

## H.R. 7010 – Paycheck Protection Program Flexibility Act of 2020

On June 5, 2020, the President signed into law H.R. 7010, the *Paycheck Protection Program (PPP) Flexibility Act of 2020* (the “PPP Flexibility Act”). In general, this legislation amends several PPP requirements as established by the *Coronavirus Aid, Relief, and Economic Security (CARES) Act*, which was further amended by the *PPP and Health Care Enhancement Act*. The changes and flexibilities established by the PPP Flexibility Act are indicated below (deletions in red, additions in blue). The changes to CARES Act section 1106 (PPP loan forgiveness) are effective as if included in the CARES Act and apply to any loan made pursuant to the provisions in CARES Act section 1102 (SBA PPP loans) or section 1109 (other PPP loans made by federal financial regulatory agency-approved lenders). Other effective dates are noted below.

In addition to the changes to PPP loan rules, the PPP Flexibility Act also amends section 2302(a) of the CARES Act (related to the deferral of certain employer payroll taxes). Specifically, the PPP Flexibility Act removes the prohibition on payroll tax deferral for entities receiving PPP loan forgiveness. This change is effective as if included in the CARES Act and applies to any loan made pursuant to section 1102 or section 1109.

The non-affected CARES Act sections relevant to the PPP are not captured below as they remain the same.

CARES Act Section	Summary
<b>Sec. 1102. Paycheck protection program.</b>	
<b>a. In general.</b>	<p>This section establishes the Paycheck Protection Program (PPP) (as new paragraph (36) under 15 USC 636(a)). Participation in the PPP by the Administration will be 100 percent. Unless otherwise noted, the provisions are applicable during the covered period.</p> <p>(A) <i>Paycheck Protection Program (PPP)</i>:            Definitions:  <b>“Appropriate Federal banking agency”</b> and <b>“insured depository institution”</b> have the meanings in 12 USC 1813.  <b>“Covered loan”</b> means a loan under the PPP during the covered period.  <b>“Covered period”</b> means 2/15/2020-6/30/2020.  <b>“Eligible recipient”</b> means an individual or entity eligible to receive a covered loan.  <b>“Eligible self-employed individual”</b> means an individual who regularly carries on trade or business and would be entitled to receive paid leave during the taxable year if the individual were an employee of an employer (not him/herself) (see FFCRA 7002(b)).  <b>“Employee”</b> includes individuals employed on a full-time, part-time, or other basis.  <b>“Insured credit union”</b> means any credit union the member accounts of which are insured in accordance with the provisions of “share insurance” (12 USC Chapter 14, Subchapter II).  <b>“Nonprofit organization”</b> means a 501(c)(3) organization exempt from taxation (under section 501(a) of the Internal Revenue Code (IRC)).</p>

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	<p><b>“Payroll costs”</b> means: (1) the sum of compensation payments to employees (salary, wage, commission, or similar compensation; payment of cash tip or equivalent; payment for vacation, parental, family, medical, or sick leave; allowance for dismissal or separation; payment required for group health care benefits, including insurance premiums); and (2) the sum of payments of any compensation to or income of a sole proprietor or independent contractor (wage, commission, income, net earnings from self-employment, or similar compensation that is not more than \$100,000 per year, as prorated for the covered period. This <u>excludes</u>: (1) compensation of an individual employee in excess of \$100,000 annual salary (prorated for the covered period); (2) certain taxes imposed or withheld during the covered period; (3) any compensation of an employee whose principal place of residence is outside of the US; (4) qualified sick leave wages (for which credit is allowed under section 7001 of the FFCRA); or (5) qualified family leave wages (for which credit is allowed under section 7003 of the FFCRA).</p> <p><b>“Veterans organization”</b> means a 501(c)(19) organization exempt from taxation (under section 501(a) of the IRC).</p> <p><i>(B) Paycheck Protection Loans:</i> The Administrator may guarantee covered loans under the same terms, conditions, and processes as a 7(a) loan.</p> <p><i>(C) Registration of Loans:</i> Not later than 15 days after the date on which a PPP loan is made, the Administration will register the loan using the Tax Identification Number (TIN) assigned to the borrower.</p> <p><i>(D) Increased Eligibility for Certain Small Businesses and Organizations:</i> Any business concern, nonprofit organization, veterans organization, or Tribal business concern, in addition to small business concerns, will be eligible to receive a covered loan if the entity employs no more than the greater of 500 employees or, if applicable, the size standard in number of employees established by the Administration for the industry in which the entity operates.</p> <p>Sole proprietorships, independent contractors, and eligible self-employed individuals will be eligible to receive a covered loan. Such eligible individuals seeking a covered loan will submit necessary documentation to establish that the individual is eligible, including payroll tax filings, other applicable tax forms (i.e., 1099-MISC), and income and expenses from the sole proprietorship as determined by the Administrator and the Secretary.</p> <p>Any business concern that employs not more than 500 employees per physical location and is assigned a North American Industry Classification System (NAICS) code beginning with 72 at the time of disbursement will be eligible to receive a covered loan.</p> <p>This section also waives provisions applicable to “affiliations” (see 13 CFR 121.103) with respect to eligibility for a covered loan for any business concern: (1) with 500 or fewer employees that, as of the date on which the covered loan is disbursed, is assigned a NAICS code beginning with 72; (2) operating as a franchise and is assigned a franchise identifier code by the Administration; and (3)</p>

