FAQ UPDATE

Paycheck Protection Program

The Paycheck Protection Program Flexibility Act of 2020 (the PPP Flexibility Act) was signed into law on June 5, 2020.

In response to the PPP Flexibility Act, the Small Business Administration (the SBA) provided two revised PPP Loan Forgiveness Applications (the Forgiveness Applications) on June 16, 2020, which implement the terms of the PPP Flexibility Act and contain novel guidance on applying for PPP loan forgiveness. The SBA has also provided additional guidance on PPP loans and loan forgiveness in the form of various Interim Final Rules (the IFRs) which have been posted by the SBA to its website.

This update to the FAQ reflects the regulations implemented, and the changes made, to the PPP, especially with respect to PPP loan forgiveness, by each of the PPP Flexibility Act, the Forgiveness Applications and the IFRs.

Pursuant to the Coronavirus Aid, Relief and Economic Security Act, the PPP was set to expire on June 30, 2020. The Paycheck Protection Program Extension Act, which was signed into law on July 4, 2020, extended the PPP until August 8, 2020 and, as a result, the PPP resumed accepting applications on July 6, 2020.

While the above mentioned regulations have had ripple effects through the entire PPP, this update includes significant new information on:

- The term of the PPP (see **Question #B.1**);
- What costs are eligible for forgiveness (See **Question #E.1**);
- Calculating the amount of a loan that can be forgiven (See **Section E**);
- The application of certain safe harbors for borrowers who may have cut headcount or reduced employee wages (see **Question #E.7**); and
- Completing the loan forgiveness application (See **Section H**).

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FAQ: Paycheck Protection Program

The Coronavirus Aid, Relief and Economic Security Act (the CARES Act) includes the Paycheck Protection Program, which provides economic relief for small businesses. Davis & Gilbert attorneys Justin Pollak and Lara Cohen address what the new program covers and how small businesses can participate. These FAQs provide up-to-date information as of June 8, 2020 on the Paycheck Protection Program, which supplements the information included in our previous alert "Coronavirus Aid, Relief and Economic Security Act: What You Need to Know," and our related "CARES Act Memorandum."

| A | The PPP Generally

1. Q: What is the Paycheck Protection Program?

A: The Paycheck Protection Program (the PPP), created pursuant to the Coronavirus Aid, Relief and Economic Security Act (or the CARES Act), is an expansion of the existing 7(a) loan program administered by the Small Business Administration (the SBA). The CARES Act appropriates $349 billion for loans under the PPP (PPP Loans). The CARES Act and the Paycheck Protection Program and Health Care Enhancement Act appropriate approximately $659 billion for loans under the PPP (PPP Loans).

| B | PPP Eligibility Requirements

1. Q: Does my business qualify for a PPP Loan?

A: The CARES Act provides that during the period beginning on February 15, 2020 and ending on August 8, 2020 (the PPP Covered Period), the following types of organizations are eligible to receive PPP Loans:

1. Any business concern, nonprofit organization, veterans organization or tribal business concern that:

   a. Employs no more than 500 employees (including all individuals employed on full-time, part-time or other basis) whose principal place of residence is in the U.S. or

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   b. Meets the SBA's employee-based size standards for the industry in which it operates.

2. Any small business concern in an industry that otherwise meets the SBA's employee-based or revenue-based size standards (the size standards can be found here);
3. Any small business concern in any industry that meets the SBA's alternative size standards which require that as of March 27, 2020, applicants have:
   a. A maximum tangible net worth of not more than $15 million and
   b. An average net income after federal income taxes (excluding any carry-over losses) of not more than $5 million for the two fiscal years prior to the date of the loan application.
4. Any individual who operates under a sole proprietorship or as an independent contractor and other eligible self-employed individuals; and
5. Any business concern in the accommodation and food services industries with more than one physical location that employs no more than 500 employees per location.

When calculating the number of employees for determining an entity's eligibility for SBA programs, the applicant's employees will be aggregated with the employees of any affiliates of the applicant.

2. Q: For purposes of the PPP, what other entities will be considered affiliates of my business?

A: Under the PPP, two businesses are deemed affiliates if one controls another or if they are under common control. The SBA laid out four basic tests to determine whether a control-based affiliation exists, including those described below. Notably, exercising control is irrelevant, and the determining factor is whether the ability to control exists.

