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E-ALERT: Paycheck Protection Program Forgiveness – Additional Guidance on Eligibility of Forgivable Expenses and Loan Forgiveness Procedure

On May 22, 2020, The U.S. Department of the Treasury and the Small Business Administration ("SBA") promulgated two additional Interim Final Rules related to the Paycheck Protection Program ("PPP") – the first detailing additional guidance regarding loan forgiveness ("IFR 14") and the second summarizing SBA loan review procedures ("IFR 15").

Expenses Eligible for Forgiveness

IFR 14 reiterates that qualifying borrowers can receive loan forgiveness for amounts equal to specifically defined payroll costs, mortgage interest, rent, and utility payments subject to certain restrictions.

Qualifying payroll costs are those paid or incurred during an eight-week period beginning on the date of loan disbursement ("Covered Period") or the first day of the first payroll cycle after the date of disbursement ("Alternative Covered Period"). Borrowers whose payroll schedule does not align with the eight-week period may opt to use the Alternative Covered Period. Payroll costs are deemed incurred on the day the employee earns his or her pay, but are deemed paid on the date paychecks are distributed.

Payroll costs eligible for forgiveness also include (1) salary, wages, and commission payments made to furloughed employees; (2) bonuses; and (3) hazard pay so long as none of these payments exceed $15,385. However, IFR 14 lists certain caps on forgivable payroll costs for self-employed individuals and Schedule C filers.

Mortgage interest, real and personal property, and utility payments are eligible for forgiveness if (1) paid during the Covered Period, or if (2) incurred during the Covered Period and paid before the next regular billing date for those expenses where the billing date occurs after the Covered Period. However, advance payments of mortgage interest are not eligible for forgiveness.

A borrower's forgiveness amount may be reduced if there have been reductions in full-time equivalent ("FTE") employees or in employee wages during the Covered Period. Employees fired for cause or employees who voluntarily request reduced schedules during the Covered Period or Alternative Covered Period will not affect a borrower's loan forgiveness as the borrower may count such employees at the same FTE level for purposes of calculating any FTE reduction penalty.

Generally, borrowers who restore reductions to FTE employees or employee wages no later than June 30, 2020 can avoid loan forgiveness reduction. Additionally, there will be an exemption for borrowers who attempted to rehire employees during the Covered Period but the employee declined the offer. For borrowers who have attempted to rehire employees, IFR 14 provides a specific calculation for loan forgiveness based on FTE headcount. To prevent double penalization of borrowers, the wage reduction applies to loan forgiveness only to the portion of decline in employee wages not otherwise attributable to FTE reduction.

Loan Forgiveness Process Involving Lender's Decision

IFR 14 provides some detail on loan forgiveness procedure; however, the guidance in IFR 14 applies only to loan forgiveness applications not reviewed by SBA before the lender's decision on the borrower's loan forgiveness application. For the procedure applicable when the SBA reviews loan forgiveness applications prior to the lender, please see below.

A borrower must submit a loan forgiveness application, which is SBA Form 3508 (or lender equivalent). Lenders have sixty days from receipt of borrower's loan forgiveness application to issue a forgiveness decision to the SBA. If the lender determines some or all of the borrower's loan amount qualifies for forgiveness, the lender requests payment from the SBA. The SBA will then remit payment, subject to review and oversight of the borrower's loan forgiveness application. The SBA has ninety days from receipt of the lender's decision to remit payment.

However, any portion of the loan amount determined by the lender or SBA to be ineligible for forgiveness, must be repaid by the borrower prior to the loan's two-year maturity date.

Loan Forgiveness Process by SBA

IFR 15 provides some open-ended information regarding the loan forgiveness process when the SBA review the loan prior to a lender. The guidance makes it clear that the SBA has the authority to review any loan as it deems appropriate for borrower eligibility, use of loan proceeds, and propriety of loan forgiveness. IFR 15 also states that the SBA can review a loan of any size at any time. **Accordingly, borrowers must retain loan documentation for six years after the loan is forgiven or repaid in full**.

In the event the SBA makes an inquiry into a borrower's PPP loan, the borrower will have an opportunity to respond to the inquiry and the SBA states it intends to issue additional guidance regarding the appeal process for borrowers. Borrowers should note that failure to respond to an SBA inquiry may result in a determination that the borrower was ineligible for a PPP loan. If the SBA determines a borrower was ineligible to receive a PPP loan, the borrower is categorically ineligible from receiving loan forgiveness and the SBA will seek repayment of the loan.

IFR 15 outlines the steps lenders must take when processing loan forgiveness applications including confirming receipt of borrower's certification and proper documentation, and ensuring borrower correctly calculated forgiveness figures. Should the SBA decide to review a loan, it will provide notice to the lender. Within five days of receiving such notice, the lender must provide SBA Forms 2483 and 3508 (or their equivalents) to the SBA as well as a copy of the executed note and other documents relating to the loan. If the SBA determines that a borrower was ineligible for a PPP loan, the lender will not receive a processing fee for that loan. Also, lenders should be aware that if the SBA determines a borrower was ineligible for a PPP loan within one year of disbursement of the loan proceeds, the processing fees received by the lender are subject to clawback by the SBA.

We will continue to provide updates on these issues as they evolve, including the potential Phase 4 stimulus legislation. In the meantime, if you have any questions related to the coronavirus stimulus legislation or the impact of COVID-19, please CLICK HERE to access our relevant practice areas and contact information on individual lawyers.