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NEW PPP LOAN APPLICATION AND INTERIM FINAL RULE REVISIONS

The Small Business Administration (SBA) published a new Paycheck Protection Program (PPP) borrower loan application form as well as additional rules on June 11 and June 12 (Interim Rules) addressing recent PPP changes made by the Paycheck Protection Program Flexibility Act of 2020 (PPPFA). A revised lender guaranty application form was also published to incorporate the changes. The borrower-friendly changes under the PPPFA expand the PPP loan terms for small businesses seeking to have their loans fully forgiven. Additional changes to the loan forgiveness application and guidance are expected to be issued in the near future. The Interim Rules address the following points:

- Expanded coverage period for loan forgiveness
- Revised safe harbor cure dates
- New full-time equivalent (FTE) rule exemptions
- Expanded ratio of nonpayroll costs eligible for forgiveness
- Expanded loan maturity date
- Extended loan deferral period
- Changes to PPP loan eligibility rules

Expanded Coverage Period for Forgiveness

The PPPFA extends the coverage period for determining the payroll and nonpayroll costs eligible for forgiveness to the earlier of 24 weeks after the origination of the loan or Dec. 31, 2020. Previously, the measuring period was determined as the eight-week period commencing on the date the borrower's PPP loan was disbursed. Subsequent guidance had given borrowers the option to use an "alternative payroll covered period" determined as the eight-week period commencing at the beginning of the borrower's first full pay period following the PPP loan disbursement date. The new rules give borrowers a more generous 24-week period for which eligible costs can be claimed for forgiveness. Under the new Interim Rules, borrowers who received a PPP loan prior to the enactment of the PPPFA on June 5, 2020, may elect to either have their covered period end on the date that is eight weeks after the date of their loan origination or utilize the new 24-week covered period.

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Revised Safe Harbor Cure Dates

Another change presented by the PPPFA and addressed in the new Interim Rules is an extension of the safe harbor date that previously required borrowers to return to their average FTE employee level measured against a selection of approved measuring periods by June 30, 2020, in order to obtain full loan forgiveness. While borrowers must still demonstrate that they have maintained their FTE count during their selected measuring period, the safe harbor date has been extended to provide borrowers until Dec. 31, 2020, to return their FTE levels back to pre-PPP loan levels. Similarly, borrowers also now have until Dec. 31, 2020, to return their wages for any employee earning less than $100,000 back to at least 75% of the level of such wages during a pre-pandemic lookback period.

New FTE Rule Exemptions

The PPPFA provides further relief from the FTE maintenance rule under two additional circumstances. First, borrowers who can demonstrate in good faith that (i) they could not rehire employees who had been employees of the borrower on Feb. 15, 2020, and (ii) they could not find a similarly qualified employee to fill a vacated position by Dec. 31, 2020, will now be exempt from having their loan forgiveness amount reduced for these reasons. Second, borrowers who are able to document an inability to return to the same level of business activity as before Feb. 15, 2020, due to their "compliance with requirements established or guidance issued 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 during the period beginning March 1, 2020, and ending Dec. 31, 2020, related to the maintenance of standards for sanitation, social distancing or other worker or customer safety requirements related to COVID-19" will also be exempt from the FTE level maintenance requirement. At this time, the supporting documentation necessary for a borrower to be able to qualify for these exemptions is unknown.

New Ratio of Nonpayroll Costs Eligible for Forgiveness

The PPPFA also changes the ratio of what a covered loan amount must be used for to claim forgiveness. Previously, at least 75% of the PPP loan costs were required to be expended for eligible payroll costs during the covered period. Now, under the PPPFA, only at least 60% of the covered loan amount must be used for eligible payroll costs. This change gives borrowers more opportunity to have their eligible nonpayroll costs forgiven. The SBA notes in the Interim Rules that it interprets this provision of PPPFA as presenting a "proportional limit on nonpayroll costs as a share of the borrower's loan forgiveness amount, rather than as a threshold for receiving any loan forgiveness," clarifying that partial loan forgiveness will still be available if the 60% payroll costs threshold is not met. The new ratio is expected to help borrowers with large amounts of rent, utilities or a covered mortgage to be in a better position to maximize their loan forgiveness eligibility.

Expanded Loan Maturity Date

The PPPFA also changes the maturity date for the repayment of the portions of any PPP loan that are not eligible for forgiveness. The new maturity date is expanded from the original two-year repayment term to a minimum five-year term. This change will apply to PPP loans originated on or after June 5, 2020. PPP loans with an origination date prior to June 5, 2020, will retain the two-year loan maturity date unless the borrower and lender agree to a change. Under the Interim Rules, borrowers and lenders of PPP loans originated before June 5, 2020, can mutually agree to extend the maturity of such loans to five years.

Extended Loan Deferral Period

The PPPFA extends the deferral period for payment of a PPP loan. Under the PPPFA, provided that a borrower submits a loan forgiveness application within 10 months after the last day of the covered period, the borrower may defer payment on the principal or interest on the loan (i) until the date on which the amount of the loan forgiveness is determined by the SBA and is remitted by the SBA to the borrower's lender, or (ii) the date SBA notifies the borrower's lender that forgiveness of the borrower's loan is not allowed.

Expanded PPP Eligibility for Borrowers with Criminal History

The Interim Rules released on June 12 narrow a PPP eligibility exclusion that had been previously announced by the SBA for any company whose owners include a person convicted of a felony within the last five years who owns 20% or more of the company's equity. In the new Interim Rules, however, the SBA has narrowed the felony exclusion to cover only a business with an owner of 20% or more of the equity in the business who is incarcerated, on probation, or on parole; presently subject to an indictment, criminal information, arraignment or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony involving fraud, bribery, embezzlement or a false statement in a loan application or an application for federal financial assistance **within the last five years,** or any other felony within the last year.

For additional information, please see our prior analysis of the SBA's frequently asked questions regarding PPP eligibility and payroll costs, application of the SBA's affiliation rules to the PPP, the SBA's initial PPP Interim Final Rule, the Treasury's initial guidance on the PPP, SBA lending program provisions of the CARES Act, SBA clarification of various PPP eligibility issues in the Interim Final Rule, SBA guidance on PPP loans, "payroll costs" and the PPP loan forgiveness application and instructions. Armstrong Teasdale attorneys are actively monitoring and providing updates regarding the impact of COVID-19, including the PPP and other provisions of the CARES Act. Should the Treasury or the SBA provide additional guidance, we will be sure to update you.