



In this issue:

New Paycheck Protection Program guidance addresses concerns about loan forgiveness 'cliff' 1
Proposed rules address like-kind exchanges, excess executive compensation paid by nonprofits 5

New Paycheck Protection Program guidance addresses concerns about loan forgiveness 'cliff'

An interim final rule released by the Small Business Administration (SBA) on June 11 to implement recently enacted legislation modifying the Paycheck Protection Program (PPP) clarifies that employers who do not meet the new law's threshold requirement for allocating PPP loan proceeds to cover payroll expenses will remain eligible for partial loan forgiveness.

URL: <https://home.treasury.gov/system/files/136/PPP-IFR-Revisions-to-First-Interim-Final-Rule.pdf>

The PPP, which was signed into law in March as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136), makes forgivable loans available to most businesses with fewer than 500 employees and to hospitality industry businesses with fewer than 500 employees per location. The loans are intended to be used largely for payroll expenses and a limited amount of nonpayroll business costs such as rent, utilities, and certain other expenses.

The program is scheduled to expire on June 30, unless Congress acts to extend or expand it. According to the SBA's most recent report on the PPP (which reflects loan approvals through June 6) nearly \$511.4 billion in loans have been approved and nearly \$130.7 billion in PPP funds remain unallocated.

URL: <https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf>

Payroll v. nonpayroll allocation thresholds

The Paycheck Protection Program Flexibility Act (P.L. 116-142), which President Trump signed on June 5 – two days after it cleared the Senate by unanimous consent and a week after it passed in the House by a vote of 417-1 – makes several changes to the PPP that are intended to better accommodate the needs of borrowers. (For prior coverage, see *Tax News & Views*, Vol. 21, No. 30, June 5, 2020.)

URL: [https://www.congress.gov/bill/116th-congress/house-](https://www.congress.gov/bill/116th-congress/house-bill/7010/text?q=%7B%22search%22%3A%5B%22paycheck+protection+program+flexibility+act%22%5D%7D&r=1&s=1)

[bill/7010/text?q=%7B%22search%22%3A%5B%22paycheck+protection+program+flexibility+act%22%5D%7D&r=1&s=1](https://www.congress.gov/bill/116th-congress/house-bill/7010/text?q=%7B%22search%22%3A%5B%22paycheck+protection+program+flexibility+act%22%5D%7D&r=1&s=1)

URL: https://newsletters.usdbriefs.com/2020/Tax/TNV/200605_1.html

Notably, it modifies restrictions imposed in regulations the SBA issued in April which provided that a loan may be forgivable if an employer spends no more than 25 percent of PPP loan proceeds on nonpayroll business expenses – something that lawmakers in both parties, along with a number of business groups had cited as problematic once the program was up and running.

The new law relaxes those thresholds, permitting borrowers to use up to 40 percent of their loan proceeds to cover nonpayroll business expenses and 60 percent to cover payroll costs.

An inadvertent cliff?: But that provision had raised some concerns when the legislation was sent over to the Senate from the House. Senate Small Business Committee Chairman Marco Rubio, R-Fla., and Sen. Susan Collins, R-Maine, contended that the bill was drafted in a way that would result in a business losing any chance of loan forgiveness if it did not spend at least 60 percent of its PPP loan proceeds on payroll expenses.

In a written statement, Collins said the House bill created a “cliff,” explaining that “[t]he current PPP program allows partial loan forgiveness if a company uses less than 75 percent of a loan for payroll, but the House bill appears to state that none of the loan would be forgiven if the 60 percent threshold isn’t met. Instead, the employer is saddled with a debt for the entire amount, and no portion of the loan is forgiven or converted to a grant.”

Rubio reportedly contacted the Treasury Department to see if it could provide an administrative remedy to what he called “inadvertent technical errors that could create unintended consequences for small businesses as they seek forgiveness.” He also noted in a statement on June 3 that if Treasury could not address the issue, Congress would need to provide a legislative fix.

Despite their stated concerns, neither Rubio nor Collins objected to moving the legislation under the chamber’s expedited unanimous consent procedures. (Under Senate rules, a unanimous consent request is defeated if a single member raises an objection.)

‘A proportional limit’: The interim final rule states that while the new legislation “provides that a borrower shall use at least 60 percent of the PPP loan for payroll costs to receive loan forgiveness,” the SBA, in consultation with the Treasury Department, “interprets this requirement as a proportional limit on nonpayroll costs as a share of the borrower’s loan forgiveness amount, rather than as a threshold for receiving any loan forgiveness.”

The SBA notes, among other things, that the 60 percent threshold “was enacted against the backdrop of [the agency’s] existing rules governing the PPP, which Congress was aware of and which provided for proportional reductions in loan forgiveness for borrowers that used less than 75 percent of their loan amount during the eight-week covered period for payroll costs.” Interpreting the 60 percent requirement as a proportional limit, the SBA explains, is consistent with the intention of Congress “to increase the flexibility provided to borrowers related to PPP loan forgiveness.”