>> **Ownership**. An individual or entity will be deemed to control a business if it has the power to control over 50% of the voting equity. In addition, a minority equity owner will be deemed to control the business if it has the ability to prevent a quorum for a vote or otherwise block an action by the board of directors (or equivalent body) or the equity holders. Note that in an analysis of a minority owner's control there may be no single dispositive element, but that the totality of the circumstances may dictate a control-based affiliation.

- **Convertible Securities and Agreements to Merge**. In reviewing control where an individual or entity owns stock options, convertible securities or similar rights, those stock options, convertible securities or rights will be treated as if they have been exercised (unless there are conditions precedent that would prevent exercise). Businesses that are parties to an "agreement to merge" will be deemed affiliates; "agreements in principle" do not result in a determination of control.

- **Management**. An individual or entity that controls the board of directors (or equivalent body) is deemed to control the business, resulting in the affiliation with other entities under common control. Likewise, if an officer of a business controls one or more other businesses, those other businesses are considered under common control.

- **Identity of Interest**. An identity of interest exists where two close relatives have substantially identical businesses or economic interests, such as when two such relatives operate in the same industry. In such a case, there is a presumption of affiliation between such businesses (though a business may provide evidence to rebut such presumption).

Under the CARES Act, however, Congress indicated that these rules are waived for:

1. Businesses in the accommodation and food services industries with no more than 500 employees;
2. Franchises that are approved on the SBA Franchise Directory; and
3. Small businesses that receive financial assistance from a company licensed under the Small Business Investment Act.

In addition, the SBA has indicated that the affiliation rules do not apply to faith-based organizations that might otherwise be considered affiliated due to their faith, beliefs or exercise of religion.

3. Q: How do the affiliation rules apply to a restaurant and to other businesses affiliated with a restaurant?

A: The SBA's affiliation rules described in Question #B.2 do not apply to businesses that have NAICS codes that begin with 72 (i.e. a restaurant, or other business in the accommodation or food services industries) (Accommodation Businesses). As a result, the employees/revenues of an Accommodation Business's affiliates will not be included in determining whether the Accommodation Business is eligible for a PPP Loan. Each location of an Accommodation Business that employs no more than 500 employees may apply for its own PPP Loan (provided it uses its own EIN) with a maximum loan amount of $10 million.

Yet, if an applicant is affiliated with an Accommodation Business, the employees/revenues of the applicant and its Accommodation Business affiliates will be aggregated in determining the applicant's eligibility for a PPP Loan. By way of example, if a marketing agency with 450 employees is affiliated with a restaurant with 450 employees, the restaurant will be eligible for a PPP Loan, but the marketing agency will not be.

4. Q: My business falls within one of the categories in Question #B.1. What are the other eligibility requirements for PPP Loans?

A: Under the PPP, there are no requirements to determine the applicant's ability to repay the loan or that the applicant is unable to obtain credit elsewhere. The primary eligibility requirement, in addition to meeting the above size requirement, is that the business was operational on February 15, 2020 and either paid employee salaries and payroll taxes or paid independent contractors as of that date. Applicants must submit documentation, such as payroll processor records, payroll tax filings, or Form 1099-MISC in order to establish eligibility.

The PPP also requires all applicants to provide a good faith certification to the lender providing the PPP Loan that, among other things:

- >> The uncertainty of current economic conditions makes necessary the loan request to support its ongoing operations;
- >> The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments;
- >> During the period beginning on February 15, 2020 and ending on December 31, 2020, the applicant has not received (and does not expect to receive) amounts under a 7(a) loan for the same purpose and duplicative of amounts applied for or received under the PPP;
- >> The information provided in the PPP application and in all supporting documents and forms is true and accurate in all material respects; and
- >> The applicant understands that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law with significant penalties, potentially including imprisonment.

5. Q: If my business has access to other adequate sources of liquidity, am I eligible for a PPP loan?

A: Potentially. As described in Question #B.4, in connection with a PPP loan application, a borrower is required to provide a good faith certification that "current economic uncertainty makes this loan request necessary to support ongoing operations…" (the Necessity Certification). While the CARES Act specifically eliminated the requirement that applicants must exhaust their other financing options, the SBA has indicated that, in making the Necessity Certification, an applicant should consider all sources of available liquidity they can access without significant harm to their business.

