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ALERT

Guidance on SBA's Newly Released PPP Loan Forgiveness Application and Instructions

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The Small Business Administration (SBA) recently released the loan forgiveness application and instructions for the Paycheck Protection Program (PPP). A business that obtained a PPP loan will need to complete and submit the application to the lender that issued – or is servicing – its loan in order to obtain forgiveness. It is possible that your lender will allow for the application to be prepared and submitted electronically, so be sure to check with your lender.

This alert summarizes the loan forgiveness application requirements; however the application will not need to be submitted until after the forgiveness period ends (currently eight weeks from the loan disbursement date), so we first summarize the documents that borrowers will need to compile in connection with the application.

Documentation Needed to Support Forgiveness Application

As expected, there will be a great deal of documentation that borrowers will need to provide and retain to support a PPP forgiveness application. We recommend starting to gather all of the required documents now and maintaining all files and records related to a PPP loan in a well-organized filing system.

Documents to be Submitted to Lender

Borrowers will need to submit the Forgiveness Calculation Form and Schedule A (described below), together with the following supporting documentation to evidence their payroll and non-payroll expenses listed on their forgiveness applications:

- *Support for Payroll Costs:*

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Practice Areas

Corporate

    - Bank account statements or third party payroll provider reports showing cash compensation to employees
    - Payroll tax filings (IRS Form 941 and state unemployment tax filings)
    - Payment receipts, cancelled checks, or account statements showing the amounts of employer contributions to health insurance and retirement plans

- *Support for Non-Payroll Costs:*
    - Mortgage interest:
        - lender amortization schedule and receipts or cancelled checks; *or*
        - lender's account statements showing mortgage interest payments
    - Rent:
        - a copy of the current lease and receipts or cancelled checks; *or*
        - landlord's account statements showing rent payments
    - Utilities:
        - copies of invoices, receipts, cancelled checks, or account statements

- *Full-Time Equivalent (FTE) Employee Counts.* Payroll tax filings (IRS Form 941 and state unemployment tax filings) to show:
    - the average number of FTE employees on the borrower's payroll per month for each month between <u>February 15, 2019 and June 30, 2019</u>; *or*
    - the average number of FTE employees on the borrower's payroll per month for each month between <u>January 1, 2020 and February 29, 2020</u>.

Documents to be Retained by All Borrowers (not required to be submitted to lender):

The SBA is requiring borrowers to retain all records related to their PPP loan for **six years** after the date the loan is forgiven or repaid in full. Borrowers will be required to give the SBA access to their PPP loan documentation upon request during this six-year period. It is important to note that these recordkeeping requirements apply to <u>all</u> borrowers who received PPP funds, not just those having loans over $2 million (which the SBA has said will be subject to audit).

Records to be retained include:

- PPP loan application
- Documents supporting the loan "necessity" borrower certification
- Documents supporting PPP eligibility and the other loan application certifications
- PPP loan forgiveness application: Form, Schedule, and copies of all submitted documents

- PPP loan forgiveness worksheet
- Documents supporting all aspects of the forgiveness application and the various calculations, including with respect to every individual employee, and the FTE Reduction Safe Harbor (discussed below)
- Other documentation, as needed, to demonstrate compliance with PPP requirements

The Loan Forgiveness Application

The SBA loan forgiveness application is 10 pages, divided into three parts: (i) the Forgiveness Calculation Form, (ii) Schedule A, and (iii) the Worksheet. (There is an optional page where a borrower can submit demographic information). When it comes time to complete the application, it will make the most sense for a borrower to complete it in reverse: Worksheet, then Schedule, then Form, so we will walk through the application that way.

Covered Period or Alternative Payroll Covered Period

First, the business will need to make a decision on the applicable "covered period" for calculating its employees and payroll costs. In general, the covered period is the eight weeks (56 days) starting on the date that the PPP loan was funded. However, the application allows a borrower to start the 8-week/56-day period (solely for payroll purposes) on the first day of the pay period immediately following the PPP loan funding; this is called the "alternative payroll covered period." So if the borrower received its loan on April 20, and has a bi-monthly pay period (with employees paid on the 1st and 15th of each month), then the "covered period" would be April 20 – June 14; but the borrower could instead choose to use the "alternative" period of May 1 – June 25 for payroll purposes. For all non-payroll purposes, the borrower must use the "covered period" (i.e., beginning on the date of loan funding).

