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COVID-19 Alert

CARES ACT PAYCHECK PROTECTION PROGRAM LOANS JUNE 26, 2020 UPDATE

JUNE 2020

This continues our efforts to provide updates on the Paycheck Protection Program (PPP) loan offerings created by the CARES Act and overseen by the Small Business Administration (SBA).

WHAT HAS CHANGED?

SBA has this week issued two new Interim Final Rules (IFRs) to further integrate into its rule-making and guidance changes to the PPP resulting from the Paycheck Protection Program Flexibility Act of 2020 (the Flexibility Act). As discussed in our June 4 and June 12 updates, the Flexibility Act made major changes in the PPP as originally created in the CARES Act and implemented by SBA. These changes particularly loosened the requirements for PPP loan forgiveness, by permitting a 24-week Covered Period and reducing the portion of the forgivable amount that must be justified by Payroll Costs to 60% from the 75% previously established by SBA.

THE FIRST NEW IFR

SBA has issued an IFR titled "Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures Interim Final Rule" (the New Forgiveness IFR). As indicated by the title, it makes revisions to two prior IFRs. Those prior IFRs are discussed in our June 1 update, and served as rule-making to backstop SBA's original Loan Forgiveness Application form and SBA's intended loan forgiveness review process.

The New Forgiveness IFR answers a major open question resulting from the new 24-week Covered Period permitted by the Flexibility Act. It specifies that, "A borrower may submit a loan forgiveness application any time on or before the maturity date of the loan – including before the end of the covered period – if the borrower has used all of the loan proceeds for which the borrower is requesting forgiveness." This interpretation permits borrowers who require more than eight weeks, but not a full 24 weeks, to maximize forgiveness to initiate the forgiveness process earlier than the end of the full 24-week Covered Period. Since the forgiveness process may run up to five months between lender and SBA reviews, this may enable borrowers to obtain certainty on their forgiveness outcomes ahead of December 31 tax year and accounting period closings.

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The New Forgiveness IFR also provides rule-making to support (and arguably expand) the limitation of owner-employee and self-employed individuals' own payroll compensation in SBA's most recent Loan Forgiveness Application. As discussed in our June 22 update, the Loan Forgiveness Application caps these individuals at 8/52 of 2019 compensation (with an absolute $15,385 maximum) per individual for borrowers using an eight-week Covered Period, and 2.5/12 of 2019 compensation (with an absolute $20,833 maximum) per individual for borrowers using a 24-week Covered Period. The New Forgiveness IFR goes beyond our prior understanding of this limitation to include owner-employees of C-corporations, as well as owner-employees of S-corporations, members of limited liability companies taxed as partnerships, general partners, and other self-employed individuals. After instituting the caps, the New Forgiveness IFR goes on to state:

> In particular, C-corporation owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health insurance contributions made on their behalf. S-corporation owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement contributions made on their behalf, but employer health insurance contributions made on their behalf cannot be separately added because those payments are already included in their employee cash compensation. Schedule C or F filers are capped by the amount of their owner compensation replacement, calculated based on 2019 net profit. General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235. For self-employed individuals, including Schedule C or F filers and general partners, retirement and health insurance contributions are included in their net self-employment income and therefore cannot be separately added to their payroll calculation.

Beyond that, the New Forgiveness IFR is largely technical. It further embeds in SBA's rule-making the 60%-40% (vs. the old 75%-25%) split between Payroll Costs and Non-Payroll Costs, and also SBA's permitted use of an Alternative Payroll Covered Period and "incurred" Payroll Costs and Non-Payroll Costs (with new examples). It incorporates the new exceptions to reductions in loan forgiveness for FTE reductions added by the Flexibility Act (see our June 4 update). And it incorporates the distinction between the SBA general Loan Forgiveness Application and the "EZ" version of it. Also included is a new example to illustrate reduction in loan forgiveness for a reduction in compensation of more than 25% for an employee earning less than $100,000 per year who works for a borrower electing a 24-week Covered Period. The new example illustrates that the same reduced compensation employee will result in three times the forgiveness reduction for a 24-week Covered Period employer as for an eight-week Covered Period employer, assuming that prior compensation is not restored by December 31, 2020.

The current SBA Loan Forgiveness Application form can be found here, with

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instructions for it found here. The current SBA "EZ" Loan Forgiveness Application form can be found here, with instructions for it found here.

THE SECOND NEW IFR

SBA has issued an IFR titled "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Revisions to First Interim Final Rule" (the New Eligibility IFR). The New Eligibility IFR makes revisions to SBA's first IFR on the PPP discussed in our April 3 update, as recently revised to account for the Flexibility Act as discussed in our June 12 update.

The New Eligibility IFR addresses criteria for original PPP loan applications, loosening restrictions on borrowers with a 20% owner who has been convicted of, is charged with, or is on probation or parole as a result of, certain crimes. It does not loosen restrictions where such an owner is incarcerated. The actual impact of the New Eligibility IFR seems limited unless the PPP is extended to permit loans to be approved beyond SBA's currently announced date of June 30, 2020, although it may serve to preserve (and perhaps allow forgiveness for) some loans previously inadvertently approved.

PRIOR UPDATES

For our previous PPP updates, please see April 1, 2020, April 3, 2020, April 9, 2020, April 16, 2020, April 24, 2020, May 1, 2020, May 6, 2020, May 13, 2020, May 18, 2020, June 1, 2020, June 4, 2020, and June 12, 2020, and June 22, 2020.

We are interested to hear your experiences with the PPP.

Please contact the Reid and Riege attorney with whom you regularly work, or a member of our Business Services practice listed to the right, for more up to date information, or questions about your unique circumstances.

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