

# **CARES Act Paycheck Protection Program: Round Two**

Presented by  
Susan Markey  
Maslon LLP  
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# Paycheck Protection Program

- President Trump signed CARES Act into law on March 27, 2020. The Act provides an estimated two trillion dollars' worth of relief for individuals and businesses, and most significantly created the Paycheck Protection Program (“PPP) loans.
- Available loan funds were initially \$349 billion
- *Funds were exhausted in 13 days*
- *1,661,367 loans issued; Average loan was \$207,000*

# Paycheck Protection Program

- Many loan seekers were not able to get loans
- Bankers were overwhelmed
- Many banks expected additional financing and continued working with consumers to complete applications in the queue to be submitted later
- Some public companies received loans

# Paycheck Protection Program and Health Care Enhancement Act

- President Trump signed the PPP Enhancement Act into law on April 24, 2020.
- The Enhancement Act provided an additional \$320 billion for PPP loans
- \$60 billion reserved for PPP loans made by small banks, small credit unions and community financial institutions
- Another \$60 billion for the Economic Injury Disaster Loan program

# Current Status: PPP and Health Care Enhancement Act

- As of May 3<sup>rd</sup>, \$175 Billion in loans had been issued under the Enhanced Act
- More than 2,000,000 loans
- Over a time period of only 5 days
- Average loan is \$79,000

# Paycheck Protection Program and Health Care Enhancement Act

- Application criteria and terms are largely the same
- SBA has been issuing FAQ and Treasury has issued several revised interim rules

# PPP Loan Forgiveness

Loan proceeds spent on eligible expenses in the 8 weeks following funding are forgiven

# PPP Loan Forgiveness: Eligible Expenses

Eligible expenses include payroll costs, interest on secured debt, rent, and utilities.

- 75% of loan proceeds used on eligible expenses must be used for payroll costs for those loan proceeds to be eligible for forgiveness
- amounts forgiven are excluded from federal gross income of the borrower

# PPP Loan Forgiveness: Payroll Expense Inclusions

Payroll costs include:

- Salary, wages, commissions, or similar compensation (employee share of federal taxes- see next slide about payroll costs)
- Tips;
- Vacation, parental, family, medical, or sick leave;
- Allowance for dismissal or separation;
- Group health care benefits premiums;
- Retirement benefits; and
- State or local tax assessed on the compensation of employees.

# PPP Loan Forgiveness: Payroll Expense Inclusions

Do federal taxes count as payroll taxes for forgiveness purposes?

- The CARES Act excludes taxes under IRC Chapters 21, 22, and 24 such as FICA, Railroad Retirement Tax, and withholdings of federal income tax
- However, April SBA FAQ states that payroll costs are calculated on a gross basis without regard to federal taxes imposed or withheld
- SBA interprets this to mean payroll costs are not reduced by taxes imposed on employee and withheld by employer, but payroll costs are not increased by employer's share of payroll costs
- Example: Employee's gross pay is \$4,000 of which \$500 is withheld for federal tax. The full \$4,000 counts as payroll costs, however, the employer-side federal payroll taxes imposed on the \$4,000 are excluded from payroll costs.

# PPP Loan Forgiveness: Payroll Expense Exclusions

Payroll costs do not include

- Employees who make more than \$100,000 of cash compensation are capped at \$100,000 for the purpose of calculating payroll costs- \$15,385 during the period
- The employer's share of federal payroll taxes;
- Qualified sick leave or family leave wages for which credit is allowed under the Families First Coronavirus Response Act (which provides for, among other things, 14-day paid leave for American workers affected by the pandemic); or
- Payments made to independent contractors.
- Benefits paid for owners

# PPP Loan Forgiveness: Mortgage Expense Inclusion

Mortgage Interest (Real Estate & Other Secured Credit) is included if mortgage:

- was first incurred prior to February 15, 2020.
- Is on real *or* personal property and
- Is the borrower's liability;

However, to be forgivable, loan proceeds may not be used to prepay or make any principal payments on the mortgage obligation

# PPP Loan Forgiveness: Rent and Utilities

Rent payments during the 8-week period are forgiven:

- Proceeds used to pay for rent owed under a lease agreement in force prior to February 15, 2020

Utilities

- Electricity, gas, water, transportation, telephone, or internet access
- For service beginning prior to February 15, 2020.

# PPP Loan Forgiveness: Salary Reduction

Forgiveness is reduced if the borrower during the 8-week period following funding:

- Reduces the number of full-time equivalent employees ("FTEs"); or
- Reduces an employee's salary or wages by more than 25% compared to employee's earnings during the most recent full quarter during which the employee was employed before the 8 weeks.
  - ❑ This limit applies to any employee who didn't receive wages or salary of more than \$100,000 annualized during any single pay period during 2019.

# PPP Loan Forgiveness: FTE Reduction

For non-seasonal borrowers, the forgiveness reduction due to a reduction of FTEs is calculated as:

- Amounts used for eligible expenses, multiplied by:
- Average number of FTEs per month employed by the borrower during the 8-week period, *divided by*, at the borrower's election, either:
  - Average number of FTEs employed per month during the period between February 15, 2019, through June 30, 2019; or
  - Average number of FTEs employed per month during the period between January 1, 2020, through February 29, 2020.

