SHARTSIS FRIESE LLP

Client Alert: SBA Releases Paycheck Protection Program Loan Forgiveness Application and Rules

On May 15, 2020, the Small Business Administration (SBA) issued the Paycheck Protection Program (PPP) loan forgiveness application, including instructions for PPP borrowers to fill out the application. The application consists of a PPP Loan Forgiveness Calculation Form, a PPP Schedule A, a PPP Schedule A Worksheet and an optional PPP Borrower Demographic Information Form. The application and instructions can be found here.

Additionally, on May 22, 2020, SBA released a pair of interim final rules regarding the PPP loan forgiveness criteria and application process. These two new interim final rules (together, the "Interim Rules") supplement the information set forth in the forgiveness application form and instructions. The Interim Rules can be found here and here.

Loan Forgiveness Application

To apply for PPP loan forgiveness, borrowers must complete the PPP Loan Forgiveness Calculation Form and PPP Schedule A, and submit them to the same lender that originated the borrower's PPP loan, together with all documents identified in the application and instructions. The application can be completed electronically through the lender.

The Interim Rules state that PPP lenders have 60 days from receipt of a completed application to issue a forgiveness decision to SBA. SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA. If only a portion of the loan is forgiven, or if the forgiveness request is denied, any remaining balance due on the loan must be repaid by the borrower on or before the two-year maturity of the loan. The Interim Rules state that borrowers may appeal SBA's determination that the borrower is ineligible for a PPP loan or ineligible for the loan amount or the loan forgiveness amount claimed by the borrower, and that it will issue further guidance regarding this appeal process.

The PPP loan forgiveness application and Interim Rules include various updates and clarifications regarding the to the PPP loan forgiveness process.

Key Takeaways

- ***Alternative Payroll Covered Period***. The application simplifies the method by which certain borrowers may calculate payroll costs . Under the CARES Act, only payroll costs paid during the period of eight weeks (56 days) beginning on the date the borrower received its PPP loan disbursement (the "Covered Period") are eligible for forgiveness. The application permits borrowers with bi-weekly (or more frequent) payroll schedules to calculate their eligible payroll costs using an alternative covered period that spans eight weeks (56 days) beginning on the first day of the first pay period following the date the borrower received its PPP loan (the "Alternate Payroll Covered Period"). This Alternative Payroll Covered Period only applies to payroll costs, however, and does not apply to non-payroll costs (*e.g.*, covered mortgage interest payments, rent and utility payments). If a borrower uses the Alternative Payroll Covered Period, the borrower must identify that period on the application. In addition, a borrower who elects to use the Alternative Payroll Covered Period must use it consistently whenever the application gives the borrower the option to use either the Alternative Payroll Covered Period or the Covered Period (*e.g.*, when determining if there has been a reduction in the borrower's full-time equivalent employees, as described below).

- ***Eligible Costs Paid or Incurred During the Covered Period***. Payroll costs paid during the Covered Period or Alternative Payroll Covered Period are eligible for forgiveness. Payroll costs are considered paid on the day that paychecks are distributed or an ACH credit transaction is originated. In addition, payroll costs incurred but not paid during the borrower's last pay period of the Covered Period or Alternative Payroll Covered Period are eligible for forgiveness if they are paid on or before the next regular payroll date. Payroll costs are considered incurred on the day that the employee's pay is earned.

  Similarly, eligible non-payroll costs may either be paid during the Covered Period or incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period. Borrowers may not double count payroll costs and non-payroll costs that were both paid and incurred during the Covered Period or Alternative Payroll Covered Period.

  The Interim Rules clarify that the "paid" and "incurred" rules are intended to allow borrowers to include non-payroll costs that were incurred over a period of more than 8 weeks (*e.g.*, prior covered mortgage interest payments, rent and utility payments), subject to SBA's requirement that no more than 25% of the forgiven amount of a PPP loan may be used to pay non-payroll costs.

- ***Leases of Personal Property and Utility Payments*** - The CARES Act provides that rent obligations under leasing agreements in force before February 15, 2020 are eligible for forgiveness. The application clarifies that this includes payments pursuant to lease agreements for personal property, in addition to leases agreements for real property. The application also specifies that covered utility payments are business payments for a service for the distribution of electricity, gas, water, transportation, telephone or internet access.

- ***Bonuses, Hazard Pay, and Payments to Furloughed Workers Eligible for Forgiveness***. The Interim Rules state that special hazard pay and bonuses paid to employees during the applicable covered period are "Payroll Costs" and thus may be eligible for forgiveness (subject to the overall annualized compensation cap of $100,000 per employee). The Interim Rules do not specify whether there needs to be any particular reason or reason at all for payment of such bonuses or hazard pay. Moreover, the Interim Rules state that if a borrower pays furloughed employees their salary, wages, or commissions during the applicable covered period, those payments are eligible for forgiveness even if those employees are not able to perform their day-to-day duties, whether due to lack of economic demand or public health considerations (subject to the overall annualized compensation cap of $100,000 per employee).

- ***Forgiveness Caps on Owner-Employees, Self-Employed Individuals and General Partners.*** The amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation can be no more than the lesser of 8/52 of 2019 compensation (*i.e.*, approximately 15.38 percent of 2019 compensation) or $15,385 per individual in total across all businesses.[1] However, unlike self-employed individuals and general partners, owner-employees (*e.g.*, C-corp and S-corp shareholders) can count retirement plan expenses and health plan expenses in their payroll costs.

