Paycheck Protection Program Update: SBA Releases Rules to Clarify Loan Forgiveness and Loan Review

Client Alert

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On May 22, 2020, the Small Business Administration (SBA) released two new interim final rules to clarify the administration of loans under the Paycheck Protection Program (PPP).

The first interim rule confirms the guidance provided in the loan forgiveness application, as previously reported:

- Full time employees are based on a 40-hour workweek, and the borrower has a choice in the method of calculating part-time employees.
- The 8-week period for disbursement can begin on the date of loan disbursement or the first day of the first payroll cycle after the loan disbursement.
- The borrower can include employees for which the borrower made a bona fide offer to rehire and the employee refused.
- The borrower can also include employees who were fired for cause, employees who voluntarily resigned and employees who voluntarily requested and received a reduction in hours.
- The rule reinforces that **June 30 is a critical date** to rehire or offer to rehire employees who have been furloughed in order to maximize the amount of loan forgiveness. This provides borrowers with an opportunity to cure reductions in employees and salary reductions.

The second interim final rule provides guidance as to the SBA review of loan forgiveness applications:

- The SBA has advised that it could review **any PPP loan**, regardless of the amount.
- The SBA may review the borrower's eligibility for the loan, based on the rules and guidance at the time of the loan application. This appears to be focused on the borrower eligibility requirement and does not change the prior guidance that the SBA will not challenge the good faith certification as to the necessity for obtaining the

loan for loans under $2 million, however the SBA still may review the eligibility of the borrower without regard to the amount of the loan.

- The SBA may also review the calculation of the loan amount, use of proceeds and amount of loan forgiveness sought.
- The SBA may undertake a loan review at any time for a loan of any size, and the focus will not just be on the certification for the necessity of the loan. Further, the borrower must retain its PPP documentation in its files for six years.
- If the SBA conducts an inquiry, the borrower will have an opportunity to respond. If the borrower does not respond to the inquiry, that may result in a determination that the borrower was ineligible for the PPP loan. If the SBA determines that the borrower was ineligible, the loan will not be forgiven, and the SBA may seek repayment of the loan balance or pursue other remedies.
- If the SBA determines that the borrower was ineligible for a loan, the lender will not be entitled to a processing fee and may be required to repay fees already paid to the lender.
- There will be an appeal process available to challenge an SBA decision, but the rules have not yet been established.
- The new interim rule provides guidance for lenders to review the loan forgiveness application and to perform a good-faith review of the borrowers' calculations and supporting documentation.
- Lenders have a 60-day period to review a loan forgiveness application and issue a determination to the SBA, and the SBA will have a 90-day period to review the PPP loan and forgiveness documentation.

We will continue to monitor developments related to the PPP loan program and will provide updates accordingly.

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