

CORONAVIRUS INFORMATION & UPDATES

May 18, 2020

Paycheck Protection Program Loan Forgiveness Application

On May 15, 2020, the Small Business Administration (“SBA”) released the Loan Forgiveness Application for the Paycheck Protection Program (“PPP”). The application provides additional clarity on the calculation of forgivable costs and reinforces how the SBA will treat PPP loan use and affiliation rules. The SBA intends to issue additional guidance on the loan forgiveness process.

Calculating Payroll Costs

The application allows borrowers to use an Alternative Payroll Covered Period for administrative convenience when calculating their eligible payroll costs, providing that borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the eight-week (56-day) period that began on the first day of their first pay period following their PPP Loan Distribution Date. An example given in the application provides that if the Borrower received its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP loan disbursement is Sunday, April 26, the first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is Saturday, June 20.

To be eligible for forgiveness, payroll costs must be both incurred *and* paid during the Covered Period or Alternative Payroll Covered Period. However, payroll costs incurred but not paid during the Borrower’s last pay period of the Covered Period or Alternative Payroll Covered Period are still eligible for forgiveness if paid on or before the next regular payroll date. Note that any forgivable cash compensation to an individual employee during the Covered Period or Alternative Payroll Covered Period is capped at \$15,385.00 (consistent with the limitation on employee compensation in excess of \$100,000 or more on an annualized basis).

Calculating Non-Payroll Costs

The original Covered Period – the eight-week period after loan origination – must still be used for calculating forgiveness of non-payroll costs. Non-payroll costs that are eligible for forgiveness include the following obligations, which must have been in place as of February 15, 2020: (i) payments of interest (not including any prepayment or payment of principal) on any business mortgage obligation on real or personal property, (ii) business rent or lease payments pursuant to lease agreements for real or personal property and (iii) utility payments defined as electricity, gas, water, transportation, telephone, or internet access. The Loan Forgiveness application provides that, to be eligible for forgiveness, the non-payroll costs must be paid during the Covered Period *or* 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. The new guidance makes the important point that those non-payroll costs incurred during the Covered Period with a billing date after the Covered Period can still be forgiven even if paid after the Covered Period but before the next regular billing date.

For example, if a borrower’s Covered Period ends June 15th and its rent obligation for the month of June is paid on June 1st, that rent for the entire month of June is eligible for forgiveness. Similarly, if the borrower’s Covered Period ends June 15th and their utility bill for the month of June is due on June 20th, as long as that utility bill is paid before June 20th, it is eligible for forgiveness.

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Full Time Equivalent Employee Reduction Exceptions and Safe Harbor

The Loan Forgiveness Application broadens the exceptions for borrowers whose full-time equivalent (“FTE”) employee levels are reduced during the Covered Period to include not only those positions for which Borrower made a good-faith, written offer to rehire that was rejected by employee, but also any employees who during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours. In any of the scenarios above, the FTE reduction will not reduce the Borrower’s loan forgiveness.

Separately, the application also reiterates the safe harbor rule from the CARES Act, which provides that a borrower is exempt from a reduction in loan forgiveness based on a reduction of FTE employees if the following conditions are met:

- i. the Borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and
- ii. the Borrower then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the Borrower’s pay period that included February 15, 2020.

Note that for both the FTE reduction exemption and safe harbor, **the borrower must maintain, but is not required to submit**, documentation regarding any employee job offers and refusals, firings for cause, voluntary resignations, written requests by any employee for reductions in work schedule and the restoration of FTE employee levels to their February 15th levels.

Additional Terms

Importantly, the application reinforced a number of positions that the SBA took in their guidance subsequent to the enactment of the CARES Act, including:

- That loans to affiliates of those businesses that were exempt from the affiliation rules in the CARES Act will not be taken into account for the purposes of determining whether a business and its affiliates received a PPP loan with an original principal amount in excess of \$2 million;
- The requirement that at least 75% of the loan proceeds must be used for payroll costs and only up to 25% of the loan proceeds can be used for eligible non-payroll costs; and
- If a borrower received an EIDL Advance, that advance amount will be deducted from the borrower’s forgiveness amount.

Affiliation Interim Rule on Treatment of Entities with Foreign Affiliates

Separately, on May 18, 2020, the SBA released an interim final rule that clarified how a borrower should calculate its number of employees for the purposes of PPP eligibility. The rule states that an entity must count all employees from both domestic and foreign affiliates, regardless of the employee’s principal place of residence, for determining whether the entity falls below the 500 (or other applicable) employee threshold for PPP eligibility. However, when calculating payroll costs and loan forgiveness amount, the entity must only count employees whose principal place of residence is in

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the United States, as the SBA makes it clear that under no circumstances may PPP funds be used to support non-U.S. workers or operations.

Importantly, the SBA has provided a safe harbor for borrowers that misunderstood this rule prior to the May 5, 2020 FAQ. The SBA will not find any borrower that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the borrower's exclusion of non-U.S employees from the borrower's calculation of its employee headcount if the borrower (together with its affiliates) had no more than 500 employees whose principal place of residence is in the United States. This is an exercise of the SBA's enforcement discretion and it conceivable that borrowers could still find themselves subject to negative publicity or other negative legal consequences.