Insights

Paycheck Protection Program: Aggregated Guidance for Loans and Forgiveness

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By: Robert A. Greising and Corben A. Lee

Did you really need those PPP funds? Did you spend 75% of your PPP funds on payroll costs, or wait, is that standard 60%? Did you lay off all of your employees and are hurrying to hire them back? What if they won't come back? Do you need a few more weeks to spend your PPP funds on forgivable expenses?

Like most borrowers you have probably asked yourself some of these same questions. With each day it seems, new information comes out on the SBA's Paycheck Protection Program ("PPP"). With the numerous changes to the PPP, and the countless number of alerts that you have received from a number of resources, our firm thought it would be helpful to aggregate our current guidance concerning the PPP in one spot. And perhaps as no surprise, this reflects guidance from the SBA issued within the last 72 hours.

What is the PPP? This Program was authorized by the CARES Act enacted at the end of March, 2020 (and subsequently amended) to provide an economic stimulus as the American economy addressed the economic disruption arising out of the COVID-19 pandemic and the looming shut-down of many businesses. The CARES Act authorized a total of $659B to be made available for loans to small businesses with the promise of forgiveness of these loans if used for designated purposes, consisting primarily of payroll costs, rent, utilities and interest on mortgages.

What is the deadline for applying for a PPP loan? The deadline for applying for a PPP loan is June 30, 2020. As of June 22, 2020, over $100 billion in PPP funds remains available. So, if you have not yet applied for a PPP loan, it is not too late.

Where do I apply for a PPP loan? You can apply through an existing SBA lender. If you have a lender you have used in the past, we encourage you to reach out directly to that lender, but you can work with any participating lender. The application for this program can be found **here**.

Am I still required to make a necessity certification? In connection with the application the borrower will still need to certify that the current economic uncetainty makes the loan request necessary to support the ongoing operations of the business. This issue has been subject to significant debate of what that certification actually means. For a thorough review and discussion of considerations on whether the borrower can make that certification, please click **here**.

What are the commercial terms of a PPP loan? PPP loans made on or after June 5, 2020 have a minimum loan term of five years. PPP loans made before June 5, 2020 have a minimum loan term of two years, though borrowers and lenders may mutually agree to extend the term of the loan to five years. The maximum term of a PPP loan is ten years.

PPP loans are subject to a maximum interest rate of 1.00%, and are not subject to any prepayment penalties. Interest on the PPP loan begins on the date of the PPP loan proceeds are disbursed to the borrower.

PPP loans are not required to be secured by collateral or personal guarantees and are not subject to SBA fees. Borrowers do ***not*** need to show that they cannot find credit elsewhere, as this requirement is waived under the CARES Act.

Finally, borrowers will be able to defer payments on the balance of their PPP loan until the SBA pays back the forgiveness amount to your bank, if this applies. (If the PPP loan is fully forgiven, no payments will be needed.) If a borrower does not apply for forgiveness within ten months of the end of its covered period, loan payments commence at the end of the ten-month period.

How long do I have to spend my PPP funding to be eligible for full forgiveness? The period will be either eight weeks or 24 weeks from disbursement depending on when the loan was funded. A borrower that received funding before June 5 can choose between using the original eight-week covered period or the new 24-week covered period. Borrowers who received loans after June 5 must use the 24-week period. As a slight variation of the eight or 24-week covered period, a borrower that uses a payroll schedule that is biweekly (or more frequently) may elect for the covered period to begin on their first pay period following the PPP loan disbursement date. However, as noted later, once the borrower has used all of its PPP funds, the borrower may apply for loan forgiveness with its lender.

How does loan forgiveness work? The entire amount of a borrower's PPP loan (including accrued interest) will be eligible for forgiveness, so long as the funds are used for permitted uses. Permitted uses include (1) payroll costs, (2) payments of interest on any mortgage existing before February 15, 2020, (3) rent (including rent expense under a personal property lease agreement) under leases in place before February 15, 2020, and (4) utilities (including electric, gas, transportation, telephone, and internet access) for which service began prior to February 15, 2020. In order to maximize forgiveness, the PPP funds must be spent or incurred prior to the end of the covered period or December 31, 2020, whichever is earlier.

Payroll costs include salary, wages, commissions or similar up to $100,000 (prorated for the applicable covered period); cash tips or equivalent; payment for vacation, parental, family, medical or sick leave; group health care benefits, retirement benefits; and state and local taxes. Bonuses can be a permitted payroll costs if earned and paid during the covered period. For self-employed individuals, the maximum amount eligible for payroll costs for the eight-week covered period is $15,385, and for the 24-week covered period the maximum amount is $20,833.

In order to receive forgiveness for the entire PPP loan proceeds, the borrower must spend at least 60% of the PPP loan proceeds on payroll costs. If a borrower spends less than 60% of PPP loan proceeds on payroll costs, the amount eligible for forgiveness will be proportionately reduced. For example, if the borrower has a PPP loan for $100,000, and during the covered period spent $45,000 on payroll costs and $60,000 on non-payroll costs, the amount of the PPP loan eligible for forgiveness will total $75,000, consisting of the $45,000 spent on payroll costs and $30,000 on non-payroll costs. The remainder of the loan proceeds would be paid in accordance with the note with the lender.

