COVID-19 Alert

REID & RIEGE ATTORNEYS

CARES ACT PAYCHECK PROTECTION PROGRAM LOANS MAY 18, 2020 UPDATE

MAY 2020

This continues our efforts to provide updates on the Paycheck Protection Program (PPP) loan offerings created by the CARES Act and overseen by the Small Business Administration (SBA).

SBA HAS EXTENDED SAFE HARBOR DATE.

Our May 13 update discussed SBA's additional guidance on the "necessary" certification topic set out in FAQ 46 issued during the morning of May 13, 2020. Following our update, SBA issued FAQ 47, in which it announced that it is extending the safe harbor date for returning PPP loans in order to be deemed to have made the certification in good faith from May 14 to May 18, 2020. The purpose for the extension is "to give borrowers an opportunity to review and consider FAQ #46." In FAQ 47, SBA indicates it will be promptly reflected in a revised Interim Final Rule pertaining to the safe harbor. The full set of FAQs, including FAQ 47, can be found here.

SBA HAS ISSUED LOAN FORGIVENESS APPLICATION FORM.

On Friday evening, May 15, 2020, SBA issued its form Loan Forgiveness Application. The Application consists of the Application itself, PPP Schedule A (which will be part of the submission), PPP Schedule A Worksheet (which will not be part of the submission), and an optional Demographic Information Form, each with its own detailed set of instructions. Also included are lists of documents each borrower must submit to support its Application, and of documents that each borrower is required to maintain for a period of six years from the date of loan forgiveness or repayment in full.

We note that SBA's initial offering on a PPP Loan Application form was revised following comment. It is possible the same will be the case with this form.

We also note that participating lenders customized the Loan Application form, and required submission via electronic portals. Electronic submission will likely be the most common route with the Loan Forgiveness Application as well. However, the beginning of the instructions to SBA's form appears to give each borrower the option of submitting to its lender either in paper format or via electronic means.

WHAT DOES IT LOOK LIKE?

Our original PPP article discussed PPP loan forgiveness as laid out in the CARES

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Act. The Loan Forgiveness Application follows this structure, as it has been modified by subsequent SBA guidance, in a somewhat user friendly manner. It does provide clarity for some issues, and does provide borrowers with some limited planning opportunities.

The most helpful element is to divide eligible expenses into Payroll Costs and Non-Payroll Costs (mortgage interest, rent and utilities) and to further separate Payroll Costs into Cash and Non-Cash categories. The Cash category consists of gross salary, wages, tips, commissions, paid leave, and allowances for dismissal and separation. The Non-Cash category consists of employer contributions for employee health insurance and retirement plans and payments of employer state and local taxes assessed on employee compensation.

The Application itself is a high level set of line items of the various items giving rise to forgiveness and the various limitations on forgiveness. Schedule A in turn is a somewhat more detailed breakdown of Payroll Costs (Cash and Non-Cash) and potential reductions to forgiveness for reductions in full-time equivalent (FTE) employees and compensation reductions. The Schedule A Worksheet (which is not required to be submitted, but is required to be maintained for six years) is a detailed-by-employee breakdown of Cash Payroll Costs and evaluation of FTE and compensation reductions.

The Application also contains a detailed set of borrower "Representations and Certifications." Notably, these do NOT include any re-certification as to the "necessity" of the PPP loan for the borrower. It does, however, contain an agreement on the part of the borrower "that SBA may request additional information for the purposes of evaluating the [b]orrower's eligibility for the PPP loan and loan forgiveness, and that the [b]orrower's failure to provide information requested by SBA may result in a determination that the [b]orrower was ineligible for the PPP loan or a denial of the [b]orrower's loan forgiveness application." The Application also requires the borrower to identify whether it received a loan in excess of $2,000,000 (inclusive of any PPP loans received by the borrower's affiliates). The list of what documents must be maintained (not submitted in the first instance) includes documents supporting the borrower's "certifications as to the necessity of the loan request and its eligibility for a PPP loan." In light of SBA's guidance issued Wednesday, May 13, 2020 (see our May 13 update), it should be expected that borrowers with PPP loans in excess of $2,000,000 will be asked for the necessity documentation as part of the forgiveness evaluation.

HAS ANYTHING CHANGED?

SBA has created a bit of an option as to the eight-week forgiveness period for employer-borrowers with normal pay-roll cycles that are bi-weekly or more frequent. These borrowers may elect to calculate forgiveness based on Payroll Costs based on either the eight-week period commencing on the date of loan funding (the "Covered Period") or the eight week period commencing with the first day of the first payroll period following the date of loan funding (the "Alternate Payroll Covered Period"). Whichever approach is chosen, it must be used consistently for both Cash and Non-Cash Payroll Costs, as well as related limitations on the forgivable amount. However, even borrowers choosing the

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Alternate Payroll Covered Period must still determine their Non-Payroll Costs for the Covered Period.

