



## PAYCHECK PROTECTION PROGRAM: UPDATES ON FORGIVENESS

June 4, 2020

On May 15, 2020, the Small Business Administration (“SBA”) issued the Paycheck Protection Program (“PPP”) Loan Forgiveness Application (“Application”). Although the Application is a helpful step in understanding the forgiveness process, the SBA and Department of Treasury continue to provide guidance and updates.

### APPLICATION PROVISIONS

The Application elaborates on the SBA’s guidance regarding how to calculate the amount of the PPP loan that is eligible for forgiveness and provides clarification on the following common questions and issues:

**Alternative Payroll Covered Period.** The CARES Act initially provided that the 8-week forgiveness period (“Covered Period”) begins on the PPP loan disbursement date. However, the Application provides an option for borrowers with a biweekly (or more frequent) payroll schedule to begin the Covered Period on the first day of the first pay period following the PPP loan disbursement date. The Application refers to this as the “Alternative Payroll Covered Period.”

**Eligible Payroll Costs – “Paid” versus “Incurred.”** The Application provides that eligible payroll costs are forgivable if they are paid during the Covered Period or Alternative Payroll Covered Period, even if incurred prior to the start of the Covered Period. Similarly, the Application contemplates that additional payroll costs that are incurred during the Covered Period or Alternative Payroll Covered Period, and are paid either during the applicable period or the next payroll after the end of the applicable period, are also eligible for forgiveness.

**Average FTE Calculation.** The borrower has two options for the method to calculate the average full-time equivalency (“FTE”) during the Covered Period or Alternative Payroll Covered Period. The calculation is used to determine whether the borrower’s loan forgiveness must be reduced due to an FTE reduction. The first option provides that for each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth. The maximum for each employee is capped at 1.0. A simplified second method states that the borrower shall assign 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours.

**FTE Reduction Expenses.** The SBA clarified that the following situations that cause an FTE reduction will not reduce the borrower’s loan forgiveness: (1) any positions for which the borrower made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period which was rejected by the employee; and (2) 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.

**Personal Property.** Business mortgage interest payments and business rent or lease payments can apply to both real property and personal property.

## INTERIM FINAL RULE

The SBA and Department of Treasury issued an Interim Final Rule regarding forgiveness that is effective as of May 28, 2020. In addition to other information, the Interim Final Rule addresses the following common forgiveness questions:

**Application Process.** The borrower will submit the completed Application to its lender. The lender has 60 days from receipt of the Application to issue a decision on forgiveness to the SBA and to request payment from the SBA. Then, within 90 days of the SBA's receipt of the decision from the lender, the SBA will, subject to any SBA review, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment. If the SBA determines that the borrower was ineligible for the PPP loan, the loan will not be eligible for forgiveness. The lender is responsible for notifying the borrower of the forgiveness amount.

**Repayment.** If the forgiveness Application or any portion of the amount requested under the forgiveness Application is denied, any remaining balance due on the loan must be repaid by the borrower on or before the two year maturity of the loan.

**Bonuses Eligible for Forgiveness.** The CARES Act defines the term "payroll costs" broadly to include compensation in the form of salary, wages, commissions, or similar compensation. If a borrower pays furloughed employees their salary, wages, or commissions during the Covered Period or Alternative Payroll Covered Period, those payments are eligible for forgiveness as long as they do not exceed an annual salary of \$100,000, as prorated for the Covered Period or Alternative Payroll Covered Period. If an employee's total compensation does not exceed \$100,000 on an annualized basis, the employee's hazard pay and bonuses are eligible for loan forgiveness because they constitute a supplement to salary or wages, and are therefore a similar form of compensation.

**Nonpayroll Costs.** A nonpayroll cost is eligible for forgiveness if it was: (1) paid during the Covered Period or Alternative Payroll Covered Period; or (2) incurred during the Covered Period or Alternative Payroll Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period or Alternative Payroll Covered Period.

## PENDING LEGISLATION

Both the U.S. House of Representatives and the U.S. Senate passed the Paycheck Protection Program Flexibility Act of 2020. The bill must now be signed into law by the President. The legislation includes the following provisions for the PPP:

- Extend the Covered Period to end on the earlier of December 31, 2020, or 24 weeks after the PPP Loan Disbursement Date.
- Revise the rule that 75% of the loan proceeds must be used for payroll costs in order to be eligible for forgiveness to instead provide that 60% of the loan proceeds must be used for payroll costs.
- Revise the minimum loan term for amounts to be repaid from two years to five years.

- Extend the time period for the safe harbor to rehire employees to December 31, 2020.
- Provide an exemption to a reduction in forgiveness related to a decrease in employees if the borrower can document in good faith (1) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020, and (2) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
- Provide an exemption to a reduction in forgiveness related to a decrease in employees if the borrower can document in good faith an inability to return to the same level of business activity as such business was operating before February 15, 2020, due to compliance with various COVID-19-related requirements.
- Permit borrowers to be eligible for deferral of payroll taxes even if the PPP loan is forgiven.
- Revises the deferral period, allowing borrowers to defer payments until they receive compensation for forgiveness amounts. Borrowers who do not apply for forgiveness will have 10 months after the last day of the Covered Period to begin making payments.

Once the bill is signed into law, we expect that the SBA will release guidance on implementation of the new provisions.

For questions, please contact a member of our [COVID-19 Task Force](#).

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