Can the total amount eligible for forgiveness be reduced? The amount eligible for forgiveness will be reduced for several reasons. One of these is failure of a borrower to maintain the same number of full-time equivalent employees during the covered period versus the period from February 15, 2019 until June 30, 2019 or January 1, 2020 until February 29, 2020. The period chosen is selected by the borrower. The forgiveness amount will also be reduced by the aggregate amount of wage and salary reductions for any employee of 25% or more compared to the previous quarter (employees that make more than $100,000 are not subject to this limitation on salary reductions).

However, given the practicality that not all employers are able to bring back its employees who have been laid off or furloughed and may not be able to find suitably qualified replacements, the SBA has introduced safe harbors related to a failure to maintain the same number of full-time equivalent employees. Compliance with the safe harbors insulates a borrower from any decrease in loan forgiveness based upon a reduction in FTE levels.

Safe Harbor 1

Under this safe harbor provision, a borrower, in good faith, must document and expressly certify that it was unable to operate between February 15, 2020, and the end of the covered period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020, by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

Safe Harbor 2

This safe harbor provision updated the original FTE safe harbor contained under the CARES Act. This safe harbor provision now provides that any reduction in FTE levels or salary cuts occurring between February 15, 2020 and April 26, 2020 that is restored in full by not later than December 31, 2020 will not require a reduction in the borrower's forgiveness amount.

Safe Harbor 3

Under this safe harbor, if a borrower, in good faith, (A) is able to document (i) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020; and (ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020, the forgiveness amount will not be reduced for any reduction in headcount or wages with respect to that employee.

What form(s) do I need to complete to apply for PPP loan forgiveness? The form you need to complete to apply for PPP loan forgiveness will differ depending on your situation. Some borrowers will be required to complete the **Paycheck Protection Loan Forgiveness Application** — the most recent revised forgiveness application was issued June 16, 2020 — and submit such application to their PPP lender. However, the **Paycheck Protection Program Loan Forgiveness Application Form 3508EZ** is a simplified forgiveness application for certain borrowers. In order for a borrower to be eligible to use this form, it must satisfy **at least one** of the following:

- The borrower is self-employed and has no employees.
- The borrower did not reduce salaries or hourly wages of its employees by more than 25% for any employee during the Covered Period or Alternative Payroll Covered Period compared to the period between January 1, 2020 and March 31, 2020 and did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the covered period. However, there is an exception when a reduction in the number of employees is due to the borrower's inability to rehire individuals and a reduction in an employee's hours is the result of an employee's refusal to restore such hours.
- The borrower experienced reductions in business activity due to compliance with COVID-19 health directives and did not reduce the salaries or wages of their employees by more than 25%.

A borrower may submit its loan forgiveness application any time on or before the maturity date of the loan – including before the end of the covered period (based on guidance issued June 22, 2020) – if the borrower has used all of the loan proceeds for which the borrower is requesting forgiveness. If the borrower applies for

forgiveness before the end of the covered period and has reduced any employee's salaries or wages in excess of 25 percent, the borrower must account for the excess salary reduction for the full eight or 24-week covered period. So, for example, if the borrower has a 24-week covered period, and expends all of its funds by week 15, it may apply for forgiveness following week 15.

When will my loan be forgiven? Once a borrower has applied for forgiveness, the lender must issue a loan forgiveness decision to the SBA within 60 days after receiving a complete loan forgiveness application. The SBA will remit the appropriate forgiveness amount to the lender, not later than 90 days after the lender issues its decision to the SBA.

Will my loan forgiveness application be reviewed by the SBA? If your PPP loan proceeds were less than $2 million dollars, then it is unlikely that your forgiveness application will be reviewed by the SBA (although the SBA has indicated that it still has the option to review these applications). If you received PPP funds in excess of $2 million dollars the SBA will review your forgiveness application. The SBA has indicated that it will review various aspects of the loan origination certifications, such as the good faith certification that the funds were necessary for the borrower, as well as the eligibility for forgiveness.

What documents will I need to submit with my forgiveness application? The borrower has the responsibility to provide sufficient documentation to the lender to support the amount of forgiveness that is requested. The forgiveness application provides suggestions for the type of documentation that will sufice, such as receipts, bank account statements or cancelled checks for payment utilities, rent and mortgage interest with copies of relevant agreements and payroll records, tax forms, bank statements or cancelled checks for payroll costs.

Krieg DeVault is committed to helping you and your business during these unprecedented times. With your needs in mind, we have established a **COVID-19 Resource Center** to assist you through this process.

If you have any further questions, comments or concerns, please feel free to contact **Robert A. Greising**, **Corben A. Lee** or a member of our **Business, Acquisitions & Securities team**.