

MEMORANDUM

DATE: June 29, 2020

RE: Latest Update: Paycheck Protection Program Loans

The SBA has released a virtual flurry of updates and changes to the PPP Loan Program resulting largely from the Paycheck Protection Program Flexibility Act enacted on June 5th. Some of the highlights are discussed below.

Loan Forgiveness Application – There are now two loan forgiveness applications: a “regular” form and an “EZ” form. The EZ form is, as the name suggests, a simpler and easier application. You may use the EZ form if you can certify the following:

- You did not reduce wages or salaries for employees earning less than \$100,000/year by more than 25% during the 8-week or 24-week covered period (whichever one you are using), as compared to January 1-March 30, 2020; AND
- Either:
 - You did not reduce the number of employees or the average paid hours of employees between January 1 and the end of your covered period, aside from reductions due to an inability to hire similarly qualified individuals for unfilled positions and reductions in employee hours that you offered to restore but were refused; OR
 - You were unable to operate between February 15, 2020 and the end of your covered period due to compliance with requirements established or guidance issued between March 1--December 31, 2020 by certain federal agencies related to sanitation, social distancing, or safety for COVID-19. The new rules make clear that this includes the “indirect” effect of state and local shut-down orders based in part on guidance from those federal agencies (HHS, CDC, and OSHA).

When to Apply for Forgiveness – The new rules and application make clear that you can apply for forgiveness before the end of your covered period (as long as you have spent all of the money for which you are seeking forgiveness.) There are at least two critical items to consider if you want to apply early:

- First, if you have reduced salaries or wages by more than 25% and you apply for forgiveness before the end of the covered period, then you must account for the salary and

wage reductions for the full 8-week or 24-week covered period, as applicable. In other words, you must compute the loan forgiveness reduction as though the wage or salary reduction extended throughout the covered period.

- Second, the rule does not state what happens if you have FTE reductions that will reduce forgiveness. Presumably, the same rule will apply. In addition, if your loan forgiveness will be reduced because of FTE reductions, you can take advantage of the safe harbor by restoring, on or before December 31, 2020, any FTE reductions that occurred between February 15-- April 26, 2020. Presumably, if you apply for forgiveness before you have met the safe harbor, then you will not be able to use that safe harbor.

December 31 Safe Harbor – Please note that the safe harbor permits you to make up FTE or wage reductions on or before December 31, 2020. If you have made up those reductions by August 15, for example, you don't need to wait until December 31 to apply for loan forgiveness.

60% Requirement for Payroll Costs – The PPP Flexibility Act permits borrowers to use up to 40% of loan proceeds on non-payroll costs. The language of the Act suggested that using less than 60% for payroll would have made a borrower ineligible for forgiveness. However, the SBA has clarified that you can use less than 60% of the loan for payroll, but then your forgiveness will be proportionally reduced. For example, if you have a \$100,000 loan and use only \$54,000 for payroll costs, then your maximum forgiveness amount will be \$90,000.

Forgivable Owner Compensation – The maximum amount of compensation eligible for forgiveness, for owner-employees, general partners, and self-employed individuals, has been updated. If you use the new 24-week covered period, the maximum amount of forgiveness per owner-employee, general partner, or self-employed individual is the lesser of (a) \$20,833 or (b) 2.5/12 (approximately 20.83%) of that person's 2019 compensation. Otherwise, for the 8-week covered period, it remains the lesser of (x) \$15,385 or (y) 8/52 of that person's 2019 compensation.

C corporation owner-employees may separately add employer retirement and health insurance contributions made on their behalf to their forgivable compensation. S corporation owner-employees may separately add only employer retirement contributions made on their behalf to their forgivable compensation. However, neither of these expenses are eligible for forgiveness for general partners or self-employed individuals.

Processing of Loan Forgiveness Applications – Lenders have 60 days after you submit your loan forgiveness application to process the application and issue a decision on forgiveness to the SBA. The SBA then has 90 days to remit the forgiveness amount or deny the lender's decision (if it elects to review the decision). Loans in excess of \$2 million are subject to mandatory SBA review, while loans less than \$2 million can be, but are not guaranteed to be, reviewed (if you "win" the SBA audit lottery).

For more information, please contact Katherine Moyer at kmoyer@hershnerhunter.com or Pablo Valentine at pvalentine@hershnerhunter.com.

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This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.