

Paycheck Protection Program Update

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The U.S. Small Business Administration has released the Paycheck Protection Program (PPP) Loan Forgiveness Application, providing instructions to borrowers on the process to calculate the amount of the loan forgiveness such borrowers may be eligible to receive under this program.

In general, PPP loans may be forgiven if the loan proceeds are used for payroll costs, mortgage interest, rent and utilities payments over the eight-week period after the loan closing; provided, however, that not more than 25% of the forgiven amount may be for non-payroll costs and the amount of loan forgiveness will be reduced if employee and compensation levels are not maintained. The CARES Act provides that the amount of loan forgiveness under the PPP will not be taxable income for federal income purposes (although the forgiveness amount may be considered as income for Generally Accepted Accounting Principles purposes). In addition, PPP loans are unsecured and do not require personal guarantees.

Although there will be additional questions from borrowers as they work through the forgiveness application, the application provides welcomed clarity for borrowers in a program that has often been fraught with more questions than answers. The forgiveness application should also provide PPP lenders with guidance as to their roles in the forgiveness process.

A borrower seeking PPP loan forgiveness is to submit a forgiveness request to the lender servicing the PPP loan. The request is to include the PPP Loan Forgiveness Calculation Form and documentation verifying the borrower's payroll and non-payroll expenses and FTE employees. The borrower must certify that the documents submitted are true and that the forgiveness amount was used to retain employees and make eligible mortgage interest, rent and utility payments. The lender is to make a decision on forgiveness within 60 days. Lenders are to perform a good faith review of the borrower's calculations and supporting documents; however, lenders are permitted to rely on borrowers' representations.

The application provides a number of clarifying provisions to hopefully reduce some compliance burdens of the program:

- An alternative payroll covered period was introduced to align with certain borrowers' regular payroll cycles. For administrative convenience, borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the eight-week (56-day) period that begins on the first day of their first pay period following their PPP loan disbursement date.
- Additional flexibility was provided to include eligible payroll paid or incurred during the eight week period after receiving the PPP loan. However, such payroll expenses that are incurred during the eight week period must be paid in the next payroll to be eligible for forgiveness.

- Step by step instructions were provided on how to calculate loan forgiveness amount.
- All employees, self-employed individuals and independent contractor wages and salaries are capped at a maximum of \$15,385 per individual.
- Employees who are offered their jobs back and refuse, were fired for cause, voluntarily resigned, or voluntarily requested and received a reduction of their hours will not hurt the full-time equivalent equation.
- Rent and interest paid on leases of non-real estate business assets will qualify for forgiveness.
- Payroll costs must consist of at least 75% of the forgiveness amount, and other eligible expenses cannot exceed 25% of the forgiveness amount.
- Forty (40) hours is the standard being used to determine whether an employee is full-time.

The SBA has said that it will soon issue regulations and guidance to further assist borrowers as they complete their applications and provide lenders with guidance on their responsibilities.

The amount that is not forgiven will continue as a PPP loan guaranteed by the SBA. The terms of the loan are as follows:

- Loan payments are deferred for six months (although interest will continue to accrue);
- Interest will accrue at a fixed interest rate of 1.0% per annum; and
- The maturity date is two years following the loan closing date.

Borrowers with continuing PPP loans should consider the following:

- PPP loans will be accounted for as a liability on a borrower's balance sheet;
- Borrowers should ensure that the PPP loan is "permitted debt" under its other loan documents - presumably that should not be a problem if the lender servicing the PPP loan is the borrower's regular lender;
- Does the PPP loan have any impact on borrower's financial covenants or pricing under other lending arrangements?; and
- Is the PPP loan "inadvertently" secured and/or guaranteed under broad language of other loan documents?

Borrowers should also take into account the following additional practical considerations in their application for forgiveness:

- Consider opening a separate bank account to deposit and disburse the PPP loan proceeds.
- Keep accurate records of all expenditures of PPP loan proceeds.
- Borrowers should retain documentation for expenditures that may arguably not be forgivable, in case of a dispute or disallowance on these or other items or an update in guidance.
- Maintain a file of all correspondence involving terminations, offers to hire and re-hire, and responses to such offers. Document contemporaneously, or immediately thereafter, any oral communications from prospective hires/re-hires.

- Consider running an additional/off-cycle payroll that ends on the last business day of the Covered Period to ensure all eligible payroll costs are included in the forgiveness application.
- Consider using a separate code block for non-payroll costs that will be paid using PPP loan proceeds, which should help categorize such items and track them to make sure they do not exceed 25%.
- Borrowers should communicate routinely with their lenders about their anticipated forgiveness processes. These processes likely will evolve and vary from lender to lender. In addition, due to the large demand for forgiveness, lenders may not be able to proactively reach out to each individual borrower.
- Borrowers should prepare to submit the following documents with their PPP forgiveness applications:

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