our website for the latest information.

About the Author

Ted R. Batson, Partner and Tax Counsel
Professional Practice Leader – Tax
tbatson@capincrouse.com
o 505.50.CAPIN ext. 1105

As a certified public accountant and tax counsel, Ted advises exempt organizations of all sizes on a wide range of issues. This includes consulting on tax and employee benefit related matters, representation before state and federal tax authorities, and assistance with firm audit or advisory engagements to formulate advice and counsel on important operating and tax issues. Ted also leads the firm’s tax preparation practice, including IRS Forms 990 and 990-T and related state forms.

Note: Although licensed to practice law in Indiana, Ted’s services through CapinCrouse do not involve the practice of law and consequently do not result in the creation of an attorney-client relationship.

About CapinCrouse

As a national full-service CPA and consulting firm devoted to serving nonprofit organizations, CapinCrouse provides professional solutions to organizations whose outcomes are measured in lives changed. Since 1972, the firm has served domestic and international outreach organizations, universities and seminaries, foundations, media ministries, rescue missions, relief and development organizations, churches and denominations, and many others by providing support in the key areas of financial integrity and security. With a network of offices across the nation, CapinCrouse has the resources of a large firm and the personal touch of a local firm. Learn more at capincrouse.com.

CapinCrouse is an independent member of the BDO Alliance USA.

AN INDEPENDENT MEMBER OF BDO ALLIANCE USA