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	<p>that receives financial assistance from a company licensed under 15 USC 681 (small business investment companies). The provisions applicable to affiliations will apply with respect to a nonprofit organization and a veterans organization in the same manner as with respect to a small business concern.</p> <p><i>(E) Maximum Loan Amount:</i>            The maximum loan amount will be the <u>lesser</u> of:            Option 1:            (1) the sum of: (A) 2.5 multiplied by the average total monthly payments for payroll costs incurred during the 1-year period before the date on which the loan is made (for a seasonal employer, as determined by the Administrator, the 12-week period beginning 2/15/2019 or 3/1/2019, chosen by the eligible recipient, and ending 6/30/2019); and (B) the outstanding 7(b)(2) loan amount made during the period beginning 1/31/2020 and ending on the date on which covered loans are made available to be refinanced under the covered loan; or            (2) if requested by an otherwise eligible recipient not in business during the period of 2/15/2019-6/30/2019, the sum of: (A) 2.5 multiplied by the average total monthly payments for payroll costs incurred during the period of 1/1/2020-2/29/2020; and (B) the outstanding 7(b)(2) loan amount made during the period beginning 1/31/2020 and ending on the date on which covered loans are made available to be refinanced under the covered loan; or            Option 2:            \$10 million.</p> <p><i>(F) Allowable Uses of Covered Loans:</i>            In addition to the allowable uses of such loan, the recipient may use the loan for: (1) payroll costs; (2) costs related to continuing group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums (3) employee salaries, commissions, or similar compensations; (4) interest on any mortgage obligation (does not include any prepayment of or payment of principal on a mortgage obligation); (5) rent (including under a lease agreement); (6) utilities; and (7) interest on any other debt obligations incurred before the covered period.</p> <p>A lender approved to make such loans will be deemed to have been delegated authority by the Administrator to make and approve covered loans. When evaluating a borrower's eligibility for a covered loan, the lender will consider whether the borrower: (1) was in operation on 2/15/2020; and (2) had employees for whom the borrower paid salaries and payroll taxes or paid independent contractors (As reported on a 1099-MISC). The authority to make such loans will be extended to additional lenders determined by the Administrator and the Treasury Secretary to have the necessary qualifications to process, close, disburse, and service loans made with the guarantee of the Administration.</p> <p>A 7(b)(2) loan made during the period beginning 1/31/2020 and ending on the date on which covered loans are made available may be refinanced as part of a covered loan.</p>

