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SBA Revisions Expand Paycheck Protection Program Eligibility and Loan Forgiveness

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On June 19 and June 22, 2020, the Small Business Administration ("SBA") issued new revisions to their First Interim Final Rule concerning the Paycheck Protection Program ("PPP"). The Revised Interim Final Rule and the Revisions to Loan Forgiveness Interim Final Rule (collectively "Revised Rules") provide guidance to the Paycheck Protection Program Flexibility Act (the "Flexibility Act") enacted on June 5, 2020.

The New Covered Period

The Flexibility Act and the Revised Rules extend the amount of time PPP loan recipients have to spend PPP loan proceeds from eight weeks to 24 weeks, and extend the initial covered period for PPP loans to December 31. Borrowers who received their loans before June 5 have the option to still use the eight-week period as the covered period. This allows business borrowers more time to spend PPP proceeds and to rehire furloughed or laid-off employees. However, it should be noted that the SBA is still only authorized to approve and assign SBA numbers to PPP loans through **August 8, 2020**, making it imperative that borrowers apply for PPP loans before that deadline.

Loan Forgiveness

The Revised Rules provide more flexibility for borrowers seeking loan forgiveness. Costs eligible for forgiveness are composed of payroll costs and non-payroll costs. "Payroll Costs" consist of the following compensation to employees whose principal place of residence is the United States, in the form of (1) salary, wages, commissions, or similar compensation (up to an annualized $100,000); (2) cash tips or equivalent (based on employer records of past tips or, in the absence of such records, a reasonable good-faith employer estimate of such tips); (3) payment for vacation, parental, family, medical, or sick leave (excluding payments for emergency paid sick leave or expanded family and medical leave); (4) allowance for separation or dismissal; (5) payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums and retirement; and (6) payment of state and local taxes assessed on compensation of employees (but not federal payroll tax).

"Non-Payroll Costs" consist of the following: (1) interest payments on any business mortgage obligation on real or personal property; (2) payments on business rent obligations on real or personal property under a lease agreement; and (3) business utility payments for electricity, gas, water, transportation, telephone, or internet services.

The per-employee limit for cash compensation costs for the eight-week period (but not other Payroll Costs) is capped at $15,385 per individual (8/52 weeks of $100,000); for borrowers using the new 24-week covered period, its capped at $46,154 (24/52 of a $100,000 annual salary). However, compensation for business owners is subject to a lower limit of $20,833 across all of their businesses (2.5 months/12 months of $100,000) for a 24-week covered period. Essentially, the amount for each owner is limited to the total amount of such owner's compensation included in the calculation of the PPP loan amount (250% of the average monthly compensation for 2019).

Business Owner Compensation Calculation

Example 1. Eight-Week Period	8 ÷ 52 × 2019 net profit, up to a maximum of $15,385.
Example 2. 24-Week Period	2.5 months' worth (2.5 ÷ 12) of 2019 net profit, up to $20,833.

Full forgiveness is now possible for borrowers using 60% of PPP proceeds on payroll costs and the remaining 40% on other permissible non-payroll expenses. Borrowers using the eight-week or 24-week covered period can apply for loan forgiveness prior to the end of the covered period when they have spent PPP proceeds, but the forgiveness reduction for salary and wages is still extended through the entire covered period.

On June 17, 2020, the SBA issued its revised PPP Loan Forgiveness Application (the "Loan Forgiveness Application"). The streamlined, five-page Loan Forgiveness Application allows borrowers to itemize how they spent their PPP funds and then calculate the amount that should be forgiven.

The PPP compares the average number of full-time-equivalent employees ("FTE") that the borrower has each month during the covered period to the average number of monthly FTE the borrower employed during one of two reference periods. The borrower may choose as the reference period either (1) the period from February 15 to June 30, 2019, or (2) the period from January 1 to February 29, 2020. As a practical matter, the borrower should calculate the number of FTEs during both these periods and choose the period with the lower number of FTEs. PPP loan forgiveness is reduced (a) in proportion to the decrease in the average FTE during the covered period as compared to a reference period selected by the borrower, and (b) dollar for dollar for the amount of reduction in excess of 25% of the total salary and wages of any employee during the eight-week or 24-week covered period as compared to a reference period. The Flexibility Act extended the FTE Reduction Safe Harbor for rehiring employees and receiving loan forgiveness reductions under the PPP from June 30 to December 31, 2020.