This determination is fact-specific, and some sources suggest that the applicant should consider:

1. When they will have access to alternative funds;
2. The cash needs of the business until the funding would be received;
3. The repayment terms;
4. The need to reduce personnel; and
5. Potential effects to the equity structure.

As a result, if an applicant has readily available access to funds, and such access would not significantly impact its business, it is unlikely this applicant would be eligible for a PPP loan. Specifically, in guidance provided by the SBA, the SBA indicated, "it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith." In addition, each applicant should be prepared to show the basis for making the certification (including documentation to support its methodology).

If a borrower applied for, and received, a PPP loan prior to April 23, 2020 and, upon reviewing the additional guidance provided by the SBA, determined that they were unable to make the Necessity" Certification in good faith, they can repay all amounts borrowed by May 18, 2020 and be deemed to have made the certification in good faith. For information on the SBA's auditing procedures with respect to the Necessity Certification, and penalties associated with a Necessity Certification deemed not to have been made in good faith, please refer to Questions #G.2 and #G.3.

6. Q: Can I get a PPP Loan if I have an existing credit facility or other debt obligation?

A: Potentially. Existing debt obligations do not prohibit applicants from receiving a PPP Loan, but you should check the terms of your existing loan documents to confirm whether there are any covenants related to incurring additional debt and what further steps may be required (*e.g.* approval from your existing lender).

7. Q: I own a hedge fund or private equity firm that otherwise meets the SBA's eligibility criteria. Can I receive a PPP Loan?

A: No. The types of businesses ineligible for PPP loans can be found here (note that non-profit businesses are not ineligible for PPP loans). Hedge funds and private equity firms are considered businesses primarily engaged in investment or speculation and, as a result, are ineligible to receive PPP loans.

8. Q: Should I count the employees of my foreign and U.S. affiliates in determining whether my business meets the 500 or fewer employee threshold?

A: Yes, absent an exception to the affiliation rules as described in Question #B.2, a business should count all of its employees as well as the employees of its U.S. and foreign affiliates when determining whether it has 500 or fewer employees (although there is some remaining ambiguity about which employees should be included in this count).

C | PPP Loan Amounts

1. Q: How much can I borrow?

A: The maximum loan amount available to a borrower under the PPP will be equal to 2.5 times the average total monthly payments by the borrower for payroll costs that were incurred either:

1. During the one-year period before the loan is made or
2. In calendar year 2019 (in each case, excluding compensation paid to any individual employee in excess of an annual salary of $100,000), up to a maximum loan amount of $10 million.

2. Q: What payroll costs may be included in calculating the PPP Loan amount?

A: As used in the CARES Act, "payroll costs" means compensation to employees in the form of:

- Salary, wage, commission or similar compensation (including payments of cash tips);
- Payment for vacation, parental, family, medical or sick leave;
- Allowance for dismissal or separation;
- Payment required for the provisions of employee benefits consisting of group health care benefits, including insurance premiums, and retirement benefits;
- Payment of state or local assessed tax on the compensation of employees; and
- For sole proprietors or independent contractors only: wages, commissions, income, net earnings from self-employment or similar compensation.

On May 28, 2020 the SBA indicated that payroll costs also include:

- Payment of salary, wages or commissions to furloughed employees;
- Hazard pay; and
- Bonuses.

Payroll costs explicitly exclude the following:

- Compensation of an individual employee in excess of an annual salary of $100,000, as prorated for the PPP Covered Period (note that this exclusion does not apply to non-cash benefits to the employee, *e.g.*, payments for the provision of group health care coverage);
- Federal employment taxes imposed or withheld during the PPP Covered Period (including FICA);
- Compensation of any employee whose principal place of residence is outside the U.S.; and
- Qualified sick and family leave wages for which a credit is allowed under Sections 7001 and 7003 of the Families First Coronavirus Response Act.

3. Q: Do payments to independent contractors count as payroll costs for purposes of a PPP Loan calculation?

A: No, because independent contractors are eligible to apply for PPP Loans in their own names, they do not count for purposes of a borrower's PPP Loan calculation or Forgiveness Amount (see Question #E.1).

