SBA Issues PPP Loan Forgiveness Application for Borrowers

UPDATE: Congress Approves Additional Modifications to Paycheck Protection Program

Late on May 15, 2020, the U.S. Small Business Administration (SBA) released its PPP loan Forgiveness Application (Forgiveness Application) for borrowers (Borrowers) under the Paycheck Protection Program (PPP). While the SBA has still not yet released interim final rules and regulations relating to PPP loan forgiveness, the Forgiveness Application provides more details on several critical questions which have been plaguing Borrowers. Although the SBA has still not provided final rules and regulation relating to PPP loan forgiveness, the new PPP Forgiveness Application provides several key clarifications regarding how PPP loan forgiveness will be calculated.

Below is a summary of key clarifications and developments found in the Forgiveness Application. Reinhart's PPP team will continue to monitor for further developments and guidance on PPP loans, including PPP loan forgiveness. If you have any questions regarding the Forgiveness Application or any aspect of your PPP loan, please reach out to your Reinhart attorney.

Forgiveness Application Format and Required Documentation

The Forgiveness Application consists of the following required elements: (1) necessary representations and certifications to be made on behalf of the Borrower by the Borrower's authorized representative; (2) the PPP forgiveness calculation form; and (3) PPP Schedule A. Borrowers will submit their completed Forgiveness Application to their PPP lender with the following supporting documentation:

- Documentation verifying the eligible payroll cost payments during the eight-week period beginning on the date of the first PPP loan disbursement (Forgiveness Period), consisting of:
    - Bank account statement or third-party payroll service provider reports documenting the amount of cash compensation paid to employees;
    - Tax forms (or equivalent third-party payroll service provider reports) for periods overlapping with the forgiveness period; and
    - Cancelled checks, receipts or statements documenting the amount of

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employer contributions to employee health insurance and retirement plans that the Borrower included in forgiveness expenses.

- Documentation showing the average number of full-time equivalent (FTE) employees on payroll per month for the comparison period selected by the Borrower for the forgiveness calculation (for non-seasonal employers, either (A) February 15 to June 30, 2019, or (B) January 1 to February 29, 2020).
- Documentation verifying the existence of mortgage and real or personal property lease obligation and utility services prior to February 15, 2020, and eligible payments relating to such obligations/services during the forgiveness period.

The Forgiveness Application also clarifies that Borrowers must maintain certain documentation relating to their PPP loan apart from what they must submit as a part of the Forgiveness Application. All Borrowers must maintain for a period of at least six years after the PPP loan is forgiven or repaid in full, the following documentation, and permit authorized representatives of SBA to access such files upon request:

- PPP Schedule A Worksheet or its equivalent, and certain specific documentation supporting various calculations thereunder; and
- All records relating to the PPP loan, including documentation submitted with the loan application, documentation supporting the Borrower's certification as to the necessity of the loan request and its eligibility for the PPP loan, documentation supporting the loan Forgiveness Application and documentation demonstrating material compliance with PPP requirements.

Costs Incurred and Payments Made

One of the most basic questions that Borrowers have faced regarding PPP loan forgiveness is with respect to the timing of the payments of qualified expenses for calculating PPP forgiveness. The Forgiveness Application clarifies that qualifying payroll costs, rent, utilities and mortgage interest expenses will count toward PPP loan forgiveness if they are either (A) paid during the forgiveness period (e.g., the payroll check is distributed or the Borrower originates an ACH credit transaction); or (B) incurred during the period and paid on or before the next regular billing date (or payroll date, as applicable).

Regarding payroll costs, the Forgiveness Application also provides that cash compensation during the forgiveness period is capped at $15,385 per individual. Any amount of cash compensation paid to an individual which exceeds this amount during the forgiveness period is not eligible for PPP loan forgiveness.

