




COVID-19

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**Coronavirus / COVID-19
Response Team**


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1

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**PPP Flexibility:
Updated Loan Forgiveness
Applications & Other
Recent Developments**

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3

Today's Topics

- PPP Flexibility Act Summary Overview
- Updated Loan Forgiveness Applications
- Other Recent PPP Developments
- Conclusions
- MJ Audit and Compliance Preparedness Program Overview

4

PPP Flexibility Act Summary Overview

Paycheck Protection Program (PPP) Flexibility Act

- Designed to give PPP borrowers more time and flexibility in how they spend PPP loan proceeds and make (re)staffing decisions.
- Overwhelming bipartisan support in Congress.
- Signed into law by President on June 5, 2020.
- SBA and Treasury have been updating rulemaking, forms and applications over the last two weeks.

Key Changes Under The PPP Flexibility Act

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

Key Changes Under The PPP Flexibility Act (cont.)

- Adds the following new exceptions for decreases in FTE employees (i.e., these do 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.).

Updated PPP Loan Forgiveness Applications

Big Picture Summary

- SBA and Treasury introduced a less extensive loan forgiveness application (Form 3508EZ) and related instructions for PPP borrowers that will not have their forgiveness reduced based on FTE and/or compensation reductions.
- The original loan forgiveness application (Form 3508) has also been updated, but is not dramatically different compared to the original version.
- Both loan forgiveness applications reflect the changes implemented by the PPP Flexibility Act.

“EZ” Loan Forgiveness Application Eligibility

- In order to use the shorter Form 3508EZ loan forgiveness application, the PPP borrower must qualify under one of three standards:
 - **First Standard:** The borrower is a self-employed individual, independent contractor or sole proprietor who had no employees at the time of the PPP loan application and did not include any employee salaries in the computation of their loan amount.

“EZ” Loan Forgiveness Application Eligibility (cont.)

- **Second Standard:** The borrower did not reduce compensation or wages of any employee by more than 25 percent during the Covered Period (excluding those earning more than \$100,000/year) **AND** the borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period.
 - The borrower should ignore reductions that arose from an inability to rehire individuals who were employees on February 15, 2020 if the borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
 - The borrower should also ignore reductions in an employee’s hours that the borrower offered to restore and the employee refused.

“EZ” Loan Forgiveness Application Eligibility (cont.)

- **Third Standard:** The borrower did not reduce compensation or wages of any employee by more than 25 percent during the Covered Period (excluding those earning more than \$100,000/year) **AND** the borrower was unable to operate during the Covered Period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1- December 31, 2020 by HHS, CDC or OSHA related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.
 - Note: This category seems fairly open-ended for those borrowers that did not/do not significantly reduce compensation or wages during their forgiveness period. More guidance may be needed.

Potential Benefits of “EZ” Loan Forgiveness Application

- Because a threshold qualification criterion for the “EZ” loan forgiveness application is that there not have been FTE and/or compensation reductions that would reduce the borrower’s loan forgiveness, far less information is required on these topics.
- However, borrowers must still certify as to their eligibility to utilize the “EZ” loan forgiveness application and must still retain extensive records and files relating to their PPP loan generally.
 - Borrowers must still retain their complete PPP loan file for six years following forgiveness and/or repayment in full.
 - SBA has the right to request/audit any relevant information.

Standard Loan Forgiveness Application

- If a PPP borrower does not qualify to use the “EZ” application, then it must use the lengthier, standard loan forgiveness application.
- The updated form of this application is not dramatically different compared to the original form of loan forgiveness application published in May.
- However, the application has been updated to include changes necessary to implement the PPP Flexibility Act, including the new FTE-related safe harbors.

Concepts Related to Both Loan Forgiveness Applications

- Both applications still require borrowers to “check-the-box” if their loan amount exceeds \$2MM (when combined with affiliates’ PPP loans, if applicable).
- The “Alternative Payroll Covered Period” concept has been retained and is available to both 8- and 24-week borrowers with more frequent payroll periods.
 - However, in no case may the Covered Period or Alternative Payroll Covered Period extend past December 31, 2020.
- The forgivable employee “cash compensation” limitations are uniform in both applications:
 - \$15,385 for 8-week borrowers
 - \$46,154 for 24-week borrowers

Concepts Related to Both Loan Forgiveness Applications (cont.)

- In relation to both the FTE and the compensation reduction restoration “safe harbors,” the instructions to both applications modified the time at which FTE and/or compensation restoration is measured.
 - Under the PPP Flexibility Act, the “restoration date” was firmly set as December 31, 2020.
 - However, the application instructions for both restoration provisions now provide that the relevant measurement date is the earlier of the date the loan forgiveness application is filed or December 31, 2020 (whichever is earlier).
 - More guidance is needed, but this change may give borrowers meaningful flexibility to manage their employee and compensation “restoration” to qualify for the safe harbor.

Concepts Related to Both Loan Forgiveness Applications (cont.)

- “Owner compensation” is limited as follows for owner-employees, self-employed individuals and/or general partners:
 - For an 8-week borrower, owner compensation is limited to 8/52 of 2019 compensation, subject to a cap of \$15,385.
 - For a 24-week borrower, owner compensation is limited to the 2.5-month equivalent of the individual’s compensation in 2019, subject to a cap of \$20,833 (the 2.5-month equivalent of \$100,000 per year).
 - These limitations apply in the aggregate across all businesses in which the relevant individual is an owner-employee, self-employed or general partner based on an interim final rule released by SBA on June 17, 2020.

Concepts Related to Both Loan Forgiveness Applications (cont.)

- Both applications reflect additional limitations for self-employed individuals, general partners and owner-employees:
 - Payroll costs do not include health care benefits for self-employed individuals, general partners or owner-employees of an S-corporation.
 - Payroll costs do not include retirement benefits for self-employed individuals or general partners.
 - However, retirement contributions on behalf of owner-employees are eligible, subject to a cap equal to 2.5 months' worth of the owner-employee's 2019 retirement contribution amount.

Other Recent PPP Developments

Updated PPP Borrower and Lender Applications

- SBA has also published an updated PPP borrower application form (Form 2483) and lender application form (Form 2484).
 - Most of the revisions to these forms simply implement program changes required by the PPP Flexibility Act.
 - These program changes are also memorialized in an interim final rule issued by SBA, in consultation with Treasury, on June 11, 2020.
 - Based on feedback from Congress, on June 12, 2020, SBA also issued an interim final rule to relax the eligibility requirements to allow for more PPP loans to businesses owned or operated by those with prior criminal records.

Changes to Eligibility Based on Criminal Records

- The criminal record “look-back” period has been reduced from five years to one year to determine eligibility for borrowers, or owners of borrowers, who, for non-financial felonies, have (i) been convicted, (ii) pleaded guilty, (iii) pleaded *nolo contendere*, or (iv) been placed on any form of parole or probation (including probation before judgment).
- However the “look-back” period remains five years for felonies involving fraud, bribery, embezzlement or a false statement in a loan or federal financial assistance application.
- The updated PPP borrower application form also eliminates pretrial diversion status as a criterion affecting eligibility.

Conclusions

- SBA and Treasury have made progress in updating the core framework of the PPP through new rulemaking and updated application forms.
- There is still a reasonable amount of murkiness related to “owner compensation” forgiveness issues.
- Further rules and guidance are expected, such as an updated forgiveness-related interim final rule, guidance on unemployment agency reporting obligations and information on the appeals process for adverse loan forgiveness determinations.
- The long and winding road continues...



**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+
\$5,500	Loan amount between \$1MM - \$1,999MM
\$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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