4. Q: Do payments to general partners count as payroll costs for purposes of a PPP Loan calculation?

A: Yes, the self-employment income of general active partners can be included in the calculation of a partnership's payroll costs, up to a pro rata portion of $100,000 on an annualized basis. Given this clarification, a partner in a partnership cannot apply for a PPP Loan on the basis that he or she is a self-employed individual. The same analysis applies to members of limited liability companies.

5. Q: If I apply for a PPP Loan as a self-employed individual, does this impact my ability to receive unemployment insurance or other relief?

A: Yes, a self-employed person's receipt of a PPP Loan may affect his or her eligibility for state-administered unemployment insurance and/or unemployment assistance programs, including assistance under the "Relief for Workers Affected by Coronavirus Act" and/or CARES Act Employee Retention Credits.

| D | PPP Loan Terms

1. Q: What can I use the loan proceeds for?

A: Borrowers may use the proceeds of a PPP Loan for any purpose otherwise allowed for 7(a) loans, as well as for:

1. Payroll costs (see Question #C.2);
2. Payments of interest (but not principal) on any mortgage obligation;
3. Rent payments;
4. Utility payments; and
5. Interest on any other debt obligations that were incurred before February 15, 2020.

According to the Paycheck Protection Program Flexibility Act of 2020 (the PPP Flexibility Act), at least 60% of the PPP Loan proceeds must be used to pay payroll costs. Additionally, self-employed individuals' (who file a Form 1040 Schedule C) are permitted to use the PPP Loan proceeds only for uses which the individual made expenditures in 2019.

2. Q: What interest rates and fees are associated with PPP Loans?

A: The PPP establishes a maximum interest rate of 1% for all PPP Loans and waives fees due to the SBA from both borrowers and lenders. The PPP also prohibits prepayment penalties for prepayments of a PPP Loan.

3. Q: Do I need to pledge any collateral or give a personal guarantee?

A: During the PPP Covered Period, borrowers are not required to provide collateral or personal loan guarantees for any PPP Loan.

4. Q: Do I need to begin paying back the loan immediately?

A: No. The PPP defers all loan payments, including principal, interest and accrued interest until the SBA remits the Forgiveness Amount (as defined in Question #E.1 below) to the lender. However, a borrower must begin repaying its loan ten months after the end of the twenty-four week period following disbursement of its loan if it has not submitted its application for loan forgiveness prior to that date. Interest will accrue on PPP Loans during this deferment period.

5. Q: What is the term of a PPP Loan?

A: Pursuant to the PPP Flexibility Act, for PPP Loans made on or after June 5, 2020, any portion of the loan that is not forgiven will have a maturity of five years. For all other PPP loans, amounts not forgiven are subject to a two year maturity. However, the Act specifies that borrowers and lenders can mutually agree to extend the maturity of such loans beyond the two years originally dictated by the CARES Act.

6. Q: Can I draw down my PPP loan in multiple installments in order to delay the start of the Forgiveness Period?

A: No. A lender must issue the PPP loan in a single disbursement which must occur within ten days after the application is approved by the SBA. If a borrower fails to return the executed PPP loan documents within 20 days after approval of the application, then the lender is supposed to cancel the loan.

| E | PPP Loan Forgiveness

1. Q: How much of this loan can be forgiven?

A: A borrower will be eligible for loan forgiveness up to the full principal amount of the loan and any accrued interest (subject to potential reduction as described in Question #E.5).

The amount of loan forgiveness is calculated based on the sum of the following amounts (the Forgiveness Eligible Expenses) paid or incurred by the borrower during the twenty-four (subject to Question #E.5) week period (the Forgiveness Period) following the receipt of the loan. Any such expenses that are incurred during the Forgiveness Period must be paid on or before the next payroll or billing date (even if such date is after the expiration of the Forgiveness Period), as applicable, to be eligible for forgiveness.

>> Payroll costs (see Question #C.2 , Questions #E.2 and Question #E.3);

>> Interest payments (but not payments of principal) on any mortgage on real or personal property that was in force prior to February 15, 2020;

>> Rent payments on any lease dated before February 15, 2020; and

>> Utility payments for electricity, gas, water, transportation, telephone or internet access services under service agreements dated before February 15, 2020.

