



May 15, 2020

Client Alert – Supplemental Guidance
Paycheck Protection Program (“PPP”) Loans
COVID-19 (Coronavirus)

Below you will find our summary of the most recent guidance from the Small Business Administration (“SBA”) and the US Treasury Department (“Treasury”) related to the Paycheck Protection Program and loans received under it. The rules surrounding the administration and use of the Paycheck Protection Program is an ever-evolving process and accordingly, the guidance below is subject to change.

The Paycheck Protection Program – General Status Update

In previous VW Client Alerts, we have provided some discussion of various aspects of the Coronavirus Aid, Relief, and Economic Security Act (“CARES” Act), which was enacted into law on March 27, 2020 in response to the outbreak of COVID-19. Among other things, the CARES Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (“PPP”). In the weeks following the enactment of the CARES Act, SBA and Treasury have regularly posted guidance related to the PPP in the form of a frequently asked questions document (“FAQs” – found [here](#)), draft forms, and interim final rules, each of which they continue to update on a frequent basis. With the bulk of federal funds allocated to the PPP having already been disbursed, our focus in this VW Client Alert is on loan use and forgiveness.

The “Loan Necessity” Certification

Much of the public discourse surrounding the PPP has been related to the receipt of PPP funds and perceived abuse of the PPP program by large companies and their affiliates. Treasury responded to this public criticism in its April 23, 2020 update to its FAQs with the addition of Question 31: “Do businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?” The answer that followed in the document raised serious questions among PPP recipients about the good faith certifications they made in the application process that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Specifically, Treasury stated that applicants must make this certification while “taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business” Those applicants and recipients of PPP loans who cannot make this certification in good faith, considering Treasury’s additional language here, are assured that there will be no negative consequences to them, *if the PPP loan funds are returned by May 18, 2020*. Additional concerns over FAQ 31 were raised on April 29, 2020 when FAQ 39 was released, stating that all borrowers of more than \$2 million would be subject to SBA review for compliance with FAQ 31.

Fortunately for smaller PPP borrowers, a safe harbor from the concerns of FAQ 31 and 39 was provided this week on May 13, 2020 in the answer to new FAQ 46: “Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.” Additionally, some comfort was given to those borrowers over the \$2 million threshold regarding the consequences of an unfavorable SBA review of their good-faith loan necessity certification, as Treasury goes on in FAQ 46 to say that borrowers that repay their loans upon written request from SBA will *not be subject to administrative enforcement or referrals to other agencies*. This additional guidance substantially limits the downside risk of those borrowers that are at risk of SBA determining their certifications were not justifiable.

Loan Forgiveness Form/Guidance Released

The first month of the PPP lending initiative saw SBA and Treasury guidance to be focused on loan applications, qualifications, and allowable uses. As PPP loan fund recipients started to use their funds, little guidance had been provided related to the forgiveness of those loans. In fact, until this past week, borrowers were required to depend almost entirely on the original CARES Act language when it came to questions about loan forgiveness.

On May 15, 2020, SBA released the PPP Loan Forgiveness Instructions and Application. It can be found [here](#). Forgiveness is based on the borrower maintaining or quickly rehiring employees and generally maintaining salary levels. Forgiveness will be reduced if full-time headcount declines, or if salaries and wages decrease more than 25%. The loan forgiveness form and instructions released this week include several measures to reduce compliance burdens and simplify the process for borrowers. The PPP Loan Forgiveness Instructions and Application also provide that additional guidance from SBA and Treasury are expected to be forthcoming, shortly. In the meantime, here are the highlights of the guidance released today:

- **Payroll Costs Incurred and Payments Made.** Many borrowers were concerned about their payroll cycle not matching up with the eight-week “covered period” for their PPP loans. In this new guidance, SBA allows borrowers to, at their option, calculate payroll costs using an “alternative payroll covered period” that aligns with borrowers’ regular payroll cycles. Furthermore, payroll costs incurred but not paid during the borrower’s last pay period of their eight-week period are eligible for forgiveness if paid on or before the next regular payroll date.
- **Eligible Non-Payroll Costs Incurred and Payments Made.** Similar inclusion rules apply to non-payroll costs, such as utility payments, mortgage interest payments, and rent payments. An eligible nonpayroll cost must be actually paid during the covered period *or* incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period.
- **FTE Reduction Safe Harbor.** Borrowers are exempt from the reduction in loan forgiveness based on FTE employees if (1) the borrower reduced its FTE numbers between February 15, 2020 and April 26, 2020, and (2) the borrower then restores its FTE levels by not later than June 30, 2020. This language tends to suggest that a borrower need only have restored its FTE levels for purposes of the FTE Reduction Safe Harbor by the day of June 30, 2020. Many have expected there to be some averaging or minimum time period associated with the FTE number restoration, but no such requirement appears in this guidance. Additional guidance on this point is expected. Also, a previously-signaled additional exception from the FTE loan forgiveness reduction is contained in this form for borrowers who have made a good-faith, written offer to rehire workers that was declined.

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