Worksheet

For every employee of the business during the applicable period ("covered" or "alternative"), the borrower will need to include the following information (do not include independent contractors, owner-employees, self-employed individuals, or partners):

- **Last four digits of SSN**
- **Cash Compensation** (capped at $15,385)
- **Average FTE:** Number of hours paid per week / 40 (capped at 1.0)
  - Instead of calculating exact FTE for each employee, a borrower can treat all 40+/hour employees as 1.0 FTE, and all other employees as 0.5 FTE
  - The borrower will need to calculate total FTE for (i) its "chosen" period (either February 15, 2019 – June 30, 2019 or January 1, 2020 – February 29, 2020, whichever is less), (ii) February 15, 2020, (iii) average for the period February 15, 2020 through April 26, 2020, and (iv) June 30, 2020.
- **Calculate "Salary/Hourly Wage Reduction"**

    - Only for employees paid at an annualized rate of $100,000 or less for all pay periods in 2019
    - For all such employees, the borrower will need to calculate the employee's average pay rate (i) during the applicable 8-week period and (ii) between January 1, 2020 and March 31, 2020. If (ii) is less than 75% of (i), then the borrower will also need the employee's pay rate (A) on February 15, 2020, (B) average for the period February 15, 2020 through April 26, 2020, and (C) on June 30, 2020.

- **Safe Harbors**
    - The amount of the PPP loan that can be forgiven will be reduced if the borrower's employee headcount (FTE) is reduced, or if the compensation for any individual employee is reduced by more than 25% – that is why all of the calculations above are relevant. However, if the borrower had a reduction in FTE or any employee compensation between February 15, 2020 and April 26, 2020 and restored the FTE or the compensation amounts (as applicable) as of June 30, 2020, then the borrower qualifies for a "safe harbor" and its loan forgiveness amount will not be subject to any such reduction.

Schedule A

Once the Worksheet has been completed, the borrower will take its calculations and populate the Schedule, which is relatively straightforward:

- **Lines 1 and 4**: Enter Total Cash Compensation
- **Lines 2 and 5**: Enter Average FTE during "applicable covered period"
- **Line 3**: Enter Salary/Hourly Wage Reduction (if applicable)
- **Line 6-8**: Enter Non-Cash Compensation: health plans, retirement plans, SUTA
- **Line 9**: Enter compensation paid to owners, partners, and self-employed individuals
- **Line 10**: Add Lines 1, 4, 6, 7, 8, and 9
- **Line 11**: Enter Average FTE during "chosen period"
- **Line 12**: Aggregate "applicable covered period" FTE (lines 2 + 5)
- **Line 13**: Divide applicable covered period FTE by chosen period FTE (line 11)

Forgiveness Calculation Form

Once the Schedule has been completed, the borrower can then complete the application form, which again should be relatively straightforward at this point:

- The first section of the form requires basic information about the borrower: name, address, EIN, phone, contact, email, SBA/Lender loan number, loan amount, loan disbursement date, employees at time of loan application and at time of forgiveness application, EIDL amount/number (if applicable), payroll schedule, applicable period (covered and alternative).

- If the borrower (together with any affiliates) received PPP loans over $2 million, the borrower will need to check a box on the Form. As discussed in a previous Wiley alert, all such loans will be audited by the SBA.
- **Line 1**: Payroll Costs (*from Schedule A, Line 10*)
- **Lines 2-4**: Non-Payroll Costs: Mortgage Interest, Rent, and Utility Payments
- **Line 5**: Salary/Hourly Wage Reduction, if applicable (*from Schedule A, Line 3*)
- **Line 6**: Net Forgivable Amount: Sum of Lines 1-4, less Line 5
- **Line 7**: FTE Reduction Quotient (*from Schedule A, Line 13*)
- **Line 8**: Modified Forgivable Amount: Line 6 multiplied by Line 7
- **Line 9**: PPP Loan Amount
- **Line 10**: Payroll Cost 75% Requirement: Divide Line 1 by .75
- **Line 11**: Loan Forgiveness Amount = Smallest of Lines 8, 9, and 10.

Takeaways

In the application and instructions, the SBA addressed some of the issues that had been outstanding since the Coronavirus Aid, Relief, and Economic Security (CARES) Act was enacted two months ago.