Pursuant to the PPP Flexibility Act, at least 60% of the amount of the loan forgiven (the Forgiveness Amount) must have been used for payroll costs and not more than 40% of the Forgiveness Amount may constitute non-payroll costs. Should a borrower spend less than 60% of their loan proceeds on payroll costs, the borrower will be eligible for only partial loan forgiveness, subject to at least 60% of the Forgiveness Amount having been spent on payroll costs.

2. Q: When are payroll expenses "paid" or "incurred" for purposes of loan forgiveness?

A: Payroll costs are:

>> Paid when paychecks are distributed or when an employer originates an automatic clearing house (ACH) credit transaction; and

>> Incurred when the employee works.

For employees on a borrower's payroll who are not performing work, payroll costs are incurred based on the schedule established by the borrower, which is generally each day that the employee would have performed work.

3. Q: What is the maximum amount of loan forgiveness attributable to an individual employee?

A: The total amount of cash compensation per employee eligible for forgiveness may not exceed $46,154. This amount does not include covered benefits.

Additionally, the SBA has clarified that the forgiveness of compensation of any owner-employee (or self-employed individual or general partner) will be limited to two and a half months' worth of 2019 net profit, capped at a maximum amount of $20,833. No additional forgiveness will be provided for retirement or health insurance contributions for these individuals.

4. Q: How long do I have to spend PPP loan proceeds and have the amount spent forgiven?

A: For an loans made on or after June 5, 2020, the borrower will have 24 weeks to spend their PPP loan proceeds and have the amounts spent on Forgiveness Eligible Expenses forgiven. If a borrower received its PPP loan prior to June 5, 2020, the borrower can elect for its Forgiveness Period to be the eight-week period following disbursement of its loan or the 24 week period following such date.

With respect to the forgiveness of payroll costs only, the borrower can elect for its Forgiveness Period to be the eight or twenty-four week period, as applicable, beginning on the first day of the borrower's first pay period following the date of loan disbursement (the Alternative Payroll Covered Period). If a borrower elects to use the Alternative Payroll Covered Period, it must use it consistently throughout its PPP Loan Forgiveness Application (the Forgiveness Application).

5. Q: What if I have laid off employees or reduced employee salaries?

A: The Forgiveness Amount will be reduced:

- >> Dollar for dollar to the extent that the total salary or wages of any employee is reduced during the Forgiveness Period by more than 25% for the period between January 1, 2020 and March 31, 2020 (other than compensation reductions to employees who received, during any pay period in 2019, wages or salary at an annualized rate in excess of $100,000) (the Salary/Wage Reduction Rule), and then
  - *Note that this reduction does not apply to a reduction in an employee's wages that is a result of a reduction in hours.*

- >> Proportionally based on any reduction in the average number of full-time equivalent (FTE) employees per month during the Forgiveness Period relative to the average number of FTE employees per month during:
  - The period between February 15, 2019 and June 30, 2019; or
  - The period between January 1, 2020 and February 29, 2020, with the comparative period being at the borrower's election (the FTE Reduction Rule).

6. Q: What if I have laid off employees or reduced employee salaries?

A: A 40-hour work week should be used to calculate the average number of FTE employees for purposes of determining whether there has been a reduction in FTE employees. This calculation can be done by:

- >> Dividing the average number of hours worked by each employee per week by 40 and aggregating the quotients (provided that each individual employee's quotient is capped at 1.0); or
- >> Attributing a 1.0 for each employee who works 40 hours or more per week and 0.5 for any employee who works fewer than 40 hours.

Whichever method a borrower opts to use must be used consistently for the Forgiveness Period (or Alternative Payroll Covered Period) and the selected referenced period.

7. Q: Are there any exceptions to the Salary/Wage Reduction Rule or FTE Reduction Rule?

A: Yes. The following safe harbor exempts borrowers from the Salary/Wage Reduction Rule:

- >> The Forgiveness Amount will not be reduced due to the Salary/Wage Reduction Rule if the borrower has reinstated the previous higher salary or wages of such employees by the earlier of:
  - December 31, 2020; or
  - The date that the borrower's Forgiveness Application is submitted.

