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PPP Loan Forgiveness Application Released

May 16, 2020

As has been much discussed, loan forgiveness is a key feature of the CARES Act's Paycheck Protection Program (PPP) administered by the Small Business Administration (SBA), but there has been little clarity regarding the process for seeking forgiveness. On May 15, 2020, the SBA and Department of Treasury released the PPP loan forgiveness application and related instructions, providing us some clarity. Additionally, the Treasury Department indicated in an associated press release that the SBA will issue regulations and guidance to further aid borrowers and lenders with the forgiveness process and their responsibilities.

Key takeaways

- In determining the payroll costs a borrower may include in its forgiveness amount, the borrower may choose either the eight weeks following loan disbursement or eight weeks (56 days) beginning on the first day of its first pay period following loan disbursement. While the application indicates this alternate calculation period is "for administrative convenience" and can be used only for certain pieces of the application, it may enable borrowers to have more of their loan amount be forgivable due to timing.
- The borrower must confirm whether it, together with its affiliates, received PPP loans in excess of $2 million. This relates to the SBA's guidance that it will conduct a full review of all groups of affiliate loans that individually are under $2 million but aggregate to over $2 million for purposes of the review previously alerted in FAQ 46.
- Despite some press suggesting that perhaps new rules would relax the 75/25 split, the application requires that the borrower confirm that at least 75% of the forgiveness amount is for payroll costs.
- The application form does not contain an express recertification of necessity as of the date of the forgiveness application. The borrower will have flexibility to include expenses *paid* or *incurred* during the applicable period.
    - This will enable the borrower to include payroll costs with paycheck distribution or origination of an ACH during the period and/or earned by employees but not yet paid (because the pay date falls after the last payday in the applicable covered period), in each case without duplication.
    - This clarifies earlier questions about whether borrowers might consider accelerating payroll dates to fall within the applicable covered period – we believe this would be ill-advised given the new clarity that "incurred" but not yet paid payroll costs count.
    - Note this concept of "incurred" or "paid" also appears applicable to other permissible uses of funds, such as utilities and mortgage interest/rent payments.
- The borrower's forgiveness amount will not be reduced for headcount reductions related to:
    - Individuals to whom the borrower has made a written offer in good faith to rehire an employee that the employee declined (as previously provided in FAQ 40),
    - Employees whose employment was terminated for cause, or
    - Employees who voluntarily resigned.
- The application requires the borrower to maintain certain documentation related to its PPP loan for at least six years after the loan is forgiven or repaid in full, including documentation supporting the necessity certification and eligibility.

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