However, the FTE Reduction Safe Harbor 2 on page 4 (see steps 1 to 5) of the Loan Forgiveness Application allowing borrowers to eliminate FTE reductions in forgiveness on or before December 31, 2020, is available in the Loan Forgiveness Application only for FTE reductions occurring during the period of February 15 to April 26, 2020. If the FTE reduction occurred after April 26, then that particular safe harbor does not apply. If the borrower maintained or increased FTEs during the period February 15 to April 26, 2020, but nonetheless had fewer average FTEs during the covered period than during the selected reference period, then the borrower can, relying on the Flexibility Act, try to avoid a proportionate reduction by asserting in good faith either (1) that it was unable to rehire laid-off employees and unable to hire qualified replacements, or (2) that it was unable to operate at its prior level due to the need to comply with certain specific federal government safety requirements.

This is set forth in FTE Reduction Safe Harbor 1 and may mitigate or eliminate any forgiveness reduction, but it is not automatic as part of Safe Harbor 2. Borrowers should seek FTE Reduction Safe Harbor by checking the box for Safe Harbor 1 on page 3 of the PPP Loan Forgiveness Application. To ensure the FTE Reduction Safe Harbor 1 exempts loan forgiveness reductions resulting from employee layoffs or reduced hours, borrowers may wish to submit documents along with the Loan Forgiveness Application showing the following: (1) employee was rehired for the same wages by December 31, 2020; (2) borrower made a good-faith written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the payroll covered period; (3) offer was for the same salary or wages earned and same number of hours worked by such employee in the last pay period prior to the separation or reduction in hours; (4) offer was rejected by such employee; (5) borrower informed the applicable state unemployment insurance office of employee's rejected offer of reemployment within 30 days of such employee's rejection of the offer; or (6) employee was fired for cause, voluntarily resigned, or voluntarily requested a scheduled reduction.

On June 17, 2020, the SBA also released a new EZ PPP Loan Forgiveness Application (the "EZ Loan Forgiveness Application"). Borrowers eligible for the newly released EZ Loan Forgiveness Application do not need to provide detailed information regarding employees, cash compensation, and hours worked. The EZ Loan Forgiveness Application is simpler than the Loan Forgiveness Application and is designed to be used only by self-employed individuals or borrowers who did not reduce the salary or wages of their employees by more than 25%.

PPP Loan Maturity and Deferral

The Revised Rules extend PPP maturity from two years to five years for PPP loans disbursed after June 5, 2020. Lenders are permitted to extend the maturity date for loans disbursed prior to June 5, 2020. The SBA is now permitting borrowers a deferral on all principal and interest payments if they submit their Loan Forgiveness Applications to their lenders within 10 months following the applicable covered period. Failure to apply for forgiveness in the allotted time frame will require borrowers to begin making payments to their lenders.

Revised PPP Loan Application and Lender Application

On June 24, 2020, the SBA released aRevised PPP Loan Application (the "Loan Application") and Revised PPP Lender Application.

On June 12, 2020, the First Interim Rule was amended in the Interim Rule on Additional Eligibility Revisions to First Interim Rule, and the look-back period for potential borrowers was reduced from five years to one year to determine eligibility for applicants, or owners of applicants, who, for nonfinancial felonies, have (1) been convicted, (2) pleaded guilty, (3) pleaded nolo contendere, or (4) been placed on any form of parole or probation (including probation before judgment). The period remains five years for felonies involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance.

The application also eliminates pretrial diversion status as a criterion affecting eligibility. Potential borrowers' criminal history for nonfinancial crimes will only be considered for the 12 months prior to applying for a PPP loan. Potential borrowers who are currently on probation or parole are still prohibited from applying. The Revised PPP Loan Application conforms to these changes.

Warning: All PPP loan applications are due by **August 8, 2020**, and all applicants should work with their lender to ensure submission of the application prior to **August 8, 2020**.

McCarter & English, LLP, can assist you with your PPP loan application and advise you on the proper use of PPP funds, maximizing loan forgiveness, and completing the loan forgiveness application.