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SBA Releases Forgiveness Guidelines For PPP Loans

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On May 15, 2020, the Small Business Association released the sample application to apply for forgiveness of a Paycheck Protection Program (PPP) loan (Forgiveness Application). The Forgiveness Application must be filled out by the borrower of a PPP loan and submitted to their lender in order to qualify for forgiveness on a PPP loan. The Forgiveness Application must be received by the borrower's lender by October 31, 2020, and may be submitted via paper to the lender, or through the lender's online portal. The Department of the Treasury also released their interim final rule (Interim Final Rule) on PPP loan forgiveness on May 22, 2020, which provided more clarity on the Forgiveness Application for borrowers.

Has the Forgiveness Application and the Interim Final Rule changed anything regarding the forgiveness rules of the PPP loan?

The Forgiveness Application has created an Alternative Covered Period within which the borrower may measure the period of forgiveness. The Alternative Covered Period allows borrowers that implement a biweekly payroll schedule to start their eight-week period on the date their first payroll payments are made, which would essentially make the forgiveness period nine weeks long. The borrower also has the option of choosing the traditional eight-week Covered Period discussed in the CARES Act and its corresponding guidance. This election must be made by the borrower on the Forgiveness Application.

Any borrower that has itself, or together with its affiliates, received a PPP loan with a principal amount in excess of $2 million must check the box indicating their PPP loan exceeded $2 million. This has been added pursuant to the Department of the Treasury's Frequently Asked Questions guidance, specifically Question 46, which states that all PPP loans with a principal amount exceeding $2 million will be audited by the Small Business Association.

The Forgiveness Application states that payroll costs incurred but not yet paid by the end of the Covered Period, or the Alternative Covered Period, are eligible for forgiveness. This means that if the final pay period that falls within your chosen Covered Period is paid after the end of the Covered period, any of that pay incurred within the Covered Period is eligible for forgiveness.

The Forgiveness Application and the Interim Final Rule also provide more guidance on the two potential reductions of the borrower's forgiveness amount: a reduction in the number of employees employed by the borrower and a reduction of salary greater than 75% for any employee.

The CARES Act and corresponding guidance states that any reduction in the number of full-time employees (FTE) compared to the number of FTEs employed by the borrower from February 15, 2019 to June 30, 2019, or from January 1, 2020, to February 29, 2020, will proportionately reduce the borrower's level of forgiveness.

Regarding any reduction in employees during the eight-week forgiveness period, the Forgiveness Application has created a safe harbor for employees that were laid off or furloughed before or during the eight-week forgiveness period. If an employee that was laid off or furloughed by the borrower is given a good faith, written offer to return to their previous position, and the employee rejects the offer, that employee does not need to be included in the reduction calculus. Also, if the borrower loses an employee during the eight-week forgiveness period, and that loss is due to a termination for cause, a voluntary resignation, or a voluntary reduction in salary or hours, and such employee is not replaced, the employee is not considered in the forgiveness reduction calculus. Also, the borrower that had laid off or furloughed any employees between February 15, 2020, and April 26, 2020, may bring any employees laid off or furloughed back by December 31, 2020, (as amended by the Paycheck Protection Program Flexibility Act discussed below) and those employees will not count against their forgiveness calculus.

Regarding a reduction in an employee's salary greater that 25%, the Forgiveness Application clarifies how this reduction will be calculated. The borrower will first have to calculate the average salary or wage earned by each employee of the borrower who was affected by the salary reduction during the eight-week forgiveness period. That average salary or wage is then compared to the last full quarter such employee was on the borrower's payroll, likely the first quarter of 2020. If the average salary or wage during the eight-week forgiveness period is less than 75% of the salary or wage earned by the employee during the first quarter of 2020, the borrower cannot include any of that employee's salary in their forgiveness calculus. However, if any individual employee's salary or wage was reduced by more than 75% between February 15, 2020, and April 26, 2020, and the borrower increases their salary back to the amount they were paid in the first quarter of 2020 by December 31, 2020, (as amended by the Paycheck Protection Program Flexibility Act discussed below), the borrower will satisfy the safe harbor in the CARES Act. This will allow the borrower to use the amounts paid to any employee whose salary or wage was reinstituted to its previous level in their forgiveness calculation.

What documentation will be required in order to substantiate the borrower's request for forgiveness?

The Forgiveness Application has provided a list of what documentation will be required to substantiate the borrower's request for forgiveness.

To substantiate a calculation for forgivable payroll costs, the borrower will be required to provide their lender the following: (Please note that the borrower's Covered Period or Alternative Covered Period has been extended per the Paycheck Protection Program Flexibility Act outlined below)

- Any bank statements or third-party payroll statements that document the amount of cash compensation paid to employees during the Covered Period or Alternative Covered Period;
- Federal payroll tax filings for the quarter(s) that the Covered Period or Alternative Covered Period fall in (typically Form 941);
- State payroll tax filings that the Covered Period or Alternative Covered Period fall in; and
- Payment receipts or account statements documenting the amounts paid for health and retirement benefits during the Covered Period or the Alternative Covered Period.

To substantiate their calculation of the borrower's number of FTEs, the lender will require the borrower to provide the following:

- · Documentation verifying the average number of employees of the borrower from either February 15, 2019, through June 30, 2019, or January 1, 2020, through February 29, 2020, whichever the borrower has chosen to utilize for their number of employees comparison.