Second, we note that the CARES Act itself referred to forgiveness in terms of "payments" for various applicable expense items. We had understood that to mean that forgiveness would be determined entirely on a cash basis, and not on an accrual basis. The Application's instructions present the opportunity to take into account both amounts "paid" and amounts "incurred" but not yet "paid." By way of example, if a borrower is in the middle of a payroll period when the relevant eight-week period ends, it would be entitled to claim both wages and salary actually paid during the eight-week period and wages and salary earned, but not yet paid, in that period, at least so long as the earned portion is paid on the next applicable payroll date. A similar approach applies for Non-Payroll Costs. Note that the documentation required to support the Application will include evidence of payment on the next applicable date of the particular "incurred" expense.

SBA is now providing a detailed list of what documentation will be required to be submitted to support the Application, as well as a broader list of documentation that must be maintained for six years following the date the loan is forgiven or repaid in full. The documentation required for submission can be defended as logical, although it will be more voluminous than anticipated by most. As noted above, all borrowers are required to maintain, but not submit, documents pertaining to "the necessity of the loan." For borrowers with loans (including amounts borrowed by affiliates) in excess of $2,000,000, it is likely that SBA will require production of those documents before approving forgiveness.

LIMITATIONS ON FORGIVENESS.

Our original PPP article discussed limitations on PPP loan forgiveness as laid out in the CARES Act. Our April 3 update described early SBA guidance specifying that at least 75% of the amount forgiven must be Payroll Costs.

The following is a quick summary of the various limitations, which are all addressed in the Application package:

- Forgiveness can never exceed the original loan amount. This principle was in the CARES Act and is reflected in lines 9 and 11 of the Application. This seems to contradict prior SBA guidance that interest accrued to the point of forgiveness could also be forgiven, although that perhaps occurs as a practical matter so long as forgiveness is completed prior to the end of the six-month payment forbearance for the loans.
- The original loan amount was calculated based on 2.5 times average monthly Payroll Costs (generally for 2019), with applicable Cash Payroll Costs for any employee capped at an annual $100,000 per year rate (a similar principle applies for payments to owners of borrowers taxed as partnerships). The same limitation applies for calculating forgiveness – Cash Payroll Cost attributable to any single employee (or partner) is capped at $15,385 ($100,000 x 8 ÷ 52). See the Instructions to Schedule A Worksheet.
- The forgivable amount is reduced dollar for dollar by Cash Payroll Cost reduction during the Covered Period (or Alternate Payroll Covered Period)

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to any employee who previously had annual Cash Payroll Cost of less than $100,000 or in excess of 25% compared to the Cash Payroll Cost for such employee during the period from January 1 to March 31, 2020 (the reduction can be undone if the employee's Cash Payroll Cost is re-increased prior to June 30, 2020). See Schedule A Worksheet and its Instructions.

- The forgivable amount is reduced proportionately for reductions in FTEs during the Covered Period (or Alternate Payroll Covered Period) to any employee compared to average monthly FTEs during the applicable base period, which is, at the borrower's election, either February 15 to June 30, 2019, or January 1 to February 29, 2020 (seasonal employers have additional options). This reduction can be reversed if FTE levels are restored by June 30, 2020. See Schedule A, the Schedule A Worksheet, and the Instructions to both of them. A couple of observations on this:
    - The methodology for calculating FTEs is left to the employer, although no employee can count as more than one. A simplified method is permitted, in which each employee working 40 hours or more per week is deemed one FTE and each employee working less than 40 hours per week is deemed one-half FTE.
    - Excluded as a reduction in FTEs are any employees (a) to whom the borrower made a good-faith written offer to rehire that was rejected (this was in prior SBA guidance), and (b) who were fired for cause, voluntarily resigned, or voluntarily requested and received a reduction in hours. Documentation of any of these situations must be maintained for six years following loan forgiveness or repayment.
- As indicated in prior SBA guidance (see our April 3 update), at least 75% of the amount forgiven must be Payroll Costs, with Non-Payroll Costs limited to 25% or less. See lines 8, 9, 10 and 11 of the Application and related Instructions.

IS THIS THE FINAL WORD?

Unlikely. As noted above, it is possible SBA itself will revise the Application. More significantly, the House of Representatives passed the HEROES Act on Friday, May 15, 2020. Given criticism of it by those in the Administration and Senate leadership, it is unlikely to become law in its current form. But it does contain provisions pertaining to the PPP, including extending the Covered Period beyond eight weeks and the overall program duration, that may eventually find their way into applicable law.

PRIOR UPDATES.

For our previous PPP articles, please see April 1, 2020, April 3, 2020, April 9, 2020, April 16, 2020, April 24, 2020, May 1, 2020, May 6, 2020, and May 13, 2020.

We are interested to hear your experiences with the PPP.

Please contact the Reid and Riege attorney with whom you regularly work, or a member of our Business Services practice listed to the right, for more up to date information, or questions about your unique circumstances.

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