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Insights

New PPP Updates Since the Passing of the Paycheck Protection Program Flexibility Act

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06.16.2020

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Since the Paycheck Protection Program Flexibility Act (the "Flexibility Act") was passed on June 5, 2020, the SBA has released several updates to the Program, including the June 11, 2020 Interim Final Rule on Revisions to First Interim Final Rule and the June 12, 2020 Interim Final Rule on Additional Revisions to First Interim Final Rule.

The new Interim Final Rules appear to primarily implement the Flexibility Act and provide additional guidance to borrowers and lenders. Notably, the Rules indicate that the extended maturity date under the Flexibility Act (5 years as opposed to 2 years) will only apply to loans made on or after June 5, 2020. It will be up to lenders and borrowers to determine whether the maturity date will be extended on loans prior to June 5. However, all other changes in the Flexibility Act appear to be retroactive to March 27.

As codified in the Flexibility Act, the loan forgiveness covered period was increased from 8 weeks to 24 weeks. Borrowers with a PPP loan prior to June 5 will have the option to choose between 8 weeks or 24 weeks in which to spend the PPP proceeds, but post-June 5 borrowers must use the 24-week period.

The Rules also provided critical information as to the new 60/40 ratio that was introduced by the Flexibility Act. While borrowers initially needed to spend 75% of the PPP loan proceeds on payroll costs, the Flexibility Act lowered this spending requirement to 60%. However, the Rules indicate that the Secretary of Treasury is interpreting the 60% requirement as a "proportional limit on nonpayroll costs as a share of the borrower's loan forgiveness amount, rather than a threshold for receiving *any* loan forgiveness." This borrower-friendly interpretation will prevent borrowers who happen to spend less than 60% of the loan proceeds on payroll costs from being completely ineligible for any amount of forgiveness, in accordance with the Flexibility Act's safe harbor, but the forgiveness amount will be reduced proportionately. However, in order to be eligible for 100% forgiveness of both principal and accrued interest, a borrower must spend at least 60% of the funds on payroll costs.

The new Rules went on to reiterate the interplay between EIDL and PPP loans. The Rules state, "[i]f you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to $10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan."

Finally, the Rules require that borrowers submit their loan forgiveness applications within 10 months of the 8 or 24-week period, as determined above. If the application is not submitted by that deadline, borrowers will be required to begin payment of principal and interest on the loan, but the Rules fail to provide further specificity on such payments.

In addition to the new Rules, a new Borrower Application was released on June 12, which updated the form in accordance with the Flexibility Act and addressed eligibility for convicted felons. This topic was discussed between Secretary Mnuchin and the Senate Committee on Small Business and Entrepreneurship on June 10, which was chaired by Florida Senator Marco Rubio. The previous rule that applicants with a felony conviction in the past 5 years could not apply for PPP loans was reduced to 1 year unless the applicant or 20% owner is currently subject to an indictment, criminal information, arraignment or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole. However, the 5-year rule still applies if the charges included fraud, embezzlement, robbery or a false statement on a loan application or an application for federal financial assistance. Further, if a borrower entity is owned by an ex-felon who holds more than 20% of the equity in such entity, then these prohibitions will also apply to the entity.

During the Senate Committee meeting, Secretary Mnuchin indicated that the forgiveness application was being rewritten to make the application less complicated. We anticipate that additional Rules and a new forgiveness application are forthcoming to provide guidance on the yet unanswered questions arising out of the ever-evolving SBA PPP loan program. Please contact the Lowndes COVID-19 Practice Group with all of your PPP-related questions.