- *Accrual or Cash Basis for Expenses.* The CARES Act provided that certain "costs incurred and payments made" during the 'covered period' would be forgiven. It was not clear whether costs had to be incurred, or paid, or incurred AND paid, during the covered period in order to be forgiven. The SBA helped borrowers out by providing essentially that costs need to be EITHER incurred OR paid during the covered period. If a cost is incurred during the covered period – and is paid in the next payroll/billing cycle after the end of the covered period – then it can be included as a forgivable expense. For example, if the covered period (for payroll and non-payroll expenses) is April 20 – June 14, then utility payments made on May 5 (covering the period April 1–30) and on July 5 (covering the period June 1-14) would be forgiven, and rental payments made on June 1 (covering the period June 1-30) would be forgiven. Remember that a borrower can use a different covered period for its payroll costs – the alternative payroll covered period – to align with the borrower's pay periods.
- *75% Payroll Requirement*: There has been discussion among some legislators for SBA/Treasury to remove the requirement that at least 75% of the forgivable loan amount be spent on payroll costs. That requirement was not in the CARES Act, but the application confirms this requirement. There had been some concern that this was an all-or-nothing requirement – such that a loan would not be forgiven at all if less than 75% was spent on payroll – but that is not the case.
- *Equipment Leases*: The SBA instructions make it clear that lease payments for real and personal property are includable as forgivable expenses.
- *Loan Principal*: The CARES Act provided that only the amount of loan principal could be forgiven. However, subsequent SBA guidance stated that the amount of loan forgiveness can be up to the

principal amount <u>and</u> any accrued interest. The SBA reiterates that only the "disbursed principal amount" of the loan can be forgiven.

- *FTE Reduction Safe Harbor (Part 1 – the new safe harbor)*: The FTE reduction safe harbor can produce a perverse result, since it applies only if a borrower reduced its employee headcount between February 15, 2020 and April 26, 2020 (and then restored the headcount by June 30, 2020). If such a borrower had a drop in employees from its "chosen period" to its "covered period," then the safe harbor would apply to prevent any FTE-based reduction of the loan forgiveness amount. However, what if a borrower did NOT reduce its employee headcount (or perhaps even increased its headcount) between February 15 and April 26? That borrower would NOT be eligible for the FTE Reduction Safe Harbor (since it did not have a reduction during the relevant safe harbor period); so that borrower would be subject to a loan forgiveness reduction if its "chosen period" headcount was larger than its "covered period" headcount. It seems as if the SBA recognized this odd result: in the application (Schedule A, before Line 11), there is an additional safe harbor, which does not appear anywhere in the statute or prior SBA guidance, which says that if the borrower has not reduced its employees between January 1, 2020 and the end of the covered period, then it will not be subject to an FTE reduction.
- *FTE Reduction Safe Harbor (Part 2 – the offer/rejection safe harbor)*: The application confirms prior SBA guidance (FAQ #40) that an employee who (i) rejects a written offer to be rehired or (ii) was fired for cause or voluntarily resigned or requested an hours reduction will not be included in the FTE calculations (unless the position was filled by a new employee), and thus will not reduce the borrower's loan forgiveness.
- *Borrower certifications*: A borrower must make a number of additional certifications in connection with the loan forgiveness application: (i) confirming the funds were used for approved expenses and the forgiveness amount was calculated properly, (ii) understanding that the government may pursue civil or criminal remedies for knowing misuse of funds or for false statements, (iii) verifying that the borrower has submitted the required forgiveness documentation for forgiveness, (iv) verifying that the tax documents submitted to the lender are consistent with the tax documents that the borrower has submitted (or will submit) to the IRS and/or state agencies, and (v) acknowledging that SBA can request additional information for the purpose of evaluating loan forgiveness.
- *SBA Guidance*: The forgiveness application and instructions provide some helpful information, but there remain a number of outstanding questions and issues. We are still waiting for additional guidance from the SBA on loan forgiveness (which, per the CARES Act, was required to be issued by April 26, 2020).
- *New PPP Legislation*: A bipartisan bill has been introduced in the House (by Reps. Chip Roy and Dean Phillips) that would make changes to certain aspects of the PPP, including (i) extending the forgiveness "covered period" from 8-weeks to 24-weeks, (ii) removing the 75% payroll requirement, (iii) increasing the minimum loan term (to repay any forgiven amounts) from two years to five years, and (iv) allowing businesses to satisfy the FTE Safe Harbors (described above) if it restores employee headcount by December 31, 2020 (instead of the current June 30, 2020 deadline). On the Senate side, Marco Rubio (Chairman of the Small Business Committee) has said there is near-unanimous support in that chamber to extend the covered period. It is reasonable to expect that there will be changes to the PPP in the

coming weeks, but unless and until new legislation is enacted, borrowers will need to operate under the current requirements.

We will provide updates on additional SBA guidance, new legislation, or other developments in connection with the PPP, as appropriate. Please do not hesitate to reach out to us if you have any questions or would like any assistance with your PPP loan forgiveness application.

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