

# SBA Issues Additional Loan Forgiveness Guidance

By Bruce L. Blasnik, CPA, CGMA, Partner

Late yesterday, June 22, the SBA issued a Paycheck Protection Program (PPP) Interim Final Rule (IFR) on *Revisions to Loan Forgiveness and SBA Loan Review Procedures*. This IFR incorporates the changes made by the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) into the existing PPP guidance. It clarifies some existing guidance and provides meaningful new guidance regarding the filing date of the Loan Forgiveness **Application**, Forms 3508 and 3508EZ (Applications).

## Filing Dates Clarified

The IFR provides that a Borrower may submit a Loan Forgiveness Application any time on or before the maturity date of the loan – including before the end of the Covered Period – if the Borrower has used all of the loan proceeds for which the Borrower is requesting forgiveness. Under prior guidance, it was not clear whether the Application could be filed before the end of the 24-week (or 8-week) Covered Period.

This clarification is welcome news for many Borrowers who are anxious to move forward with the forgiveness process. The one caveat is that if the Borrower reduced any employee's salary or wages in excess of 25 percent during the Covered Period, the excess wage reduction must be computed as if it continued for the entire 24-week (or 8-week) period.

The IFR also makes it clear that a Borrower can apply for loan forgiveness even after the loan deferral period has expired (which is the date 10 months after the end of the Borrower's Covered Period), up until the maturity date of the loan. While most Borrowers are unlikely to wait that long, it is useful to know that a Borrower can wait if, for example, they do not want to take the forgiven portion of the loan into income until after a particular date.

## Forgivable Payroll Costs

The IFR essentially reiterates the existing rules regarding payroll costs:

- Payroll costs paid and incurred during the Covered Period are eligible for forgiveness.
- Payroll costs are considered to be paid when the paychecks are distributed.
- Payroll costs incurred at the end of the Covered Period and paid by the next regular payroll date can be accrued.

With regard to owner-employees, the IFR also confirms:

- C-corporation owner-employees are capped by the amount of their 2019 employee cash compensation plus employer retirement and health insurance contributions made on their behalf.
- S-corporation owner-employees are capped by the amount of their 2019 employee cash compensation plus employer retirement contributions made on their behalf. Employer health insurance contributions made on their behalf cannot be separately added because those payments are already included in their employee cash compensation.
- Schedule C or F filers are capped by the amount of their owner compensation replacement, calculated based on 2019 net profit.
- 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.
- For self-employed individuals, including Schedule C or F filers and general partners, retirement and health insurance contributions are included in their net self-employment income and, therefore, cannot be separately added to their payroll calculation.

## Reduction Safe Harbors Clarified

The Flexibility Act added a provision that reductions to FTEs resulting from (a) an inability to rehire or replace terminated individuals who were employees prior to February 15, 2020 no later than December 31, 2020, or (b) an inability to return to the pre-February 15, 2020 level of business due to compliance with certain federal agency COVID-19 related mandates or guidelines. However, it was unclear how these exceptions were to be documented and/or applied. The recent IFR provides specific guidance.

To document a Borrower's good faith effort to rehire or replace employees, the Borrower should maintain, at a minimum, the written offer to rehire, a written record of the rejection (and, presumably, written evidence of the notification to the state unemployment office, if applicable), and a written record of the efforts to hire a similarly qualified individual.

With regard to the inability to return to the pre-February 15, 2020 level of business, the Borrower should retain copies of the applicable *COVID Requirements or Guidance* for each business location. Importantly, the IFR clarifies that this exemption includes both direct and indirect COVID Requirements and Guidance. Indirect guidance includes state or local government directives to shut-down businesses based on COVID-19 guidance issued by the specified federal agencies.

## Other Information Provided

The IFR addresses a number of rules relating to loan review procedures and the loan forgiveness process for lenders. This guidance is the same as guidance previously issued by the SBA.

## What Is Not Addressed

This most recent IFR still leaves us with many important unanswered questions:

- Who is an owner-employee? Is there a minimum equity threshold to be met before someone is considered an owner-employee (like, for example, the two percent threshold under the Tax Code that applies to the reporting of benefit payments)? Do any attribution rules apply?
- Are noncash payroll costs also considered to be paid on the date the paychecks are distributed, or does some other *deemed pay date* apply?
- Is the election to use an 8-week covered period revocable?
- What is included in utility costs? Does it really include gas for a vehicle? What about heating oil?
- Regarding recipients of government grants or cost (cost-plus) contracts, how are the costs covered by those contracts treated for PPP loan forgiveness purposes? Are those costs excluded from costs eligible for loan forgiveness, or are they recoverable by the grantor/contracting agency?

Hopefully the answers to these significant questions will be addressed in the near future.

## Contact Us

As always, for further guidance and assistance, please reach out to your PKFOD engagement team members, or Bruce L. Blasnik, CPA, CGMA, Partner at [LoanForgiveness@pkfod.com](mailto:LoanForgiveness@pkfod.com). We are here to help.

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