The following are exceptions to the FTE Reduction Rule:

- >> If the borrower has rehired such number of full-time equivalent employees, then the Forgiveness Amount will not be reduced due to the FTE Reduction Rule, if such employees are rehired by the earlier of:

- December 31, 2020; and
- The date that the borrower's Forgiveness Application is submitted.

>> If an employee was fired for cause, voluntarily resigned or voluntarily requested and received a reduction in his or her hours, then the borrower's Forgiveness Amount will not be reduced.

>> If the borrower has terminated an employee or reduced an employee's hours, the borrower makes a good faith offer, in writing, to rehire the employee or restore the reduced hours and the employee rejects the offer. In order to take advantage of this exception, the borrower must maintain written records of the employee's rejection of the offer and inform the applicable state unemployment insurance office of the employee's rejection of the offer within 30 days. Additionally, the offer must be for the same salary or wages earned and same number of hours worked, as applicable, in the last pay period prior to the termination of the employment relationship or reduction in hours.

The following safe harbors exempt borrowers from the FTE Reduction Rule:

>> The borrower is unable to (i) rehire the individuals who were employees as of February 15, 2020 and (ii) hire similarly qualified employees for the unfilled positions on or before December 31, 2020.

>> The borrower is unable to return to the same level of business activity at which it operated prior to February 15, 2020 as a result of compliance with COVID-19 related requirements and guidance issued by the Secretary of Health and Human Services, the Centers for Diseases Control and Prevention or the Occupational Safety and Health Administration.

8. Q: Are there any exceptions to the Salary/Wage Reduction Rule or FTE Reduction Rule?

A: The maximum amount of loan forgiveness a borrower is eligible to receive is the lowest of:

>> The borrower's full loan amount;

>> An amount equal to the eligible payroll costs incurred or paid by the borrower during the Forgiveness Period (or Alternative Payroll Covered Period) divided by 0.60; and

>> The sum of the borrower's Forgiveness Eligible Expenses less any reductions pursuant to the Salary/Wage Reduction Rule and/or the FTE Reduction Rule.

9. Q: Are forgiven amounts included in my taxable income?

A: No. Any cancelled indebtedness resulting from loan forgiveness will not be included in the borrower's taxable income.

10. Q: Are forgiven amounts included in my taxable income?

A: No. The Internal Revenue Service (IRS) issued a notice that provides that it will deny the deductibility of otherwise deductible expenses paid from the proceeds of a PPP loan to the extent the loan is later forgiven. Certain members of Congress have indicated that this IRS notice is contrary to Congressional intent and that they plan to propose legislation to make these expenses tax deductible.

11. Q: Can I take advantage of the employer tax deferrals provided for in the CARES Act if my PPP loan is forgiven?

A: Yes. The PPP Flexibility Act permits borrowers to defer, until December 31, 2021, the payment of all employer-side social security taxes (and certain deposits related to unemployment and other employee insurance funds) for periods through December 31, 2020, with:

>> 50% of such deferred taxes paid on December 31, 2021; and

>> 50% paid on December 31, 2022.

Similarly, self-employed individuals can defer the payment of 50% of the self-employment taxes they owed for the period from March 27, 2020 through December 31, 2020.

Prior to the PPP Flexibility Act, a borrower who received a PPP loan could not take advantage of this deferral once its PPP loan was forgiven.

| F | PPP Applications

1. Q: How and when can I apply for a PPP loan?

A: You can apply for a PPP Loan by submitting the PPP Application Form and payroll documentation to a participating lender.

Due to the high demand for PPP Loans, we recommend contacting your existing banking relationship promptly for more information about its participation as a lender under the PPP. You should also begin gathering your payroll information for the past year in preparation for submitting your application. If your existing bank relationship is not participating in the program, here is a list of the 100 most active 7(a) lenders.

2. Q: How will PPP Loan determinations be made?

A: PPP loan determinations will be made by the lender on a first come, first served basis.

3. Q: I was notified that the PPP funds were exhausted. When will the PPP funds be replenished?

A: The President signed the Paycheck Protection Program and Health Care Enhancement Act (the PPPCHE Act) on April 24, 2020, which provided the PPP with an additional $310 billion of funding. The SBA reopened applications for PPP loans in response to the additional funding on April 27, 2020. Given the demand for the program, it is possible that the additional funds will be insufficient for all of the applications, and so potentially interested businesses should apply as quickly as possible.