The Forgiveness Application does not specifically identify what documentation is required to support this calculation; however, it is likely sufficient to provide any federal and state payroll tax forms, or any third-party payroll service reports that cover these periods. The borrower should speak to their lender to determine if they have any preference.

To substantiate the calculation of the borrower's non-payroll costs, including rent, utility or mortgage interest costs, the borrower will be required to provide their lender the following:

- For mortgage interest, a copy of the lender amortization schedule, or lender account statements showing payments made by the borrower from February 2020 through one month after the Covered Period or Alternative Covered Period ends;
- For rent or lease payments, a copy of the borrower's current lease agreement with verification of payments, or lessor account statements showing payments made by the borrower from February 2020 through one month after the Covered Period or Alternative Covered Period ends; and
- For utility payments, a copy of invoices from February 2020 and those paid during the Covered Period and receipts, canceled checks, or account statements verifying those eligible payments.

Additional documentation that will not be required to be submitted to the borrower's lender, but must be maintained by the borrower include:

- Documentation supporting the inclusion of each employee listed in the borrower's FTE calculation;
- Documentation outlining any employees that have refused a written offer of rehire, terminations for cause, voluntary resignations, and voluntary reductions in pay and/or hours; and
- Documentation supporting the borrower's use of the June 30, 2020, safe harbor for rehiring FTEs.

All documentation listed above must be maintained by the borrower for six years from the date the PPP loan has been forgiven or repaid in full and must permit the Small Business Association, or its agents, access to inspect such documentation upon request.

Have there been any other changes to the PPP to be aware of?

On June 3, 2020, the Senate passed the Paycheck Protection Program Flexibility Act which had passed the House of Representatives on May 28, 2020 (PPPFA). The President has not signed the PPPFA yet, but is expected to do so in the near future. The PPPFA is Congress' response to the ongoing nature of the COVID-19 pandemic that was unanticipated at the time the original PPP guidelines were released in March. The PPPFA is intended to help those borrowers who have received their PPP proceeds, or for borrowers who still intend to apply for a PPP loan, who have not been able to resume normal operations due to the reopening guidelines in their respective state. This is accomplished by extending some aspects of the PPP as originally created by the CARES Act. Specifically, the PPPFA makes the following changes to the PPP:

- The eight-week forgiveness period will now be extended to twenty-four weeks to aid those borrowers whose business has been unable to reopen due to state-level shutdowns;

- The 25% ceiling on non-payroll costs (mortgage interest, rent and utilities) has been raised to 40%, which reduces the floor for payroll costs to 60%;
- The June 30, 2020, safe harbor deadline to rehire workers in order to be eligible for full forgiveness of the PPP loan has been extended through Dec. 31, 2020;
- The two-year maturity of the PPP loan has been extended to a five-year maturity;
- Allows the borrower of a PPP loan to continue to defer 2020 payroll taxes after the time the loan is forgiven, amending previous guidance from the IRS that stated the opposite.
- Creates an exemption for employee availability, which allows the borrower to exclude certain employees from their forgiveness reduction calculus if the borrower can document:
  - An inability to rehire employees that were employed by the borrower on February 15, 2020; and
  - An inability to hire employees similarly qualified prior to December 31, 2020; or
  - An inability to return to the same business activity prior to February 15, 2020, due to compliance with HHS, CDC and/or OSHA guidance from March 1, 2020 – December 31, 2020.
- Loan payments will be deferred for ten months after the end of the Covered Period of the borrower.

The extension of the Covered Period from eight to twenty-four weeks allows the borrowers that have not been able to or have just recently been able to reopen their business more time to utilize the PPP proceeds that they may not have been able to utilize in their original eight-week Covered Period. It remains unclear how this extended Covered Period will impact the Forgiveness Application and its Alternative Covered Period. It is expected that the Forgiveness Application will be amended to reflect the changes made by the PPPFA and this alert will be updated once the updated Forgiveness Application has been released.

Also of importance, the deferral period that borrowers will enjoy has been extended to ensure that borrowers will not have to worry about making any payments before their PPP loan is reviewed and any amounts are forgiven. The original six-month deferral could have possibly created a situation where the borrower was still in their Covered Period but would have to begin making payments on their PPP loan. Extending it to ten months and allowing that ten months to start tolling once the borrower's Covered Period has ended ensures that no borrower will be forced to make any payments on their PPP loan before their lender has made a forgiveness determination.

The borrower will also have a relaxed standard when determining the number of employees they employed during the Covered Period for purposes of their FTE reduction calculation. The PPPFA allows the borrower to demonstrate that their operations do not support their ability to bring back every employee that they employed in the period they have decided to use as a comparison for the FTE reduction calculation. This will ensure more borrowers are able to realize full forgiveness on their PPP loan than the original CARES Act would have allowed.

In reality, the PPPFA may be too late to have a significant impact for some borrowers, but the borrowers that are just now able to reopen, or are on the cusp of being able to reopen, will now be able to fully enjoy the benefits of the PPP loan they received.

If you have any questions about the forgiveness of your PPP loan, or any other PPP loan questions, please reach out to us at Lippes Mathias Wexler Friedman for assistance.