

## **Paycheck Protection Program: Small Business Administration Issues Interim Rules for Loan Forgiveness**

Since the implementation of the Paycheck Protection Program with the passage of the Coronavirus Aid, Relief, and Economic Security Act (H.R. 748) (the “CARES Act”),<sup>1</sup> eligible businesses that have received loans under the program, as well as the lenders who make the loans, have eagerly awaited guidance on forgiveness of up to 100% of the principal amount of these loans. On May 15, 2020, the Treasury Department and the Small Business Administration (the “SBA”) released the form of application for loan forgiveness under the Paycheck Protection Program (the “Loan Forgiveness Application”).<sup>2</sup> On May 22, 2020, the SBA issued two interim rules (13 C.F.R. Part 120) (the “Interim Rules”) codifying and clarifying the instructions in the Loan Forgiveness Application.<sup>3</sup> This memorandum discusses the additional guidance provided in the Interim Rules not discussed in the Loan Forgiveness Application and instructions.

### **I. Clarification on Payroll Costs**

The Interim Rules provide additional clarification on payroll costs that are eligible for forgiveness under the Paycheck Protection Program. The Loan Forgiveness Application confirms payroll costs incurred or paid during the covered period are eligible for forgiveness. The Interim Rules provide that payroll costs are considered to be “incurred” on the day the employee’s pay is earned, meaning the day the employee worked. If the employee is not performing work, but is on the borrower’s payroll, payroll costs are “incurred” according to a schedule established by the borrower, which is likely to be based on the days the employee would have worked. Furthermore, the Interim Rules confirm that salary, wages or commission payments to furloughed employees are considered payroll costs and are eligible for loan forgiveness. Additionally, hazard pay and bonuses are considered payroll costs and are eligible for forgiveness as long as the employee receiving such hazard pay or bonus does not receive total annual compensation over \$100,000.

The Interim Rules provide further guidance for owner-employees, self-employed individuals, and general partners. Compensation to owner-employees and self-employed individuals is capped at the lesser of 8/25 of their total compensation for 2019 or \$15,385. For owner-employees, this amount includes cash compensation, and employer retirement and health care contributions made on their behalf. General partners’ compensation is capped at 92.35% of their 2019 net earnings from self-employment (reduced by expense deductions claimed under section 179 of the United States Internal Revenue Code, unreimbursed partnership expenses, and depletion from oil and gas properties). Forgiveness is not available for retirement or health insurance contributions for self-employed individuals and general partners.

### **II. Reduction in Full-Time Equivalency and Salary/Wage Reduction**

The Interim Rules also clarify that if salary and wages are reduced due to a decrease in full-time equivalency, the borrower will not be penalized a second time under the salary/wage reduction. Stated differently,

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<sup>1</sup> For information on the low-interest rate loan programs available to small businesses and not-for-profit organizations with fewer than 500 employees, see our memorandum “The CARES Act: What Small Business Owners and Not-for-Profit Organizations Need to Know,” found [here](#).

<sup>2</sup> The Loan Forgiveness Application form and related instructions and worksheets can be found [here](#). For information on the guidelines outlined in the Loan Forgiveness Application and instructions, see our memorandum “Paycheck Protection Program: Guidelines for Loan Forgiveness,” found [here](#).

<sup>3</sup> The full text of the Interim Rules can be found [here](#) and [here](#).

the salary/wage reduction *only* applies to the portion of the reduction in employee salary and wages that is not attributable to a decrease in full-time equivalency. For example, if an hourly employee works fewer hours and therefore earns less money, the business will not be penalized for both reducing the employee's hours and reducing that employee's total wages. However, if the business reduces both an hourly employee's hours and that employee's hourly wage by more than 25%, then forgiveness may be reduced due to a reduction in full-time equivalency and under the salary/wage reduction.

### III. Loan Forgiveness Process and Review

Once an application for forgiveness is submitted, a lender is expected to perform a good-faith review of the borrower's calculations and supporting documents for loan forgiveness. A lender has 60 days from receipt of the complete application to issue a decision to the SBA with the PPP Loan Forgiveness Calculation Form, PPP Schedule A, and PPP Borrower Demographic Information Form (if submitted to the lender). If the lender determines that the borrower is entitled to forgiveness in full or in part, the lender will also request payment from the SBA. If the lender determines that the borrower is not entitled to forgiveness, it must provide the SBA with the reason for denial. The lender is responsible for notifying the borrower of the amount to be forgiven or that the lender has issued a decision to the SBA denying the loan forgiveness application. A borrower may request that the SBA review the lender's decision within 30 days of notice from the lender. Within 90 days of a lender's request for payment, the SBA will remit to the lender the appropriate forgiven amount plus any accrued interest. If the amount the SBA remits to the lender exceeds the remaining principal balance of the loan because the borrower made payments on the loan prior to the final determination regarding forgiveness, the lender must forward the excess amount to the borrower. Borrowers must retain copies of all submitted documentation for six years after the loan is forgiven or repaid in full.

The SBA may undertake a review of any loan or forgiveness application at its discretion, regardless of the size of the loan. The SBA will review applications relating to loans that are in excess of \$2 million. If the SBA undertakes such a review, within five business days, the lender must submit the Borrower Application Form, the Loan Forgiveness Application, a signed and certified transcript of account, a copy of the executed note evidencing the loan, and any other documents relating to the loan requested by the SBA. If such documentation indicates that the borrower may not be eligible for forgiveness, the lender must request additional information from the borrower in writing and provide any such additional information to the SBA. While review is pending, the lender may not approve any Loan Forgiveness Application for such loan. If, within one year after the loan was disbursed, the SBA determines that the borrower was ineligible for a loan under the Paycheck Protection Program, the SBA will seek repayment of the lender processing fee from the lender.

### IV. Conclusion

The Interim Rules provide businesses receiving loans under the Paycheck Protection Program, and their lenders, much-needed clarification on the process and requirements for forgiveness of their loans. The SBA has stated that it intends to issue an additional interim rule regarding the appeal process if it is determined that a loan is ineligible for forgiveness.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Helene R. Banks at 212.701.3439 or [hbanks@cahill.com](mailto:hbanks@cahill.com) or Robyn Sablove at 212.701.3753 or [rsablove@cahill.com](mailto:rsablove@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).