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PAYCHECK PROTECTION PROGRAM
LOAN FORGIVENESS APPLICATION

May 21, 2020

On May 17, 2020, we published a Client Alert with key takeaways from our initial review of the Paycheck Protection Program ("**PPP**") Loan Forgiveness Application (the "**Application**") and instructions that were released by the Small Business Administration ("**SBA**"), in consultation with the Department of the Treasury ("**Treasury**"), late last week. The purpose of this Client Alert is to provide some general guidance and information regarding the Application and instructions. Because the effect of the forgiveness rules on an individual borrower will depend on that borrower's specific situation, it is not practical to provide detailed guidance that will be relevant in all cases.

The Application and instructions are akin to what is found in a tax form. The forgiveness rules are much more complex than they may first appear and that complexity may not become apparent until a borrower actually goes through the process of completing the Application. Therefore, we recommend that, as soon as possible, a borrower go through the exercise of reviewing and completing the Application in order to do an initial projection of the amount of its loan forgiveness. The borrower should then do a subsequent review and projection about 6 weeks after the proceeds of the PPP loan were received. This process should help the borrower appreciate the practical application of the rules to its situation and may bring to light opportunities to make adjustments in how the borrower deploys its PPP funds so as to use them to its maximum advantage.

The rules on loan forgiveness are likely to continue to change and evolve, possibly in ways that are material to how a borrower can best use its PPP funds, and there continue to be areas where the SBA's guidance and the Application are unclear or open to interpretation. The Application and instructions reflect the SBA's current guidance on loan forgiveness, which differs in some respects from the SBA's prior guidance (which itself differs from the statute in some respects). The SBA has also indicated that it intends issue further guidance. In addition, changes to some aspects of the PPP loan program are under active consideration by Congress. **We strongly encourage borrowers to obtain assistance in completing the Application from an attorney or accountant who is well-versed in the forgiveness rules and the SBA's guidance in order to maximize loan forgiveness and avoid unexpected adverse results.**

If you have any questions about the Application, please contact us. We are available to discuss in detail how loan forgiveness amounts and loan forgiveness reductions are calculated.

The Application and instructions can be found at:

https://content.sba.gov/sites/default/files/2020-05/3245-0407%20SBA%20Form%203508%20PPP%20Forgiveness%20Application.pdf.

Our May 17th Client Alert can be found at:

https://bswlaw.com/wp-content/uploads/2020/05/Client-Alert-PPP-Loan-Forgiveness-Application.pdf.

1. **General Rule for Loan Forgiveness**. A borrower may apply for forgiveness of a PPP loan if and to the extent that the borrower used the proceeds of the PPP loan to pay permitted payroll and non-payroll expenses during the eight-week period beginning on the date the loan was disbursed (the "**Covered Period**"). For the purpose of calculating payroll expenses (but not non-payroll expenses) and the number of full-time equivalent employees ("**FTEs**"), and in order to avoid the administrative inconvenience of dealing with partial pay periods, a borrower may elect to use the eight-week period that begins on the first day of the borrower's first pay period following the loan disbursement date (the "**Alternative Payroll Covered Period**"). In this Client Alert, the Covered Period or the Alternative Payroll Covered Period, as applicable, may be referred to as the "**Applicable Loan Period**."

2. **Necessary Calculations**. In order to complete the Application, the borrower must calculate each of the following items:

   (a) Payroll Expenses. The eligible cash compensation and employee benefit payments for each employee (i) paid during the Applicable Loan Period or (ii) incurred during the Applicable Loan Period and paid on or before the borrower's next regular payroll date following the end of the Applicable Loan Period. Payroll costs are considered "paid" on the day that paychecks are distributed or the day the borrower originates an ACH transaction, and payroll costs are considered "incurred" on the day that the employee's pay is earned. Compensation paid to owners, self-employed individuals and general partners is capped at the lesser of $15,385 per individual (the eight week equivalent of annual compensation of $100,000) or 15.385% of the individual's 2019 compensation. **Note that current SBA guidance is that eligible payroll expenses must account for at least 75% of the borrower's requested loan forgiveness amount.**

   (b) FTEs. The average number of FTEs (full time equivalent employees) employed (i) during the Applicable Loan Period, and (ii) during either (at the option of the borrower) (x) February 15, 2019 through June 30, 2019, (y) January 1, 2020 through February 29, 2020, or (z) in the case of seasonal employers, either of the preceding periods or a consecutive twelve-week period between May 1, 2019 and September 15, 2019 (the "**FTE Base Period**"). **The calculation of the number of FTEs is based on a 40-hour workweek and determined by dividing the average number of hours paid to each employee per week by 40 and rounding to the nearest tenth.**

   (c) Reductions to Salaries and Wages. Any reduction of more than 25% to the average annual salary or wages paid to an employee during the period from January 1, 2020 to March 31, 2020 (the "**Compensation Base Period**"), prorated for such period, paid to such employee during the Applicable Loan Period, prorated for such period.

   (d) Non-Payroll Expenses. The amount of eligible non-payroll expenses (i) paid during the Covered Period or (ii) 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 instructions regarding rent and utility payments do not exclude prepayments, but it is unclear if this omission means a borrower can prepay its rent or utility obligations during the Covered Period. **Note that non-payroll costs must be accounted for using the Covered Period,**

even if the borrower used the Alternative Payroll Covered Period to calculate its eligible payroll costs and FTEs. In addition, under current SBA guidance non-payroll costs cannot exceed 25% of the total loan forgiveness amount.

3. **Reductions to Loan Forgiveness Amount**

(a) Reduction to FTEs. If the average number of FTEs during the Applicable Loan Period is less than the average number of FTEs during the FTE Base Period, the borrower's loan forgiveness amount will be reduced by the percentage decrease in FTEs.

(b) Salary/Wage Reductions. If the salary or hourly wages paid to any employee during the Applicable Loan Period was less than 75% of the annualized salary or hourly wages paid to that employee during the Compensation Base Period, the borrower's loan forgiveness amount will be reduced as a result of that reduction.

(c) Exceptions to FTE Reductions. If during the Applicable Loan Period (i) a borrower made a good faith written offer to rehire an employee and that offer was rejected by the employee, or (ii) an employee was fired for cause, voluntarily resigned or voluntary requested a reduction of his/her hours, the FTE represented by each such employee is included in the average number of FTEs during the Applicable Loan Period, and the borrower's loan forgiveness amount is not reduced on account of such employee(s).

(d) June 30, 2020 Safe Harbor to Cure Reductions. Under most circumstances, a borrower may cure the reductions to FTEs or salaries and wages described in clauses (a) and (b) above. Specifically, a borrower is exempt from a reduction in loan forgiveness based on its average FTEs if (i) the borrower reduced its FTE employee levels during the period from February 15, 2020 to April 26, 2020, and (ii) restores its FTE levels by not later than June 30, 2020 to its FTE levels in the pay period that included February 15, 2020. Further, if an employee's average annual salary or hourly wage as of June 30, 2020 is equal to or greater than the employee's average annual salary or hourly wage as of February 15, 2020, the borrower's loan forgiveness amount will not be reduced due to that employee, even if the salary or hourly wages paid to that employee during the Applicable Loan Period was less than 75% of the annualized salary or hourly wages paid to that employee during the Compensation Base Period.