

COVID-19 Legal Update

July 1, 2020

The SBA Releases Additional Guidance for the Paycheck Protection Program

By Vance L. Liebman, Peter T. Berk, and Paul M. King

Recently, the Small Business Administration (“SBA”) released additional guidance regarding the Paycheck Protection Program (“PPP”), which includes changes to several previously released Interim Final Rules and provides two new loan forgiveness applications. This newsletter highlights information from those sources to help borrowers better understand the PPP loan program.

The 60/40 Split

The SBA clarified that a borrower who spends less than 60% of PPP loan proceeds on payroll costs is still eligible for partial loan forgiveness. This is a welcome clarification to the text of the Paycheck Protection Program Flexibility Act, which stated that borrowers who spend less than 60% of loan proceeds on payroll costs are ineligible for forgiveness. Now, borrowers can receive forgiveness for an amount based on the requirement that 60% of the forgivable amount is spent on payroll costs. For example, if a borrower receives a \$100,000 PPP loan and spends \$54,000 (or 54%) on payroll costs, the borrower may receive forgiveness for up to \$90,000, because the \$54,000 in payroll costs is 60% of \$90,000.

Expenses Eligible for Forgiveness

The SBA also clarified that the forgiveness is based on amounts spent for:

1. payroll costs, including salary, wages, and tips (up to \$46,154 per employee for a 24-week covered period, or \$15,385 per employee for an 8-week covered period), and covered benefits for employees, including healthcare expenses, retirement contributions, and state taxes imposed on employee payroll paid by the employer;
2. owner compensation (up to \$20,844 for a 24-week covered period or \$15,385 for an 8-week covered period);
3. rent payments;
4. interest payments on mortgage obligations existing before February 15, 2020; and
5. utility payments.

The EZ Form

The SBA also released Form 3508EZ, a simplified forgiveness application that some borrowers can use to apply for forgiveness. As its name suggests, the form is shorter and easier to complete than the original form. A borrower can use Form 3508EZ if it meets any one of the following three criteria:

1. The Borrower is self-employed with no employees at the time of application.

F V L D

2. During the Covered Period¹, the Borrower did not reduce (a) its employees' hours or wages by more than 25% compared to the period between January 1 and March 31, 2020, **and** (b) the number of its employees or the average paid hours for employees.
3. During the Covered Period, the Borrower (a) did not reduce its employees' hours or wages by more than 25% compared to the period between January 1 and March 31, 2020, **and** (b) the Borrower was unable to return to its February 15, 2020, level of business activity due to compliance with specific federal agency requirements.

Confusion about the Use of Loan Proceeds

The Coronavirus Aid, Relief, and Economic Security Act lists allowable uses for loan proceeds. Allowable uses include forgivable uses, other enumerated uses like interest on any debt incurred before February 15, 2020, and any use allowed under Section 7(a) of the Small Business Act. In its recent guidance, however, the SBA restricts the **allowable** uses of loan proceeds to require at least 60% of the loan proceeds be spent on payroll costs. Notably, the SBA's list of allowable uses does not include a category mentioning the other Section 7(a) uses, creating uncertainty whether those uses are allowed. The SBA's recent guidance further provides that "if the funds are knowingly used for unauthorized purposes, the Federal Government may hold [borrowers] [] legally liable such as for charges of fraud." As these rules continue to evolve, a borrower's potential liability for improper use of loan proceeds is unclear, making it likely that there is more guidance to come.

Questions Remain

While this guidance provides some clarity, substantial questions still remain. FVLD will continue to monitor the program for new guidance and other substantial developments.

For more information, please feel free to contact the authors of this update or your usual FVLD contact.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Vance L. Liebman 312.701.6850 vliebman@fvldlaw.com, Peter T. Berk 312.701.6870, pberk@fvldlaw.com, Paul M. King 312.701.6842 pling@fvldlaw.com, or your regular FVLD contact.

¹ For borrowers who took a PPP loan before June 5, 2020, the Covered Period is either (a) the 8-week, or (b) the 24-week period beginning with the disbursement of the loan. For borrowers who took a PPP loan after June 5, 2020, the Covered Period is the 24-week period beginning with the disbursement of the loan.

FVLD