

PPP Flexibility Act Changes to Forgiveness Application Process: Points to Ponder

The PPP Flexibility Act (Flex Act) became law on June 5th, and the new law included provisions for PPP applications as well as the forgiveness application process. In that the application window closes June 30th, the focus for borrowers, lenders and advisers is shifting to the forgiveness process, which is the most unique feature of PPP loans. Based on the numerous changes to the PPP forgiveness process enacted by the Flex Act, it was deemed appropriate to compile these changes, which includes the following:

The advance term:

- For loans approved prior to 6/5/2020 borrowers can opt to use either the 8-week advance term (Covered Period), or use the 24-week term
- All loans approved on 6/5/2020 or later will use the 24 week advance term
- Each Pre 6/5/2020 borrower should determine which option will maximize their forgiveness

Percentage of Proceeds:

For all loans approved, the amount to be spent on payroll and related expenses should comprise at least 60% of the total received, with the remaining 40% to be spent on a short list of non-payroll expenses

Safe Harbor for Employee Headcount:

Borrowers are able to maximize their eligibility even if their employee headcount is reduced for the following reasons:

- Employee rejected a re-hire offer (must be confirmed in writing)
- Employee was fired for cause during covered period
- Employee requested a reduction in hours
- Employee voluntarily resigned
- Borrower cannot hire “similarly qualified” replacement employee

Safe Harbor for Employee Wages/Salaries:

Borrowers are able to maximize their eligibility even if employee wages are not reduced by more than 25% unless the business was unable to operate at pre-crisis levels due to government policy or guidelines (see below)

Also, if a borrower selects the 24-week term, the \$100,000 per employee, pro-rated increases to \$46,154

Safe Harbor for Businesses impacted by Government Policy:

- If a borrower’s operation was impacted by a federal government policy or guideline concerning social distancing and/or employee or customer safety related to COVID-19 requirements, then the business will not be subject to eligibility reduction
- Any policies issued between 3/1/2020 and 12/31/2020 are eligible if operations are impacted and employees are also impacted
- Although the guidance specifically states federal policies, it also included businesses “indirectly” impacted by these guidelines, which has been inferred to include state and local restrictions

The EZ Application:

- In an effort to simplify the forgiveness application process, the EZ application was created, which is 4 page document (vs. 11 pages for the original application)
- The EZ form requires significantly fewer calculations and does not include detailed supporting documents required in the “long form”

- To qualify, a borrower must meet one of the following criteria:
 - Borrower if self-employed, independent contractor, or sole proprietor with no employees at the time of applying for the PPP loan and did not include any employee salaries in the computation of average monthly payroll in their application, **or**
 - Borrower did not reduce annual salary or hourly wages of employee by more than 25% during the Covered Period or Alternative Covered Period compared with the period between 1/1/2020 and 3/31/2020 (capped at \$100,000 pro-rated), **and**
 - Borrower did not reduce the number of employees or the average paid hours between 1/1/2020 and the end of the Covered Period (excluding employees being paid as of 2/15/2020 that could not be rehired or replaced with similarly qualified employees by 12/31/2020). In addition, employees that had hours reduced, then refused to work additional hours when offered by employer
 - Borrower did not reduce annual salary or hourly wages by more than 25% during Covered Period or Alternative Covered Period compared to the period 1/1/2020 and 3/31/2020, capped at \$100,000 on a pro rata basis, **and**
 - Borrower was unable to operate during the Covered Period at the same level of business activity as before 2/15/2020 due to compliance with requirements established or guidance issued between 3/1/2020 and 12/31/2020 by the Secretary HHS, Director of the 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
- *There is no loan size limitation connected to the use of the EZ form*

Sole Proprietors, Owners, Independent Contractors:

- Guidance for these classes of borrowers took additional time to be issued, and include:
 - The amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at 2.5 months (2.5/12) of 2019 compensation (approximately 20.83% of 2019 compensation) or \$20,833 per individual, whichever is less, regardless of legal entity structure
 - Borrowers need to check to see if certain expenses can be included, such as retirement account contributions, health insurance premiums
 - The SBA wants to be sure that borrowers do not "double dip" for some of these expenses
 - Confusion remains on how the SBA differentiates between different legal classes, for under some structures certain expenses are eligible while other times they are not eligible

Payroll Tax:

- Borrowers who have PPP loans that are forgiven would be permitted to delay payment of the employer portion of FICA taxes for all payroll paid from 3/27/2020 – 12/31/2020
- The deferral does not apply to employee withholdings, the employee or employer portion of the Medicare tax, or employee portion of FICA taxes
- The payment of the tax will be deferred, with 50% of the tax payable on 12/31/2021 and the remaining 50% of the tax payable on 12/31/2022
- As long as the employer portion of FICA taxes subject to deferral are timely deposited by 12/31/2021 and 12/31/2022 the tax will be treated as a timely deposit, avoiding penalties for late payments

Income Tax Deductions:

Any expenses paid by the PPP loan that are subsequently forgiven cannot be included in the borrower's 2020 income tax return

When to Apply:

- Borrowers can apply as soon as their PPP funds have been fully spent, *or no later than 10 months after funds are exhausted*
- If they do not apply, the balance is converted to a loan

Document Retention:

- EZ Application requires borrowers to provide to their lender the following documents:
 - Bank account statements or 3rd party payroll service records documenting the amount of cash compensation paid to employees
 - Tax forms or similar form provided by payroll service for the periods that overlap with the Covered Period or Alternative Covered Period that indicates:
 - Payroll tax filings reported, or that will be reported, to the IRS (i.e. 941), and
 - State quarterly business and individual employee wage reporting and unemployment insurance tax filings that have been or will be reported
 - Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that borrower provided in the forgiveness amount
 - If box #2 on page 1 was checked, provide the average number of FTEs on payroll as of 1/1/2020 and the end of the Covered Period
 - Business mortgage interest payments, along with an amortization schedule and receipts/canceled checks or similar proof from lender
 - Copy of current lease agreements along with canceled checks or other proof
 - Copy of utility bills and corresponding payment proof
- EZ Application documents to be retained by borrower but not provided to lender includes:
 - Documentation that supports certification of annual salaries or wages were not reduced by more than 25% and the amounts paid to employees during the Covered Period
 - Documentation related to any employee job offers and refusals, refusals to accept restoration of reduced hours, firings for cause, voluntary resignations, written requests by employees to reduce work schedule, and any efforts to hire similarly qualified employees prior to 12/31/2020
 - Documentation supporting certification that borrower did not reduce the number of employees or the average paid hours between 1/1/2020 and end of the Covered Period
 - Documentation supporting that business was unable to operate between 2/15/2020 and the end of the Covered Period due to compliance with HHS, OSHA, CDC concerning sanitation, social distancing, or any other work or customer safety requirements related to COVID-19. This also includes similar documentation from state or local restrictions, and must include copies of applicable requirements for each location of business and relevant borrower financial records
- All records related to borrower's PPP loan, including documents submitted with their application, supporting documents, and Borrower's Certification supporting borrower's application must be maintained for 6 years after

the date the loan is forgiven or repaid in full. This same documentation is required for the borrower's Forgiveness Application, along with proof that borrower was in compliance with PPP requirements.

Borrowers that do not use the EZ form should following detailed instructions found with the standard forgiveness application.

All borrowers are strongly encouraged to discuss their applications prior to filing for forgiveness with their lenders for each lender may add their own, unique requirements in addition to those required by the SBA.

Forgiveness Review Timeline:

- Borrowers have up to 10 months after they expend all the of their PPP funds to apply for forgiveness
- If they do not apply by that time the balance will convert to a loan
- Following the submission of the forgiveness application, their lender has 60 days to review the package and determine whether the request will be granted
- The lender then forwards their recommendation to the SBA, which has an additional 90 days to determine eligibility
- No loan payments are made during this time period

Conversion to a Loan and Repayment Term:

- Loans approved before 6/5/2020 will convert to a 2-year loan (with 6 months deferred)
- If the borrower and lender agree, loans made before 6/5/2020 can be converted to a 5-year repayment term
- Loans approved on 6/5/2020 or later will be converted to a 5-year repayment term, with 6 months on deferral

EIDL Advance Impact:

- *If a client received an EIDL advance, the amount received will reduce the amount of PPP forgiveness by a like amount*
- *All borrowers who received an EIDL advance will end up with a balance on their PPP loan*

Conclusion:

These changes and the implementation of the policy guidelines are subject to change either by additional federal legislation or updated/additional guidance from the SBA. In addition, each lender may add its own requirements or documentation to the application process. Therefore, it is critical for clients to maintain good communications with their SBDC advisers (and vice versa) as well as their lender. We strive to stay current with these changes, which are believed to be accurate as of *June 27, 2020*.