Other PPP changes addressed, updated application forms released

The interim final rule also implements provisions in that new law that:

- Extend the PPP’s covered period for loan forgiveness from eight weeks after the date of loan disbursement to 24 weeks after the date of loan disbursement. Borrowers who have already received PPP loans retain the option to use an eight-week covered period.
- Provide a safe harbor from reductions in loan forgiveness based on reductions in full-time equivalent employees for borrowers that are unable to return to the same level of business activity the business was

operating at before February 15, 2020, due to compliance with requirements or guidance issued between March 1, 2020, and December 31, 2020, 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, related to worker or customer safety requirements stemming from the coronavirus.

- Provide a safe harbor from reductions in loan forgiveness based on reductions in full-time equivalent employees, to provide protections for borrowers that are both unable to rehire individuals who were employees of the borrower on February 15, 2020, and unable to hire similarly qualified employees for unfilled positions by December 31, 2020.
- Increase to five years the maturity of PPP loans that are approved by SBA (based on the date SBA assigns a loan number) on or after June 5, 2020.
- Extend the deferral period for borrower payments of principal, interest, and fees on PPP loans to the date that SBA remits the borrower's loan forgiveness amount to the lender (or, if the borrower does not apply for loan forgiveness, 10 months after the end of the borrower's loan forgiveness covered period).

June 30 cutoff still in place: The new guidance also confirms that June 30, 2020, remains the last date on which a PPP loan application can be approved – addressing concerns raised in the Senate by Republicans Mike Lee of Utah and Ron Johnson of Wisconsin, who had argued that the bill's language could be construed as extending the PPP loan application period through December 31 instead of simply extending the covered period for using PPP loan proceeds.

Several members of the Senate Small Business Committee asked Treasury Secretary Steven Mnuchin during a June 10 hearing on the PPP if the administration would support legislation extending the program's application and approval deadlines. Mnuchin did not provide a direct response but expressed a general interest in exploring relief for large and small businesses in a future economic recovery package.

Updated application forms: Along with the interim final rule, Treasury and the SBA also released an updated borrower application form and an updated lender application form reflecting the recent legislative changes to the PPP.

URL: <https://home.treasury.gov/system/files/136/PPP-Borrower-Application-Form-Revised-June-2020.pdf>

URL: <https://home.treasury.gov/system/files/136/PPP-Lenders-Application-Form-PPP-Loan-Guaranty-Revised-June-2020.pdf>

Cornyn pushes for loan expense deductibility

In other developments, Senate Finance Committee member John Cornyn, R-Texas, told Tax Analysts this week that he is continuing efforts to gain unanimous consent in the Senate for legislation he has sponsored (S. 3612) that would clarify that otherwise deductible business expenses funded with PPP loan proceeds would remain deductible even if the loan is forgiven.

URL: <https://www.congress.gov/bill/116th-congress/senate-bill/3612/text?q=%7B%22search%22%3A%5B%22s.+3612%22%5D%7D&r=1&s=1>

Senate Republican leaders recently "hotlined" Cornyn's proposal to gauge its level of support within the conference, but that effort ran into unspecified objections from a few GOP members. Cornyn told Tax Analysts that he is "slowly chipping away at these holds," but he did not indicate exactly how many objections remain in place.

The IRS recently held in Notice 2020-32 that these expenses are not deductible. (For prior coverage, see *Tax News & Views*, Vol. 21, No. 24, May 1, 2020). But Senate Finance Committee Chairman Charles Grassley, R-Iowa, and ranking member Ron Wyden, D-Ore., along with House Ways and Means Committee Chairman Richard Neal, D-Mass., subsequently challenged that position in a letter to Treasury Secretary Mnuchin, arguing that it was contrary to congressional intent and urging the Service to reconsider. (For prior coverage, see *Tax News & Views*, Vol. 21, No. 25, May 8, 2020.)

URL: <https://www.irs.gov/pub/irs-drop/n-20-32.pdf>

URL: https://newsletters.usdbriefs.com/2020/Tax/TNV/200501_1.html

URL: [https://www.finance.senate.gov/imo/media/doc/2020-05-05%20CEG,%20RW,%20RN%20to%20Treasury%20\(PPP%20Business%20Deductions\).pdf](https://www.finance.senate.gov/imo/media/doc/2020-05-05%20CEG,%20RW,%20RN%20to%20Treasury%20(PPP%20Business%20Deductions).pdf)

URL: https://newsletters.usdbriefs.com/2020/Tax/TNV/200508_1.html

Grassley, Wyden, and several other Finance Committee members are co-sponsors of Cornyn's bill.

