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# Alerts

## Legislative Fix for PPP Loan Forgiveness Problems

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*Hinshaw Alert*

The Small Business Administration (SBA) and the U.S. Department of the Treasury released an Interim Final Rule on Paycheck Protection Program (PPP) Loan Forgiveness and the PPP Loan Forgiveness Application.

Although this rule and the application provided additional clarity on several issues raised in previously issued guidance from the agencies, others still remain unanswered.

In particular, some borrowers have concerns with the 75/25 split on permitted payroll and nonpayroll costs that may be forgiven. This 75/25 split was not mandated by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act); instead it was included in the rules by the agencies. Similarly, there is concern about the eight week period during which borrowers must spend the PPP loan proceeds on permitted costs (the "Covered Period").

The House and Senate have approved legislation designed to address these problems—which we covered in this May 27 alert.

*Update, June 9:* The legislation (H.R. 7010) was signed into law by the President late last week. In a joint statement issued on June 8, 2020, the agencies indicated, among other things, that they planned to "promptly issue rules and guidance, a modified borrower application and a modified loan forgiveness application implementing these legislative amendments to the PPP."

## Legislative Resolutions

### Eight Week Covered Period

H.R. 7010 would extend the Covered Period from eight weeks to 24 weeks after the loan funds have been disbursed, or December 31, 2020. Additionally, a borrower who received a PPP loan before the enactment of H.R. 7010 may elect to use the existing eight week Covered Period rather than the extended Covered Period.

### 75/25 Split

This legislation also eliminates the requirement that at least 75% of the loan proceeds must be spent on permitted payroll costs, and establishes the split at 60/40.


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There is a problem with this fix, however. The current 75/25 split allows for partial forgiveness of a loan if the less than 75% of the loan proceeds are spent on permitted payroll costs.

To receive loan forgiveness under this new provision, an eligible recipient must use at *least* 60% of the PPP loan proceeds for payroll costs, and may use up to 40% for payment of interest on any covered mortgage obligation—which shall not include any prepayment of, or payment of, principal on a covered mortgage obligation—any payment on any covered rent obligation, or any covered utility payment.

As written, the legislation appears to create a "cliff" which would require the borrower to spend at least 60% of the loan proceeds on payroll costs. It creates the implication that if a borrower does not spend 60% on payroll expenses, no portion of the loan would be forgiven.

Guidance has been sought from both the Treasury and SBA on whether said cliff can be handled by regulations adopted by the agencies. Assurances have been given by the Trump Administration that the law would be interpreted to avoid the cliff.

*Update, June 9:* in the joint statement, the agencies indicated that they would not enforce the cliff: "If a borrower uses less than 60 percent of the loan amount for payroll costs…, the borrower will continue to be eligible for partial loan forgiveness, subject to at least 60 percent of the forgiveness amount being used for payroll costs."

## Additional Legislative Resolutions

### Two Year Loan Term Extended to Five-Year Minimum

Although the CARES Act provides that the term of a PPP loan can be up to ten years, the SBA and Treasury had settled on a two-year term for repayment of any unforgiveness loan balance.

Under H.R. 7010, a PPP loan must have a minimum maturity of at least five years, providing borrowers extra time to repay the unforgiven portion of the loan. It also allows the lender and the borrower to modify the terms of existing PPP loans to extend the maturity date from two years to five years.

### Delayed Payment of the Employers Portion of the Social Security Taxes

According to rules set forth by the IRS, starting on March 27, 2020, a PPP borrower could delay paying the employer's share of the social security taxes, but that deferment ends when the PPP loan is forgiven.

H.R. 7010 allows a PPP borrower to delay payment of the employer's share of the social security taxes after the loan has been forgiven for the remainder of 2020.

### Rehiring Employees

The forgiveness rules include an employee test that can reduce the amount of loan forgiveness if there is a reduction in the number of employees. However, this reduction can be avoided if the borrower has the same number of employees by June 30, 2020.

H.R. 7010 modifies this provision by: (1) by applying the new 24 week Covered Period instead of the eight week Covered Period; and (2) extending the rehiring date to December 31, 2020.

As a further help to employers, H.R. 7010 also eliminates the employee test under the circumstances described below:

> "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

(1) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020; and

(2) 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."

## Loan Deferment Period

The CARES Act provides that a borrower is allowed to defer the payment of interest for the first six months following the receipt of the loan proceeds and is not required to make principal payments until the loan maturity date.

However, H.R. 7010 provides that a borrower would not be required to make payments of principal, interest, or fees, until the date on which the amount of forgiveness determined under section 1106 of the CARES Act is remitted to the lender by the SBA. Because the borrower can determine when it will seek forgiveness, the bank has 60 days to act on a forgiveness application and the SBA must forward payment to the lender within 90 days of its receipt of the lender's decision; the deferment period may be substantially expanded.

To discourage this approach to a certain extent, the legislation provides that if a borrower fails to apply for PPP loan forgiveness within ten months after the last day of the Covered Period, the borrower shall make payments of principal, interest, and fees on the loan, beginning on the day that is not earlier than the date that is ten months after the last day of the Covered Period.

## Application Deadline

The deadline for submitting PPP loan applications remains June 30, 2020.