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	<p>The Administrator will have no recourse against any individual shareholder, member, or partner of an eligible recipient of a covered loan for nonpayment of any covered loan, except to the extent that such shareholder, member, or partner uses the covered loan proceeds for an unauthorized purpose.</p> <p><i>(G) Borrower Requirements:</i> An eligible recipient applying for a covered loan must make a good faith certification: (1) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient; (2) acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; (3) that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and (4) during the period 2/15/2020-12/31/2020,</p> <p><i>(H) Fee Waiver:</i> The Administrator will not collect the yearly fee (15 USC 636(a)(23)(A)) or guarantee fees (see 15 USC 636(a)(18(A))).</p> <p><i>(I) Credit Elsewhere:</i> The requirement that a small business concern is unable to obtain credit elsewhere will not apply to a covered loan.</p> <p><i>(J) Waiver of Personal Guarantee Requirement:</i> With respect to a covered loan, no personal guarantee and no collateral will be required.</p> <p><i>(K) Maturity for Loans with Remaining Balance After Application of Forgiveness:</i> A covered loan that has a remaining balance after reduction based on the loan forgiveness amount (see section 1106), the remaining balance will continue to be guaranteed by the Administration and the covered loan will have a minimum maturity of 5 years and a maximum maturity of 10 years from the date on which the borrower applies for loan forgiveness. This change applies to loans made on or after enactment (6/5/2020). However, lenders and borrowers may mutually agree to modify the maturity terms of a covered loan to conform with this new requirement.</p> <p><i>(L) Interest Rate Requirements:</i> The covered loan's interest rate will not exceed 4 percent.</p> <p><i>(M) Loan Deferment:</i> The Administrator will:</p>

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	<p>(1) Consider each eligible recipient that applies for a covered loan to be an “impacted borrower” (an eligible recipient in operation on 2/15/2020 and has an application for a covered loan that is approved or pending approval on or after enactment; presumed to have been adversely impacted by COVID-19); and</p> <p>(2) Require lenders to provide complete payment deferment relief for impacted borrowers with covered loans, including payment of principal, interest, and fees, until the date on which the amount of forgiveness is remitted to the lender.</p> <p>For a covered loan sold on the secondary market, if an investor declines to approve a requested deferral by a lender, the Administrator will exercise the authority to purchase the loan so that the impacted borrower may receive the deferral. This clause is revised to reflect the same deferral period required for lenders.</p> <p>Not later than 30 days after enactment, the Administrator will provide guidance to lenders on the deferment process.</p> <p>If an eligible recipient fails to apply for forgiveness within 10 months after the last day of the covered period (defined in section 1106(a), below), the eligible recipient is required to make principal, interest, and fee payments on the covered loan beginning not earlier than 10 months after the last day of such covered period.</p> <p>These changes are effective as if they were included in the CARES Act and apply to any loan made under section 1102 or section 1109.</p> <p><i>(N) Secondary Market Sales:</i> A covered loan is eligible to be sold in the secondary market. The Administrator may not collect any fee for any guarantee sold into the secondary market.</p> <p><i>(O) Regulatory Capital Requirements:</i> A covered loan will receive a risk weight of zero percent by the appropriate Federal banking agencies or the National Credit Union Administration Board.</p> <p>Insured depository institutions or insured credit unions that modify a covered loan due to COVID-19-related difficulties in a troubled debt restructuring (TDR) on or after 3/13/2020 will <u>not</u> be required to comply with certain accounting standards for purposes of complying with the Federal Deposit Insurance Act (12 USC 1811) until such time and under circumstances determined appropriate by the appropriate Federal banking agency or National Credit Union Administration Board.</p> <p><i>(P) Reimbursement for Processing:</i> The Administrator will reimburse authorized covered loan lenders at a rate based on the balance of the outstanding financing at the time of disbursement of the covered loan. This rate is as follows: (1) 5 percent for loans not more than \$350,000; (2) 3 percent</p>