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Alternative Forgiveness Period with Respect to Payroll Costs for Some Borrowers

The Forgiveness Application provides that Borrowers with a bi-weekly or more frequent payroll schedule can elect to calculate their eligible payroll costs using the eight-week period beginning on the first day of the first pay period following the date of their first PPP loan disbursement (Alternative Forgiveness Period) rather than the Forgiveness Period. If a Borrower elects to use the Alternative Forgiveness Period, they must do so consistently across the Forgiveness Application where the SBA indicates that a Borrower may use the "covered period" or "alternative payroll covered period." Note that the Alternative Forgiveness Period cannot be used for calculating non-payroll costs (mortgage interest, rent, and utilities). Borrowers should consider whether the use of the alternative forgiveness period would have a beneficial impact on the amount of payroll costs eligible for forgiveness, as well as with respect to the FTE reduction and salary/wage reduction penalties discussed below.

FTE Employee Calculation and Safe Harbor

The CARES Act used the term "full-time equivalent" (FTE) employee without further elaboration or definition, which caused confusion and uncertainty for many Borrowers. The Forgiveness Application clarifies that Borrowers may elect to use either of two calculations for determining FTE employees.

The first calculation option is for each employee to enter the average number of hours paid per week, divide by 40 and then round the total to the nearest tenth. For example, an employee who worked an average of 33 hours per week during the applicable forgiveness period would count as 0.8 FTE (33 hours/40 hours = 0.825; round to nearest tenth, 0.8). No employee will be counted as more than 1.0 FTE, so if an employee works 40 hours or more, they will simply count as 1.0 FTE.

The second calculation option is to assign employees who work 40 hours per week or more 1.0 FTE and assign those who work less than 40 hours per week 0.5 FTE. It appears that Borrowers can use whichever calculation is more favorable for them.

The Forgiveness Application also clarifies how the FTE reduction penalty "safe harbor" will work. A Borrower will be exempt from the FTE reduction penalty to PPP loan forgiveness if (1) the Borrower reduced its FTE levels in the period beginning February 15, 2020, and ending April 26, 2020; and (2) the Borrower restored its FTE levels to the levels in the Borrower's pay period which included February 15, 2020, but not later than June 30, 2020.

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Additional FTE Reduction Exceptions

The Forgiveness Application provides that the following circumstances will not reduce a Borrower's loan forgiveness due to FTE reduction: (1) a Borrower makes a good-faith, written offer to rehire an employee during the forgiveness period which the employee rejects; (2) firings for cause; (3) voluntary resignations; and (4) voluntary requests for reductions of hours which were honored by a Borrower will not reduce a Borrower's PPP loan forgiveness if they are not offset by new employees. While the SBA previously indicated that the exception listed in (1) would apply through FAQ guidance, exceptions (2), (3) and (4) are new exceptions first referenced by the SBA in the Forgiveness Application.

Salary/Wage Reduction Penalty

Finally, the Forgiveness Application clarifies how the salary and wage reduction penalty to PPP loan forgiveness will operate. For each employee who (1) was employed by the Borrower at any point during the applicable forgiveness period; (2) whose principal place of residence is in the United States; and (3) who received compensation at an annualized rate of less than or equal to $100,000 for all pay periods in 2019 or were not employed by the Borrower at any point in 2019, the following calculation must be performed:

Divide the average annual salary (for salaried employees) or hourly wage (for hourly employees) during the forgiveness period by the average annual salary (for salaried employees) or hourly wage (for hourly employees) during the period January 1, 2020 to March 31, 2020.

If the result of this calculation is 0.75 or more, or if the Borrower qualifies for the salary/wage reduction "safe harbor" described below, there will be no salary/wage reduction penalty with respect to that employee. If the result of this calculation is less than 0.75 and the Borrower does not qualify for the salary/wage reduction "safe harbor" described below, a salary/wage reduction penalty will reduce the amount of PPP loan forgiveness by the total dollar amount of the reduction to the employee's salary exceeding 25 percent, calculated as provided in the Forgiveness Application.

A Borrower qualifies for the salary/wage reduction penalty "safe harbor" with respect to an employee if the employee's average annual salary or hourly wage (as applicable) 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.

If you have any questions about the PPP loan Forgiveness Application or any

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aspect of your PPP loan, contact your Reinhart attorney.

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