# PPP Loan Forgiveness: Rehire Exemption

If borrower fails the FTE or Salary Reduction test and forgiveness is reduced, proceeds become re-eligible for forgiveness if:

- Borrower eliminates the reduction in the number of FTEs by June 30, 2020; or
- Borrower eliminates the reduction in salary or wages of employees by June 30, 2020.

# PPP Loan Forgiveness: Forgiveness Application

Borrowers will "apply" to lenders originating the loan for forgiveness, each of whom will have their own specific process.

Documents that all lenders will require from borrowers include:

- Payroll tax filings reported to the IRS(for the 8-weeks);
- Prior year state income, payroll, and unemployment insurance filings;
- Evidence of the payment of eligible expenses, like cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on eligible mortgage interest payments, rent, and utility payments;
- Certifications that: (i) documentation provided is true and correct; and (ii) amount for which forgiveness is requested was used to retain employees, make interest payments on eligible mortgage interest, rent, or utilities; and
- Any other documentation the SBA deems necessary.

The lender is required to issue a decision within 60 days after receiving an application for forgiveness.

# PPP Loan Forgiveness: Forgiveness

What if the is not forgiven?

- Loan portions that are not forgiven have a term of 2 years and an interest rate of 1%.
- There is no pre-payment penalty.

# PPP Loan Forgiveness: Proactive Steps

SBA has not yet issued specific guidance on loan forgiveness (including an application deadline), but borrowers can take the following steps to maximize their chances of loan forgiveness:

- Document fund use and allocation by keeping cancelled checks, payment receipts, and transcripts of accounts
- Consider separating PPP loan proceeds from other funds and putting other accounting controls in place
- If there has been any reduction in FTEs or employee salaries or wages, strategize now to ensure elimination of the reduction by June 30, 2020
- Calculate your total eligible expenses in the first 8-weeks (the potential forgivable amount). After the proceeds hit your bank account, spend as much as you can on eligible expenses, but not more than 25% of your anticipated forgivable amount on non-payroll expenses.

# PPP Hot Topics

- SBA will review all loans in excess of \$2,000,000 after forgiveness application is received.
- One topic of review: PPP application certification that “current economic uncertainty makes this loan request necessary to support the ongoing operations of Applicant”
- The SBA still has not issued guidance implementing loan forgiveness procedures.

# PPP Hot Topics

- PPP application certification that “current economic uncertainty makes this loan request necessary to support the ongoing operations of Applicant”
- Large companies with adequate sources of liquidity should take into account their current business activity and ability to access other sources of liquidity to support ongoing operations in a manner that is not detrimental to the business
- It is unlikely that a public company with substantial market value and access to capital markets will be able to be make the certification in good faith.

# PPP Hot Topics: Forgiveness Reduction Nuance

- Section 1106(d)(6) of the CARES provides that regulations will be prescribed granting de minimis exemptions from the Act's limits on loan forgiveness
- SBA/Treasury indicated in FAQ they intend to issue an interim final rule specifying that if a borrower made a good faith, written offer of rehire and the employee rejected it, forgiveness would not be reduced.

# PPP Hot Topics: Taxability of Loan Proceeds

- CARES Act stated that debt forgiveness “shall be excluded from gross income”
- IRS issued Notice 2020-32 indicating that no deduction is allowed for an expense that is otherwise deductible if the payment of the expense results in forgiveness of a covered loan under the CARES Act and the income associated with the forgiveness is excluded from gross income.
- Various members of Congress have spoken out against the IRS position and that this may be fixed in subsequent legislation.

# PPP Hot Topics: Lobbying Efforts

AICPA is requesting that:

- the 8 week start date begins when a state lifts its shelter-in-place orders, not when proceeds are received
- FTEs should be calculated on a wage-based formula for salaried employees
- Payroll reduction calculation should be based on average payroll per employee per week, not total compensation per employee

THESE ARE ONLY PROPOSALS; NOT LAW

# PPP Updates: Common Forgiveness Questions

- **When should I start rehiring?**
  - You must use proceeds for covered expenses that are incurred and paid during the covered period.
  - Employees must be on the payroll for costs to be incurred and paid; however, it depends on need- it may not make sense to incur a cost only to increase forgiveness if the time is not productive.
  - Remember the June 30 date is key

# PPP Updates: Common Forgiveness Questions

- **Can I prepay covered expenses?**
- The CARES Act covers costs that are incurred and paid. It is unlikely that a prepaid expense is both paid and incurred, but the SBA has not clarified how forgiveness will align with payroll periods. Most employers are taking the position that payroll is incurred and paid when funds are released to payroll provider.

# PPP Updates: Common Forgiveness Questions

- **Should I pay employees that are not working?**
- It depends on your circumstances. Paying employees who are not working is probably not a good business decision, unless you may lose those employees. In order to make this decision, you should weigh whether you will meet the 75% threshold for forgiveness, the benefit of retaining those employees, and the amount eligible for forgiveness.

# Questions?

Susan Markey

612-672-8357

[susan.markey@maslon.com](mailto:susan.markey@maslon.com)

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