

SBA Releases Two Critical Interim Final Rules On: (1) Paycheck Protection Program Loan Forgiveness; And (2) Review of Forgiveness Applications by Lenders and SBA

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As a follow-up to its release of the PPP Forgiveness Application (see our previous Client Alert on the application found [here](#)), late on Friday, May 22, 2020, the SBA released the following two Interim Final Rules (IFRs): (1) Paycheck Protection Program – Requirements – Loan Forgiveness (which [can be found here](#)); and (2) Paycheck Protection Program – SBA Loan Review Procedures and Related Borrower and Lender Responsibilities (which [can be found here](#)). These IFRs include a wealth of useful guidance and should be carefully consulted by PPP borrowers.

As a number of the details in the IFR on Loan Forgiveness are also discussed in our Client Alert on the PPP Forgiveness Application linked above, I will not reiterate all of those details here. Rather, I will focus this alert on new information and clarifications.

Here are the highlights from the referenced IFRs:

ADDITIONAL FORGIVENESS GUIDANCE

(1) Payments to Furloughed Employees – In response to the confusion of many employers who furloughed employees (whether in response to government-mandated business closures or otherwise), the SBA makes clear that salary, wages, and commissions paid to furloughed employees during the covered 8 week period are eligible for forgiveness. We have heard of some employers only paying employees for work that the employees are actually able to do – to be clear, this is not the intent of the Paycheck Protection Program. The primary intent of your PPP loan is to keep your employees on the payroll regardless of whether they are actually able to perform work functions during the 8 week covered period. Employers who do not keep employees on the payroll for the covered period will either not be eligible for forgiveness or will only be eligible for partial forgiveness consistent with the forgiveness reduction provisions discussed in previous client alerts.

(2) Bonuses and Hazard Pay – The SBA has determined that, if an employee's total compensation does not exceed \$100,000 on an annualized basis, the payment of hazard pay and bonuses to the employee is eligible for loan forgiveness as a supplement to salary or wages.

(3) Caps on Loan Forgiveness for Owner-Employees and Self-Employed Individuals – The amount of PPP loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation can be no more than the lesser of: (i) 8/52 of 2019 compensation (i.e. approximately 15.38% of 2019 compensation); or (ii) \$15,385 per individual in total across all businesses receiving a PPP loan. Please refer to the IFR on Loan

Forgiveness (Section III.3.c.) for specific details on the caps for (a) owner-employees; (b) Schedule C filers; and (c) general partners. Of note, the SBA has determined that no additional forgiveness will be provided for retirement or health insurance contributions for self-employed individuals, including Schedule C filers and general partners, as such expenses are paid out of the net self-employment income of such individuals.

(4) Employees who Refuse Reemployment Offers – The SBA previously indicated that an employer's loan forgiveness amount would not be reduced for an employee who was laid-off or who had his/her hours reduced during the period between February 15, 2020 and April 26, 2020, and who refused a re-employment offer made once the applicable employer received its PPP loan funds. The SBA has clarified the requirements for such exception as follows (including the critical change highlighted below):

- a. The borrower must have made a good faith, written offer to rehire such employee during the covered period (or alternative payroll covered period, as applicable);
- b. The offer to the employee must be for the same salary or wages and the same number of hours as earned by the employee during the last pay period prior to the separation or reduction in hours;
- c. The offer was rejected by the employee;
- d. The borrower has maintained a written record documenting the offer and its rejection; and
- e. **The borrower informed the applicable state unemployment insurance office of such employee's rejected offer of re-employment within 30 days of the employee's rejection of the offer.**

FORGIVENESS PROCESS AND REVIEW

(1) Timing for Forgiveness Process – Once you submit your PPP Forgiveness Application (Form 3508) and all required documentation, your lender will have 60 days to review your application package and provide a determination on forgiveness to the SBA. If your lender has recommended the forgiveness of all or a portion of your SBA loan, the SBA will have 90 days after receipt of your lender's forgiveness determination to remit the appropriate forgiveness amount to your lender (subject to the outcome of any internal review by the SBA of your application).

(2) Lender Review Responsibilities – Your lender will be responsible to confirm the following to the SBA in connection with its forgiveness determination for your loan: (i) receipt from you of the proper certifications; (ii) receipt from you of the required documents supporting your payroll and non-payroll costs for which forgiveness is sought; (iii) your forgiveness application calculations; and (iv) compliance by you with the 75% rule (requiring you to spend 75% of your loan proceeds on payroll costs).

(3) Forgiveness Determination – Following your lender’s review of your forgiveness application, your lender may recommend the following to the SBA: (i) forgiveness (in whole or in part); (ii) denial; or (iii) denial without prejudice (which means that you will have the chance to request reconsideration – perhaps after the submission of additional needed information). If your lender determines that you are not entitled to forgiveness in any amount, your lender must provide that determination to the SBA together with the reason for its denial and all documents submitted as part of your forgiveness application. Furthermore, in such case your lender must provide you with notice of such denial determination. The SBA reserves the right to review your lender’s determination. Additionally, if your forgiveness application has been denied, then, within 30 days after you receive notice of your lender’s denial determination, you will have the right to request that the SBA review your lender’s decision.

(4) SBA Review Right; Notice to Borrower – The SBA made it clear that it has the right to review any PPP loan. If the SBA undertakes a review of your loan forgiveness application, the SBA will notify your lender in writing and your lender is responsible to advise you of such review by the SBA within 5 business days after the lender receives notice of such review from the SBA. As established in prior client alerts, the SBA will pay special attention to PPP loans for borrowers who (when considered with their affiliates) received loans in excess of \$2,000,000, but this does not mean that the SBA cannot also review PPP loans for lesser amounts.

(5) Document Retention Requirements – The SBA reiterated the obligation on borrowers to retain PPP related documents (including loan applications, forgiveness applications and supporting documents) in their files for a period of 6 years.

(6) Outcome of SBA Review – If your PPP loan is determined to be an ineligible loan, the SBA may: (i) direct your lender to not forgive the loan; (ii) require prompt repayment; and/or (iii) pursue other available remedies. As indicated in previous client alerts, the SBA in previous guidance has indicated its intent to simply require prompt repayment of loans determined to be ineligible and that, if such ineligible loans are promptly repaid, the SBA will not make any referrals to other government agencies for enforcement.

(7) Borrower Right to Respond to SBA Questions; Borrower Right to Appeal – If your forgiveness application is reviewed by the SBA, the SBA will provide you with the opportunity to respond to any questions that they have. This process will largely take place through your lender, but may also be addressed directly with you by the SBA. If your forgiveness application is denied in whole or in part, the SBA indicates that you will have a right to appeal that decision. The SBA intends to issue a future IFR outlining the forgiveness appeal process.

(8) Notification of Forgiveness Determination – If your forgiveness application is approved, your lender will notify you of the forgiveness amount. If the forgiveness is partial (and your PPP loan was not otherwise determined to be an ineligible loan), you will have 2 years to repay the balance of your loan with interest at 1% per annum.

Final Recommendations: We recommend that you become familiar with the details of the various Q&A sections of the IFR on Loan Forgiveness as there is a great amount of detail provided in that IFR. Also, as the forgiveness application is the beginning of a process that could take almost 5 months before a borrower receives confirmation of forgiveness (initial 60-day lender review period plus the 90 day SBA review period), we strongly recommend that each borrower commence now to prepare the information necessary to submit its application for forgiveness and that such application be filed with the applicable lender promptly following completion of the applicable 8 week covered period.