



**COVID-19**

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**Coronavirus / COVID-19  
Response Team**

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**SBA & PPP:  
This Week's Roundup**

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## Today's Topics

- Payroll Protection Program Flexibility Act
- CDFI Dedicated Funds
- Latest SBA Interim Final Rules
- Conclusions
- Q&A
- MJ Audit and Compliance Preparedness Program Overview

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## Payroll Protection Program Flexibility Act

## Paycheck Protection Program (PPP) Flexibility Act

- Bipartisan bill passed by the House of Representatives on May 28, 2020
  - Final vote tally: 417 - 1
- Designed to give PPP borrowers more time and flexibility in how they spend PPP loan proceeds and make (re)staffing decisions
- Senate seems poised to approve similar legislation as early as next week
  - Reconciliation may be necessary, however

## Key Proposed Changes Under The PPP Flexibility Act

- Extend 8-week loan forgiveness period to earlier of:  
(i) 24 weeks or (ii) December 31, 2020
  - Existing PPP borrowers could elect to keep 8-week period
- Reduce minimum “payroll cost” spending requirement from 75% to 60%
- Extend June 30 “safe harbor” rehiring / compensation restoration date to December 31, 2020
- Prolong deferral and repayment periods for loans
  - All new PPP loans would have minimum five year maturity
- Allow PPP participants to utilize payroll tax deferral provisions under the CARES Act

## Other Proposed Changes

- PPP loans would be available through December 31, 2020 (rather than June 30), subject to fund availability
- Would add the following new exceptions for decreases in FTE employees (i.e., these would not count against PPP borrowers for loan forgiveness calculations):
  - An inability to rehire any employee who was employed by the borrower as of February 15, 2020 (or a similarly qualified employee for the unfilled position)
  - An inability to rehire back up to prior levels resulting from new HHS, CDC or OSHA compliance requirements created between March 1-December 31, 2020 (e.g., social distancing, sanitation requirements, etc.)

## Other Proposed Changes (cont.)

- Other proposed changes (cont.):
  - If a borrower does not apply for loan forgiveness within 10 months after their loan forgiveness period, then they would need to begin making principal and interest payments on their PPP loan
- Key PPP terms not addressed or modified:
  - Eligibility criteria to participate in the PPP
  - “Need” standard / certification issues
  - Maximum loan amount calculation
  - Expansion of “forgivable” uses of PPP loans
  - Appropriations
  - Interest rate

## Next Steps for PPP Flexibility Act

- If passed by Senate (or reconciled with other Senate legislation) and signed by President:
  - SBA and Treasury will need to revisit existing applications forms, FAQs, guidance, interim final rules, etc., to align with new / updated terms
  - Initial borrowers may have qualms and questions about their early use of funds, as they were operating under a different set of rules
    - In particular, borrowers that paid employees who were not working during a portion of the original eight-week covered period will be understandably aggrieved

## CDFI Dedicated Funds

- Also on May 28, SBA and Treasury jointly announced that \$10 billion in “Round 2” PPP funds are being set aside to be lent by Community Development Financial Institutions (CDFIs)
  - Represents an effort to extend program participation in “underbanked” communities
  - CDFIs work to expand economic opportunities in low-income communities by providing access to financial products and services for local residents and businesses
  - CDFIs have so far originated \$3.2 billion of PPP loans in “Round 2,” so this action dedicates an additional \$6.8 billion to CDFIs during “Round 2”

## Latest SBA Interim Final Rules

- May 15, 2020: SBA releases PPP loan forgiveness application, including detailed instructions and worksheets (Application)
- May 22, 2020: SBA and Treasury issue two new interim final rules (IFRs):
  - Loan Forgiveness IFR
  - Process & Procedures IFR
- The new IFRs supplement the Application (discussed in our prior webinar) and provide further guidance on some (but not all) key borrower issues and questions



## Loan Forgiveness IFR – Key New Guidance

## Big Picture & Furloughed Employees

- **Big Picture:** Largely formalizes the guidance and instructions included in the Application itself
  - No further guidance on “need” certification issues
- **Furloughed Employees:** Confirms that forgivable payroll costs may cover/include employees who are being paid during the forgiveness period, even though they are furloughed and/or not actually working or performing their typical day-to-day responsibilities

## Paid or Incurred & Hazard Pay/Bonuses

- **Paid or Incurred:** Reinforces the “paid or incurred” eligibility of payroll costs relative to the borrower’s forgiveness period, as suggested by the Application
  - So, forgivable payroll costs may evidently include amounts paid during the forgiveness period, even if those amounts relate to work performed prior to the forgiveness period
  - Unclear how far back in arrears forgiveness may be permitted
- **Hazard Pay/Bonuses:** Confirms that hazard pay and bonuses may be included in forgivable payroll costs
  - However, these amounts are subject to the \$100,000 annualized cap on forgivable cash compensation

## Owners/Self-Employed

- **Owners/Self-Employed:** States that owner-employees’, general partners’ and self-employed individuals’ forgivable payroll costs are capped at the lesser of (i) 8/52 of their 2019 compensation (i.e., approximately 15.38% of their 2019 compensation) or (ii) \$15,385 in total across all businesses
  - Further provides that no additional forgiveness is provided for retirement or health insurance contributions for self-employed individuals, including Schedule C filers and general partners
  - No definition provided for “owner-employee”



## Paid or Incurred

- **Paid or Incurred:** Reinforces the “paid or incurred” eligibility of forgivable non-payroll costs (rent, mortgage interest and utilities) relative to the forgiveness period
  - An example in the Loan Forgiveness IFR specifically states that a borrower whose forgiveness period begins on June 1 could obtain forgiveness for a May utility bill as long as the May bill is paid during the forgiveness period
  - Again, it is unclear how far back in arrears such forgiveness may be permitted