Larger coronavirus response package still on hold

Also this week, congressional Republican leaders and Trump administration officials used recently released Labor Department figures showing an unexpected drop in the US unemployment rate in May to bolster their argument that action on another coronavirus response package should be delayed until policymakers can gauge the economic impact of the recovery bills that have been enacted to date and that new legislation should be more narrowly tailored than previous efforts.

Senate Majority Leader Mitch McConnell, R-Ky., who has indicated that another recovery bill may not be ready for another few weeks, said in a statement released June 5 that “our economic comeback is just beginning” and that “future efforts must be laser-focused on helping schools reopen safely in the fall, helping American workers continue to get back on the job, and helping employers reopen and grow.”

He once again dismissed The Heroes Act, the \$3 trillion-plus recovery bill that cleared the House last month, stating that “[w]e must keep the wind in our sails, not slam the brakes with left-wing policies that would make rehiring even harder and recovery even more challenging.” (For details on The Heroes Act, see *Tax News & Views*, Vol. 21, No. 27, May 15, 2020.)

URL: https://newsletters.usdbriefs.com/2020/Tax/TNV/200515_1.html

Michael Zona, a spokesman for Finance Committee Chairman Grassley, likewise said in a statement released June 5 that “[t]he jobs report underscores why Congress should take a thoughtful approach and not rush to pass expensive legislation paid for with more debt before gaining a better understanding of the economic condition of the country.”

For his part, Treasury Secretary Mnuchin told members of the Senate Small Business Committee at their June 10 hearing that he “definitely think[s] we are going to need another bipartisan [bill] to put more money into the economy,” although he also cautioned that “we don’t need to rush into that.”

“Whatever we do going forward needs to be much more targeted particularly to the industries and small businesses that are having the most difficulty reopening as a result of COVID-19,” he added.

Details on possible tax provisions remain elusive: The public comments from GOP leaders have shed little light thus far on exactly what tax provisions might be included in a future recovery bill.

McConnell continues insist on the inclusion of liability protections for health care workers, business owners, and employees, and has stated that he will not accept Democratic proposals to extend the CARES Act’s enhanced unemployment insurance benefits without significant changes.

A partisan debate over unemployment insurance played out during a June 9 Senate Finance Committee hearing on that issue. Democrats argued that high unemployment levels make it critical to families that the enhanced benefits be extended. Republicans argued that the expanded benefits can act as a disincentive to work, noting that some people have received unemployment benefits that exceed their lost earnings – a situation that adds to the challenges facing employers trying to jump-start their businesses. Ohio Republican Sen. Portman, however, enunciated a potential middle ground in the form of his proposal for a temporary \$450-per-week “back to work bonus” for unemployed individuals who return to the workforce.

Finance Committee Chairman Grassley’s spokesman said in his June 5 statement that “[i]t’s too early to say” what the next legislative package should include, although he noted that it “would need to address any ongoing problems in an effective manner and encourage further job growth.”

The Trump administration has not released a formal list of tax provisions it would like to see in the next bill, although White House officials are said to be considering, among other things, a payroll tax cut, incentives to encourage individuals to travel and entertain in the US, and other supply chain measures, such as reducing the corporate tax rate and permanent bonus depreciation. The president also has been said to be mulling a further cut in the tax rate on capital gains, although Treasury Secretary Mnuchin appeared to downplay that possibility during his appearance before the Senate Small Business Committee this week.

“That’s something we’ll look at. But I think we’re much more targeted at getting people back to work, and I think investors are prepared to invest a lot of liquidity that they have right now,” Mnuchin said.

Ways and Means panel to hold hearing on worker and family relief

In the House, meanwhile, Ways and Means Select Revenue Measures Subcommittee Chairman Mike Thompson, D-Calif., announced this week that his panel will hold a virtual hearing on “Tax Relief to Support Workers and Families during the COVID-19 Recession.”

URL: <https://waysandmeans.house.gov/media-center/press-releases/select-revenue-measures-subcommittee-chairman-thompson-announces-hearing>

The hearing is scheduled for June 18 at 12:00 p.m. At press time, a witness list was not available.

Coronavirus guidance update

On the guidance front, the IRS this week provided answers to frequently asked questions about net operating loss (NOL) carrybacks by tax-exempt organizations and addressed issues related to employer leave-based donation programs that aid victims of the coronavirus pandemic.

NOL carrybacks by tax-exempt organizations: A new FAQ page published by the IRS addresses the interaction of:

URL: <https://www.irs.gov/newsroom/faqs-carryback-of-nols-by-certain-exempt-organizations>

- Provisions in the 2017 tax code overhaul known informally as the Tax Cuts and Jobs Act (P.L. 115-97) that generally repealed NOL carrybacks (while allowing unlimited carryforwards) and changed the way a tax-exempt organization generally calculates its unrelated business taxable income, including for purposes of calculating any NOLs separately with respect to each trade or business under section 512(a)(6) and
- Provisions in the CARES that allow taxpayers to carry back NOLs arising in 2018, 2019, and 2020.

