

# CORONAVIRUS INFORMATION & UPDATES

May 27, 2020

## Treasury Issues Loan Forgiveness Guidance Regarding Paycheck Protection Program

On May 22, 2020, the Small Business Administration (“SBA”) and the United States Department of the Treasury published two Interim Final Rules relating to loan forgiveness and the SBA loan review process for the Paycheck Protection Program (“PPP”). The new rules provide certainty for previously unclear aspects of the CARES Act and subsequent guidance while also imposing additional requirements on borrowers. While bills have been introduced in both the House and Senate to extend the forgiveness period (from the current eight weeks) and to expand borrower’s ability to use more than 25% of loan proceeds on non-payroll costs, the Senate recessed for the Memorial Day holiday before taking any action.

### Calculating Full-Time Equivalent Employees

The Interim Final Rules provide clear guidance on how borrowers are to calculate the number of full-time equivalent (“FTE”) employees, which are used in determining the amount of the loan eligible for forgiveness. The rules state that borrowers should calculate FTE employees by dividing the average number of hours paid for each employee per week by 40, capping the quotient at 1.0 (e.g. if an employee was paid 48 hours per week during the covered period, that employee would be considered an FTE employee of 1.0). For employees who were paid for less than 40 hours per week, borrowers may choose to calculate the full-time equivalency using one of two methods and must apply that method consistently to all part-time employees. The first method allows borrowers to calculate the average number of hours a part-time employee was paid per week during the covered period (e.g. if an employee was paid for 30 hours per week on average during the covered period, the employee could be considered to be an FTE employee of 0.75). The second method, for administrative convenience, allows borrowers to elect to use a full-time equivalency of 0.5 for each part-time employee. In either case, the borrower must provide the aggregate total of FTE employees for both the selected reference period used on the PPP Application and the covered period (or the alternative payroll covered period) by adding together all of the employee-level FTE employee calculations and then dividing the average FTE employees during the covered period (or the alternative payroll covered) by the average FTE employees during the selected reference period, resulting in the reduction quotient.

### FTE Employee Reduction Exception

The previously released PPP Loan Forgiveness Application had provided for an exception to the reduction in loan forgiveness based on a reduction in the number of FTE employees if an employee rejected an offer by the borrower to rehire the employee during the covered period or alternative payroll covered period (the “FTE Reduction Exception”). The Interim Final Rules add additional requirements that a borrower must comply with to utilize the FTE Reduction Exception. For a borrower to qualify for this exception and exclude any reduction in FTE employee headcount that is attributable to any such employee, the following requirement must be satisfied:

1. The borrower made a good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the covered period (or alternative payroll covered period);

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2. The borrower made the offer for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;
3. The offer was rejected by such employee;
4. The borrower has maintained records documenting the offer and its rejection; and
5. The borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the employee's rejection of the offer (which time period, for some borrowers, may have started to run more than 30 days before the Interim Final Rule was released).

Note that further information on how borrowers are to report information concerning rejected rehire offers to state unemployment insurance offices will be provided at a later date by the SBA.

## Additional Clarification

There were a few other important clarifications to the PPP loan forgiveness rules provided in the Interim Final Rules:

- Salaries, wages or commission payments to furloughed employees; bonuses; and hazard pay made during the covered period (or alternative payroll covered period) are included in "payroll costs" and are eligible for forgiveness, provided that it does not exceed the \$15,385 cap on cash compensation to an individual employee.
- Re-affirms that 75% of the PPP loan proceeds must be spent on payroll costs and at most 25% can be spent on eligible non-payroll costs.
- Loan reduction calculations for reductions in salaries in excess of 25% for employees making less than \$100,000 per year will be performed on a per employee basis and not in the aggregate.
- Any eligible non-payroll cost is eligible for forgiveness if it was (i) paid during the covered period or (ii) incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period. To provide clarity on the timing for these payments, the SBA provided the following example: A borrower's covered period begins on June 1 and ends on July 26. The borrower pays its May and June electricity bill during the covered period and pays its July electricity bill on August 10, which is the next regular billing date. The borrower may seek loan forgiveness for its May and June electricity bills, because they were paid during the covered period. In addition, the borrower may seek loan forgiveness for the portion of its July electricity bill through July 26 (the end of the covered period), because it was incurred during the covered period and paid on the next regular billing date.

## SBA Loan Review Process

After a borrower submits its PPP Loan Forgiveness Application, PPP lenders will have 60 days to issue forgiveness decisions to the SBA and the SBA will have an additional 90 days to remit its final decision on loan forgiveness amount. This means that a borrower could wait up to 150 days before receiving a final decision on if and how much of its PPP loan will be forgiven. The Interim Final Rules re-affirm that the SBA may audit loans of any size at any time in its

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discretion and that it will audit loans to confirm (i) a borrower's eligibility at the time of application (and based on guidance available at the time of application), (ii) the loan amount and the correct use of loan proceeds and (iii) the loan forgiveness amount. Borrowers will be promptly notified by their lender if the SBA is auditing their loan or loan forgiveness application and could receive a notification from either the lender or SBA for additional documentation.

Borrowers will have an appeal right based on SBA determination of loan eligibility or forgiveness (more guidance to be provided by the SBA) and the statute of limitations for the SBA claims, and for the retaining of PPP documentation, is six years.