## Prepayments & FTE Calculations

- **Prepayments:** Confirms that advanced payments of mortgage interest are not eligible for forgiveness due to the clear prohibition on mortgage prepayments under the CARES Act
  - However, advance payments of payroll costs, rent and utilities are conspicuously not addressed by the Loan Forgiveness IFR
- **FTE Calculations:** Provides that FTE calculations should be based on average hours paid for work during relevant calculation periods

## Employee Offers & Unemployment Reporting

- **Employee Offers:** Expands the “rehire offer” full-time equivalent (FTE) employee “cure” concept for previously laid-off employees to also apply to offers to restore working hours for employees who, while not laid-off completely, had their paid hours reduced
- **Unemployment Reporting:** Adds a new requirement that borrowers **must report employees who decline these offers to their relevant state unemployment agencies** within 30 days of an employee’s rejection of the offer
  - Must also retain documentation of offer and rejection process in case of SBA audit or review

## No “Double Penalty” & Documentation

- **No “Double Penalty”:** Confirms that borrowers will not be “doubly penalized” for reductions in hours worked that result in an overall decrease in an employee’s compensation:
  - *“To ensure that borrowers are not doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is not attributable to the FTE reduction.”*
- **Documentation:** Restates and reinforces extensive documentation provision and retention requirements for loan forgiveness included in the Application
  - Must retain entire PPP loan support file for six years

## Process & Procedures IFR – Key New Guidance

### Broad Review Potential

- **Broad Review Potential:** *“For a PPP loan of any size, SBA may undertake a review at any time in SBA’s discretion.”*
  - *“[SBA] may review whether a borrower is eligible for the PPP loan based on the provisions of the CARES Act, the rules and guidance available at the time of the borrower’s PPP loan application, and the terms of the borrower’s loan application.”*
  - Specifies that the following may be within the scope of SBA’s review: (i) borrower eligibility; (ii) loan amounts; (iii) use of loan proceeds; and (iv) loan forgiveness amounts

## SBA Info Requests, Appeals Process & Calculations

- **SBA Info Requests:** Confirms that borrowers will have the ability to respond to SBA questions and/or provide additional information to SBA as part of the review process
- **Appeals Process:** States that there will be a process for PPP borrowers to appeal an adverse eligibility or forgiveness determination by SBA
- **Calculations:** Provides that PPP lenders must perform a “good faith review” of the borrower’s loan forgiveness application and key calculations
  - However, responsibility for calculations remains with borrower

## Determinations

- **Lender Forgiveness Determinations:** Confirms that lender forgiveness decisions must generally be made within 60 days after the forgiveness application is submitted by the borrower
- **Lender Adverse Determination:** States that if a PPP lender determines that a borrower’s loan is not forgivable, the lender must notify both SBA as well as the borrower (providing its rationale for the decision)
  - The borrower may then request that SBA review its lender’s adverse determination within 30 days after the lender first notified the borrower of its decision

## SBA Review

- **SBA Review:** SBA may use the 90-day period between a lender's loan forgiveness determination and SBA's payment of the forgiven amount to the lender to review a borrower's loan file
  - If SBA initiates a review, SBA will notify the lender, who must in turn notify the borrower
  - If SBA initiates a review, the lender may be required to transmit the borrower's loan file (including supporting documents and information) to SBA for review
  - So, borrowers should assume that any documents or information they provide to lenders may be provided to SBA

## Conclusions

- PPP Flexibility Act (or a similar bill) may be a “game changer” for PPP borrowers by adjusting program rules for new economic realities
- However, it also underscores the constantly shifting “rules of the road” for PPP participants
- SBA would need to revisit virtually all prior forms, applications, guidance, etc., if PPP Flexibility Act (or a similar bill) becomes law
- So, while latest guidance is incrementally helpful, there is surely more to come
- Compliance with evolving program rules still critical



## COVID-19 RESPONSE TEAM

### PPP Compliance Readiness Program

Miller Johnson's interdisciplinary team of corporate and litigation attorneys will work with you to identify and gather relevant documents and performance data to ensure your business is best positioned to comply with the ever-changing rules governing the Paycheck Protection Program (PPP) and any resulting inquiry or investigation related to your business's application for, and receipt of, PPP funds.

#### Services

- Assist with identifying and compiling records and performance data to support the good faith "need certification" made at the time the PPP loan application was made.
- Review use and accounting of funds to support your application for loan forgiveness.
- Compliance assessment based on review of information received.
- Advise on best practices and evolving rules and guidance related to the PPP.
- Development of audit preparedness plan.
- Advise on enforcement defenses and evidentiary support for the same.

#### Pricing

*Flat Fee\* based on amount of PPP loan.*

**\$5,000**  
Loan amount of \$2MM+

**\$3,500**  
Loan amount between \$1MM - \$1.99MM

**\$3,000**  
Loan amount between \$500K - \$999K

**\$2,000**  
Loan amount between \$250K - \$499K

**\$1,500**  
Loan amount less than \$250K.

*\*Legal services related to responding to, or otherwise participating in, an informal or formal inquiry, investigation, audit or any other enforcement action (collectively, "PPP Enforcement Action") are excluded from the scope of legal services offered in this Compliance Readiness Program. However, in the event your business is required to respond to, or otherwise participate in, a PPP Enforcement Action, Miller Johnson will credit 50% of the Flat Fee paid for the Compliance Readiness Program against the cost of advising and representing your business with respect to any PPP Enforcement Action.*

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