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	<p>for loans more than \$350,000 and less than \$2 million); and (3) 1 percent for loans of not less than \$2 million. The appropriate reimbursement will be made not later than 5 days after the covered loan is disbursed.</p> <p>An agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the Administrator's established limits.</p> <p>It is the Sense of the Senate that the Administrator should issue guidance to lenders and agents to ensure processing and disbursement prioritizes small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals, women, and businesses in operation for less than 2 years.</p> <p><i>(Q) Duplication:</i> Recipients of an economic injury disaster loan (EIDL) or 7(b)(2) loan made between 1/31/2020 and the date on which covered loans are made available, can receive assistance under the PPP so long as the 7(b)(2) loan is for a purpose other than paying payroll costs and other obligations in subparagraph (F).</p> <p><i>(R) Waiver of Prepayment Penalty:</i> There is no prepayment penalty for any payment made on a covered loan.</p>
<b>b. Commitments for 7(a) loans.</b>	For the period of 2/15/2020-6/30/2020: (1) \$349 billion is authorized for commitments for general 7(a) business loans, including PPP loans; and (2) the amount authorized for commitments for such loans as added in the Consolidated Appropriations Act, 2020, will not apply.
<b>c. Express loans.</b>	7(a) Express Loan maximum amounts (15 USC 636(a)(31)(D)) are temporarily increased from \$350,000 to \$1,00,000 until 1/1/2021.
<b>d. Exception to guarantee fee waiver for veterans.</b>	This paragraph eliminates the exception to the guarantee fee waiver so that the Administrator may not collect a guarantee fee from a veteran or spouse of a veteran even if the President's budget for the upcoming FY includes a cost for the small business intermediary lending pilot program.
<b>e. Interim rule.</b>	On and after enactment, the Administrator's interim final rule "Express Loan Programs: Affiliation Standards" (85 FR 7622, 2/10/2020) is permanently rescinded and will have no force or effect.
<b>Sec. 1106. Loan forgiveness.</b>	
<b>a. Definitions.</b>	<p>"Covered loan" means a loan guaranteed under paragraph (36) of 7(a) of the SBA as added by section 1102.</p> <p>"Covered mortgage obligation" means any indebtedness or debt instrument incurred in the ordinary course of business that is the borrower's liability, is a mortgage on real or personal property, and was incurred before 2/15/2020.</p> <p>"Covered period" means the earlier of: (A) 24 weeks after the date of origination; or (B) December 31, 2020. <i>Note:</i> eligible recipients that received a covered loan prior to June 5, 2020, may elect a covered period that is 8 weeks after the origination date of the loan.</p>

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	<p>"Covered rent obligation" means rent obligated under a leasing agreement in force before 2/15/2020.</p> <p>"Covered utility payment" means payment for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before 2/15/2020.</p> <p>"Eligible recipient" means recipient of a covered loan.</p> <p>"Expected forgiveness amount" means the amount of principal that a lender reasonably expects a borrower to expend during the covered period on the sum of any payroll costs, payments of interest on any covered mortgage obligation (which will not include any prepayment of or payment of principal on a covered mortgage obligation), payments on any covered rent obligation, and covered utility payments.</p> <p>"Payroll costs" has the definition under paragraph (36) of 7(a) of the SBA as added by section 1102.</p>
<p><b>b. Forgiveness.</b></p>	<p>An eligible recipient will be eligible for covered loan forgiveness of indebtedness on a covered loan in an amount <i>equal to the sum of the following costs incurred and payments made during the covered period</i>: (1) payroll costs; (2) any payment of interest on any covered mortgage obligation; (3) any payment on any covered rent obligation; and (4) any covered utility payment.</p>
<p><b>c. Treatment of amounts forgiven.</b></p>	<p>Amounts forgiven will be considered canceled indebtedness by an authorized 7(a) lender. For the purposes of the purchase of the guarantee for a covered loan by the Administrator, amounts forgiven under this section will be treated in accordance with procedures otherwise applicable to a 7(a) guaranteed loan.</p> <p>Not later than 90 days after the date on which the amount of forgiveness is determined, the Administrator will remit to the lender an amount equal to the amount of forgiveness plus any accrued interest through the date of payment.</p> <p>A 7(a) lender (or at the discretion of the Administrator, a third party participant in the secondary market) may report to the Administrator an expected forgiveness amount on a covered loan or on a pool of covered loans for up to 100 percent of the principal on the covered loan(s). Not later than 15 days after receiving this report, the Administrator will purchase the expected forgiveness amount of each covered loan on the report as if it were the principal amount of a guaranteed 7(a) loan.</p>
<p><b>d. Limits on amount of forgiveness.</b></p>	<p>The amount of loan forgiveness <i>will not exceed</i> the principal amount of the financing made available under the applicable covered loan.</p> <p><i>Reduction Based on Reduction in Number of Employees:</i></p> <p>The loan forgiveness amount <i>will be reduced</i> (but not increased) based on the eligible recipient's reduction in number of employees. The reduction will be determined by multiplying the covered loan forgiveness amount (described in subsection (b)) by the quotient obtained by dividing the average number of full-time equivalent (FTE) employees per month employed during the covered period by:</p> <p>(1) <i>at the election of the borrower</i>: (A) the average number of FTE employees per month employed by the eligible recipient from 2/15/2019 through June 30, 2019; or (B) the average number of FTE employees per month employed by the eligible recipient from 1/1/2020 through 2/29/2020; or</p>