The Service released proposed regulations regarding section 512(a)(6) in April.

URL: <https://www.federalregister.gov/documents/2020/04/24/2020-06604/unrelated-business-taxable-income-separately-computed-for-each-trade-or-business>

Employer leave-based donation programs: Notice 2020-46, released on June 11, provides that cash payments employers make to charitable organizations that provide relief to victims of the coronavirus pandemic in exchange for sick, vacation, or personal leave which their employees forgo will not be treated as compensation. Similarly, the employees will not be treated as receiving the value of the leave as income and cannot claim a deduction for the leave that they donated to their employer.

An employer, however, may deduct these cash payments as a business expense (under section 162) or as a charitable contribution (under section 170) if the employer otherwise meets the respective requirements of either section.

URL: <https://www.irs.gov/pub/irs-drop/n-20-46.pdf>

Find out more: A running list of guidance and other resources that address significant tax issues stemming from the pandemic is available from Deloitte Tax LLP.

URL: <https://newsletters.usdbriefs.com/2020/Tax/TNV/Stimulus-Resource-Table.pdf>

— Michael DeHoff
Tax Policy Group
Deloitte Tax LLP

Proposed rules address like-kind exchanges, excess executive compensation paid by nonprofits

The Treasury Department and Internal Revenue Service recently released two sets of proposed regulations – one on like-kind exchanges and the other on the treatment of certain executive compensation paid by nonprofit organizations – that reflect legislative changes enacted in the 2017 tax code overhaul known informally as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97).

URL: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-11530.pdf>

URL: <https://www.federalregister.gov/documents/2020/06/11/2020-11859/tax-on-excess-tax-exempt-organization-executive-compensation>

The TCJA generally limits the scope of like-kind exchanges providing for nonrecognition treatment to exchanges of real property not held primarily for sale, effective for exchanges completed after December 31, 2017. Personal property that qualified for nonrecognition treatment under prior law is no longer eligible, although the TCJA included an exception for exchanges if one part of the transaction began before December 31, 2017.

For tax-exempt organizations, the TCJA generally imposes a 21 percent excise tax on compensation paid to certain covered employees over \$1 million and any excess parachute payment paid to certain covered employees.

OIRA receives NOL proposed regs

In other developments, the Office of Information and Regulatory Affairs (OIRA) indicated in an update published on its web site this week that proposed regulations under section 1502 addressing the calculation of net operating losses (NOLs) by consolidated groups have been submitted for review by the Treasury Department.

URL: <https://www.reginfo.gov/public/do/eoDetails?rrid=130672>

The TCJA generally eliminated the NOL carryback period but allows an indefinite NOL carryforward, subject to an 80 percent limitation, for NOLs arising in tax years ending after December 31, 2017. But the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-36), enacted on March 27, modified those rules to allow taxpayers to carry back NOLs arising in 2018, 2019, and 2020 to the five prior tax years, and also allow NOLs incurred in these years to fully offset prior-year taxable income.

OIRA's review of a separate set of regulations under section 172 addressing the TCJA's changes to the NOL rules was completed in March of this year, but those regulations have not yet been published.

URL: <https://www.reginfo.gov/public/Forward?SearchTarget=RegReview&textfield=%22net+operating+loss%22>

OIRA is part of the White House Office of Management and Budget. Its review of a regulatory project is one of the final actions taken before the guidance is released to the public.

Public recommendations requested for Priority Guidance Plan

In other developments, Treasury and the IRS on June 10 released Notice 2020-47, which invites the public to submit recommendations for projects to be included in the 2020-2021 Priority Guidance Plan. The plan will identify guidance projects that the Treasury Department and the Service intend to actively work on as priorities during the period from July 1, 2020, through June 30, 2021.

URL: <https://www.irs.gov/pub/irs-drop/n-20-47.pdf>

Guidance recommendations must be submitted by July 22, 2020, to be considered for inclusion in the upcoming plan.

Details for submitting recommendations are included in the notice.

- Michael DeHoff
Tax Policy Group
Deloitte Tax LLP

This document contains general information only and Deloitte is not, by means of this document, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This document is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. Deloitte shall not be responsible for any loss sustained by any person who relies on this document.

About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. In the United States, Deloitte refers to one or more of the US member firms of DTTL, their related entities that operate using the "Deloitte" name in the United States and their respective affiliates. Certain services may not be available to attest clients under the rules and regulations of public accounting. Please see www.deloitte.com/about to learn more about our global network of member firms.