- ***Determining Full-Time Equivalent Employees***. The CARES Act provides that a borrower's PPP loan forgiveness amount must be reduced due to a reduction in full-time equivalent employees (FTEs), but does not define how the number of FTEs will be calculated. The application clarifies that a borrower's FTEs are calculated using the average number of hours paid to each employee per week, divided by 40 (rounded to the nearest tenth), with the maximum for each employee capped at 1.0. The application permits borrowers to elect a simplified method that assigns a 1.0 for each employee who works 40 hours or more per week and 0.5 for each employee who works fewer hours per week.

- ***Calculation of Reductions Based on Reductions in Compensation***. The application provides a worksheet for calculating reductions to the amount to be forgiven based on reductions in employee compensation. The application clarifies that reductions to compensation will be measured by comparing the average annual salary or hourly wage of each employee during the Covered Period or Alternative Payroll Covered Period to that employee's average annual salary or hourly wage between January 1, 2020, and March 31, 2020.

  In addition, the application clarifies that in determining a borrower's forgivable loan amount, salary and hourly wage reductions are applied first, before applying any reduction based on reductions in FTE. Also, to ensure that borrowers are not doubly penalized, the Interim Rules state that the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is not attributable to the FTE reduction. For example, if an hourly employee's hours are reduced during the applicable covered period but his/her hourly wage is not reduced during the same period, the only reduction that would apply would be the FTE reduction.

- ***Exceptions from FTE Reductions***. In determining whether a borrower's forgiveness amount will be reduced by any reduction in FTEs, the termination or reduction in hours of an employee under the following circumstances will not be included: (1) the borrower made a good-faith, written offer to rehire the employee during the Covered Period or the Alternative Payroll Covered Period, which was rejected by the employee; or (2) during the Covered Period or the Alternative Payroll Covered Period the employee (a) was fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of the employee's hours. If a borrower intends to rely on either of these exceptions, it should carefully document the facts on which it is relying and maintain such documentation for at least 6 years, as described below.

  Additionally, to qualify for the FTE exception, a borrower whose re-employment offer is rejected must inform the applicable state unemployment insurance office of such employee's rejected offer within 30 days of such rejection. In a footnote, the Interim Rules state that further information regarding how borrowers will report information concerning rejected rehire offers to state unemployment insurance offices will be provided on SBA's website.

  The application also clarifies that the borrower is not required to complete the proportionate reduction calculation if it has not reduced the number of its employees or the average paid hours of its employees between January 1, 2020 and the end of the Covered Period.

[1] General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235.

- ***Loan Forgiveness Amount***. The application provides that a borrower's loan forgiveness amount will equal the lowest of (1) the PPP loan amount, (2) the borrower's payroll costs during the Covered Period or Alternative Payroll Covered Period divided by 0.75, or (3) the borrower's aggregate eligible costs (payroll costs, business mortgage interest payments, lease payments and utility payments) reduced by any wage reduction and any proportionate reduction based on FTE reduction. The second alternative (the borrower's payroll costs divided by 0.75) is not included in the CARES Act, but is intended to implement SBA's requirement that no more than 25% of the forgiven amount of a PPP loan may be used to pay non-payroll costs.

  This provision creates some ambiguity, because limiting the maximum loan forgiveness amount to the amount of the PPP loan makes it unclear whether interest that has accrued on a PPP loan will be forgiven. SBA had previously indicated that interest would be eligible for forgiveness, but the application makes this ambiguous again.

- ***Certifications***. The application requires each borrower to confirm whether or not its PPP loan (together with any PPP loans received by its affiliates, if applicable) exceeds $2 million. In addition, the borrower must certify certain facts, including that the amount for which forgiveness is requested was used to pay eligible costs and has been accurately calculated, that the borrower has submitted documents verifying those costs, that the information in the application is true and correct in all material respects, and that the tax documents submitted with the application are consistent with those that the borrower has or will submit to the IRS or a state tax or workforce agency. In addition, the borrower must acknowledge and agree that SBA may request additional information for purposes of evaluating the borrower's eligibility for the PPP loan and for forgiveness of the loan amount, and that the borrower's failure to provide information requested by SBA may result in a determination that the borrower was ineligible for the PPP loan or the denial of the application for loan forgiveness.

- ***Record Retention***. The application requires borrowers to maintain certain records that are not required to be submitted with the application, including documentation supporting employee compensation information in the worksheets to the application for forgiveness, documentation regarding job offers, refusals, firings for cause, voluntary resignations and written request by employees for work schedule, and documentation supporting the FTE reduction safe harbors. Such records must be retained for at least 6 years.

- ***SBA Review of PPP Loans***. The Interim Rules state that SBA is authorized to review (a) borrower eligibility, (b) loan amounts and use of proceeds, and (c) forgiveness amounts. The Interim Rules also state that SBA may undertake a review of a PPP loan of any size at any time in SBA's discretion.

Additional Resources

For additional background on small business loans available under the CARES Act, including PPP loans, please see our Client Alert on Small Business Loans under the CARES Act, available here. For additional background on SBA's guidance with respect to PPP loans, please see our Client Alerts on SBA Updates to PPP loans here, here, here and here . Due to the recent adoption of the CARES Act, interpretation of some of its provisions is uncertain, and it is subject to additional clarification and interpretation by Treasury, IRS, SBA and other federal regulatory agencies.

If you need more information, or if you are considering relying on this relief, please contact one of the attorneys in the Corporate Group at Shartsis Friese LLP: P. Rupert Russell, Anthony J. Caldwell, Michael

B. Dell, Jeffrey L. Braker, David Suozzi, Elizabeth Sparrowe Marcil, Sergio A. Broholm or Maribeth T. Charvet.