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SBA Releases PPP Loan Forgiveness Application and Instructions

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The SBA has issued the application form and instructions for borrowers seeking loan forgiveness under the Paycheck Protection Program (PPP). The new materials address a number of questions that remained unclear even as borrowers received funds and began spending them over the last several weeks. The application is fairly simple, tracks the statute and regulations and seems designed to allow for forgiveness of eligible expenses. Here are some of the highlights of the new guidance.

The “Covered Period”

Many borrowers had wondered how the SBA would determine whether certain payments for eligible expenses fell within the “covered period,” the 8-week period during which the borrower’s eligible “costs incurred and payments made” were to be forgiven. What if a cost was incurred before the borrower received its PPP loan, but paid afterward? What about employee compensation for pay periods falling partially within the covered period?

The instructions to the forgiveness application provide clarity and flexibility on this point. A borrower may seek forgiveness for eligible expenses incurred *or* paid during the covered period. For non-payroll costs such as mortgage interest, rent and utilities, the expense must be either (i) paid during the covered period, or (ii) incurred during the covered period and paid by the next date it regularly comes due. There does not appear to be any restriction on claiming forgiveness for expenses accrued before the covered period, so long as they are paid during it.

Payroll costs are treated similarly, but a borrower can also elect to choose an “alternative payroll covered period” which is the 8-week period beginning on the first day of the first pay period following the loan disbursement date. This allows the business to align its covered period with its payroll schedule. However, this does not affect the covered period for non-payroll costs.

Cash vs. Non-Cash Compensation



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The forgiveness application instructions make clear that the total amount of cash compensation that is eligible for forgiveness per employee cannot exceed an annual salary of \$100,000, prorated for the covered period. Therefore, it is capped at \$15,385 per employee. "Cash compensation" includes the sum of gross salary, gross wages, gross tips, gross commissions, paid leave (vacation, family, medical or sick leave, not including leave covered by the Families First Coronavirus Response Act), and allowances for dismissal or separation.

Non-cash compensation that is not subject to the above limitation includes amounts paid as employer contributions for employee health insurance and retirement plans, and amounts paid for employer-side state and local taxes assessed on employee compensation.

Owner Compensation

The instructions state that forgiveness of amounts paid to business owners (including owner-employees, self-employed individuals, or general partners) is capped at the lower of (1) \$15,385 (the eight-week equivalent of \$100,000 per year) for each individual or (2) the eight-week equivalent of the owner's applicable compensation in 2019, whichever is lower.

Forgiveness Reduction Calculations

The application provides rules for calculating the borrower's number of full-time equivalent (FTE) employees, for purposes of potentially reducing forgiveness if the borrower's workforce has been reduced as compared to one of two comparison periods. FTE employees can be calculated based on all employees' average hours per week divided by 40, and capped at 1.0 per employee. Alternatively, each employee working 40 or more hours per week may be counted as 1.0 FTE, and each employee working fewer hours may be counted as 0.5 FTE.

Loan forgiveness is also reduced if an employee's salary has been reduced by more than 25% during the applicable covered period, and the application provides a worksheet for calculating that reduction.

The application somewhat expands the exceptions to the forgiveness reduction rules. A borrower's forgiveness will not be reduced for FTE reductions if: (1) the borrower made a good-faith, written offer to rehire an employee during the applicable covered period, which was rejected by the employee; or (2) the reduction relates to an employee who was fired for cause, voluntarily resigned, or voluntarily requested and received a reduction of their hours. The application also implements the exemption from forgiveness reduction if the borrower's reduced FTE employee levels, or reduced salaries, are restored by June 30, 2020 to the levels that existed as of February 15, 2020.

Documentation

The application requires the borrower to submit certain specified documentation to the lender. It also requires the borrower to maintain this and other documentation related to its PPP loan for at least six years after the loan is forgiven or repaid in full, including

documentation supporting its certifications as to eligibility and the necessity of the loan.

Conclusion

While the application and instructions specifically address the above issues, other scenarios remain unclear based on the language of the CARES Act and the SBA's existing guidance. The [press release](#) issued with the application indicates that the SBA "will also soon issue regulations and guidance to further assist borrowers as they complete their applications, and to provide lenders with guidance on their responsibilities." We will continue to monitor developments in this area, and are available to assist borrowers with their PPP loan questions as they arise.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorneys J. Allen Holland, Jeffrey Loeb, Frank Gaeta, or David Glod.