4. Q: I applied for a PPP loan right before the program's funding was depleted. Do I need to reapply to receive a loan from the additional funds?

A: Each bank has discretion to determine how it will handle pending PPP applications in light of the new funding. Many lenders have indicated that they were continuing to review applications in preparation for submission to the SBA upon the release of additional funds. If you have not yet heard from your bank, we recommend reaching out proactively to determine how it is treating these applications.

5. Q: When is my PPP Loan considered "approved"?

A: A SBA loan will be deemed approved when it is assigned a loan number by the SBA.

| G | SBA Review of PPP Applications

1. Q: Does the SBA, in addition to the lender, review PPP applications?

A: Yes. The SBA has indicated that it plans to review all loan applications for loans in excess of $2 million, as well as other loans the SBA deems appropriate. This review will take place following the lender's submission of the borrower's loan forgiveness application to the SBA. The SBA plans to provide additional guidance as to how it will implement this review process.

2. Q: Is the SBA reviewing all PPP loan applications to determine if the Necessity Certification was made in good faith?

A: No. The SBA will only be reviewing loans received by a borrower who, together with its affiliates, received PPP Loans with an aggregate original principal amount equal to, or in excess of, $2 million. All other borrowers will be deemed to have made the Necessity Certification in good faith.

3. Q: What penalties could I face if the SBA determines that I did not make the Necessity Certification in good faith?

A: If following its review, the SBA determines that a borrower (who received a loan in excess of $2 million) did not make the Necessity Certification in good faith, the SBA will seek repayment of the outstanding loan balance and the loan will not be eligible for forgiveness. If the borrower repays the loan upon request from the SBA, the SBA will not pursue other administrative enforcement or referrals to other agencies.

H. Forgiveness Applications

1. Q: How do I apply for loan forgiveness?

A: To receive loan forgiveness, a borrower needs to submit the Forgiveness Application or the EZ PPP Loan Forgiveness Application (the EZ Application) to its lender. While the same rules apply to the Forgiveness Application and the EZ Application, the EZ Application requires fewer calculations and less documentation of eligible borrowers.

A borrower is only permitted to use the EZ Application if it meets one of the below criteria; all other borrowers are required to use the Forgiveness Application.

- >> The borrower is self-employed and has no employees.
- >> The borrower did not reduce the salaries or wages of employees by more than 25% (excluding employees who made in excess of $100,000 in 2019) and did not reduce the number of hours of its employees.

>> The borrower experienced a reduction in business activity as a result of health directive related to COVID-19 and did not reduce the salaries or wages of its employees by more than 25% (excluding reductions to employees who made in excess of $100,000 in 2019).

Instructions for the Forgiveness Application can be found here and instructions for the EZ Application can be found here.

2. Q: What other documents do I need to submit with my application?

A: The borrower is also required to submit detailed documentation to verify payroll, headcount and non-payroll expenses including, but not limited to, bank account statements, tax forms, invoices, account statements and receipts (the Supporting Documents), with the documentation required dependent on whether the borrower submits the Forgiveness Application or the EZ Application.

The Forgiveness Application and the EZ Application also require the borrower to make additional certifications, including that the tax documents that the borrower submits to its lender are consistent with those that it has submitted (or plans to submit) to the IRS and/or the state tax or workforce agencies.

3. Q: What is the Forgiveness Application review process?

A: Once the borrower submits it application of forgiveness, the lender has 60 days to review the application and issue a decision to the SBA. The lender will review the application and assess the borrower's eligibility for loan forgiveness in accordance with the PPP regulations and guidance issued by the SBA through the date of the borrower's application.

If, in its review, the lender determines that the borrower miscalculated its Forgiveness Amount or that the Supporting Documents do not provide adequate support for the calculation, the lender must work with the borrower to attempt to remedy any defects.

When the lender issues its decision, it will:

1. Request that the SBA remit payment of the Forgiveness Amount to the lender; and
2. Notify the borrower of its decision.

If the borrower disagrees with the lender's decision regarding the amount of forgiveness, the borrower has 30 days to request that the SBA review the lender's determination.

For More Information

Please contact the attorneys listed below or the D&G attorney with whom you have regular contact.

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