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	<p>(2) for seasonal employers, as determined by the Administrator, divided by the average number of FTE employees per month employed by the eligible recipient during the period beginning 2/15/19 through 6/30/19.</p> <p><i>Calculation of Average Number of Employees:</i> For the purposes of calculating the reduction, the average number of FTE employees will be the average number of FTE employees for each pay period falling within a month.</p> <p><i>Reduction Relating to Salary and Wages:</i> The loan forgiveness amount will also be reduced by the amount of any reduction in total salary or wages of an employee during the covered period that is in excess of 25 percent of the employee's total salary or wages during the most recent full quarter during which the employee was employed before the covered period.</p> <p>An employee for the purposes of this calculation is any employee who did not receive during any single pay period during 2019, wages or salary at an annualized rate of pay that is more than \$100,000. Eligible recipients with tipped employees (see 29 USC 203(m)(2)(A)) may receive forgiveness for additional wages paid to those employees.</p> <p>In the following circumstances, the amount of loan forgiveness for an eligible recipient will not be affected by a reduction in FTE employees or a reduction in the salary of 1 or more employees, during the period of 2/15/2020 through 30 days after enactment: There is a reduction in the number of FTE employees and/or in salary or wages of 1 or more employees from 2/15/2020 through 30 days after enactment (as compared to 2/15/2020) and not later than 12/31/2020, the eligible employer has eliminated the reduction (i.e., through hiring an FTE employee or by eliminating the reduction in salary or wages so that these return to the 2/15/2020 levels).</p> <p><i>Exemptions:</i> The Administrator and the Treasury Secretary may prescribe regulations granting de minimis exemptions from these requirements.</p> <p>The loan forgiveness amount will be determined without regard to a proportional reduction in the number of FTE employees if the eligible recipient, in good faith: (A) is able to document an inability to rehire employees (or to hire similarly qualified individuals) on or before 12/31/2020; or (B) is able to document an inability to return to the same level of business activity as the business was operating at before 2/15/2020 due to compliance with requirements or guidance issued by HHS, CDC, or OSHA during the period of 3/1/2020-12/31/2020, related to sanitation standards, social distancing, or any other worker or customer safety requirement related to COVID-19.</p> <p><i>Limitation on Forgiveness:</i></p>



<b>CARES Act Section</b>	<b>Summary</b>
	To receive loan forgiveness, an eligible recipient must use at least 60 percent of the covered loan amount for payroll costs. Up to 40% of the covered loan amount may be used for payment of interest on any covered mortgage obligation (not including any prepayment of or payment of principal), covered rent payment, or covered utility payment. As noted in the definition of “covered period”, an eligible recipient that received a covered loan before the date of enactment (6/5/2020), may elect for the covered period for this loan to end 8 weeks after the date of origination.
<b>e. Application for loan forgiveness.</b>	An eligible recipient seeking loan forgiveness must submit an application to the lender that is servicing the covered loan, which must include: <ol style="list-style-type: none"> <li>(1) documentation verifying the number of FTE employees on payroll and pay rates for the periods described above (this includes: payroll tax filings reported to the IRS; and state income, payroll, and unemployment insurance filings);</li> <li>(2) documentation, including canceled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments;</li> <li>(3) a certification from a representative of the eligible recipient authorized to make certifications that states the documentation presented is true and correct and the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments; and</li> <li>(4) any other documentation the Administrator determines necessary.</li> </ol>
<b>f. Prohibition on forgiveness without documentation.</b>	No eligible recipient will receive forgiveness without submitting the information in subsection (e) to the lender.
<b>g. Decision.</b>	Not later than 60 days after the date on which a lender receives an application for loan forgiveness, the lender will issue a decision on the application.
<b>h. Hold harmless.</b>	If a lender has received the documentation required from an eligible recipient attesting that the eligible recipient has accurately verified the payments for payroll costs, on covered mortgage obligations, on covered lease obligations, or covered utilities during the covered period, the lender will be protected from any enforcement action under the SBA and will not be subject to any penalties by the Administrator related to loan forgiveness for the payments specified.
<b>i. Taxability.</b>	Canceled indebtedness will be excluded from gross income for tax purposes.
<b>j. Rule of construction.</b>	Cancellation of indebtedness will not otherwise modify the terms and conditions of the covered loan.
<b>k. Regulations.</b>	The Administrator will issue implementing guidance and regulations not later than 30 days after enactment.