

May 18, 2020

## SMALL BUSINESS ADMINISTRATION PUBLISHES LOAN FORGIVENESS APPLICATION

To Our Clients and Friends:

On May 15, 2020, the U.S. Small Business Administration (“SBA”) released the much anticipated loan forgiveness application (“Application”) for loans issued under the Paycheck Protection Program (the “Program” or “PPP”), available [here](#).<sup>[i]</sup> The Application and related instructions provide additional guidance regarding the amount of a PPP loan that may be forgiven and the amount such forgiveness may be reduced. The SBA has said it will soon issue regulations and guidance to further assist borrowers with the Application and provide lenders with direction on their duties. Below is a summary of the SBA Application and its instructions.

### **Covered Period**

The Application provides borrowers with two paths to ascertain payroll costs eligible for forgiveness.

The Application confirms, consistent with the *Coronavirus Aid, Relief, and Economic Security Act* (“CARES Act”) requirement, that only certain expenses paid or incurred during the 8-week period beginning on the date of the origination of a PPP loan may be forgiven. The Application provides that the first day of this 56-day “Covered Period” must be the same as the “PPP Loan Disbursement Date,” which is defined as the date that the borrower received the PPP loan proceeds from the lender or, if PPP loan proceeds were received on more than one date, the first date on which the borrower received PPP loan proceeds.

The Application also allows borrowers flexibility to choose an 8-week period specific to their own payroll schedule. If a borrower has a biweekly (or more frequent) payroll schedule, then the Application provides that the borrower may use an alternative 56-day period to calculate the amount of payroll costs paid or incurred that may be forgiven. This 56-day period, known as the “Alternative Payroll Covered Period,” begins on the first day of the borrower’s first pay period following the PPP Loan Disbursement Date. The Alternative Payroll Covered Period may only be used in lieu of the Covered Period to determine the amount of payroll costs eligible for forgiveness, and may not be used to determine the amount of nonpayroll costs eligible for forgiveness.

### **Costs Eligible for Forgiveness**

The Application provides some detail on the amount eligible for forgiveness:

1. **Payroll Costs**. Payroll costs paid and incurred during the Covered Period or Alternative Payroll Covered Period, as applicable, are generally eligible for forgiveness. Payroll costs are paid on

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the day that paychecks are distributed or an ACH credit transaction is originated; they are incurred on the day that an employee's pay is earned. To be eligible for forgiveness, payroll costs must be paid during the Covered Period or Alternative Payroll Covered Period, except that payroll costs incurred during the last pay period of the Covered Period or Alternative Payroll Covered Period, as applicable, may be paid on or before the borrower's next regular payroll date. As provided by the CARES Act, the total amount of cash compensation of any individual employee that is eligible for forgiveness may not exceed an annual salary of \$100,000, as prorated for the covered period. The Application does not provide further guidance as to what costs constitute "payroll costs," but refers readers to the Interim Final Rule on Paycheck Protection Program posted on April 2, 2020 (85 FR 20811).

2. **Nonpayroll Costs.** As previously announced by the SBA, the Application provides that nonpayroll costs cannot exceed 25% of the total forgiveness amount. The Application further provides that to be eligible for forgiveness, nonpayroll costs must be either (1) paid during the Covered Period or (2) incurred during the Covered Period and paid on or before the next regular billing date, even if after the Covered Period ends.

The categories of nonpayroll costs eligible for forgiveness are:

1. *Covered mortgage obligations:* payments of interest on any business mortgage obligation on real or personal property incurred before February 15, 2020, but excluding any prepayment or payment of principal.
2. *Covered rent obligations:* business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020.
3. *Covered utility payments:* business payments for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.

## **Reduction of Loan Forgiveness Amount**

The forgiveness application includes "PPP Schedule A," "PPP Schedule A Worksheet" and related instructions. These materials are used to determine whether and to what extent the loan forgiveness amount will be reduced. The Worksheet requires the borrower to list every employee employed during the Covered Period and, for each employee: his or her compensation, the average full-time equivalency of hours paid per week, and—if applicable—the amount of any salary or hourly wage reduction that exceeds 25%.

As required by the CARES Act, the amount of loan forgiveness may be reduced if there are reductions in the number of the borrower's full-time equivalent employees ("FTEs") per month during the covered period and/or the total salary or wages of any employee during the covered period, in each case, as compared to a prior period. For purposes of these determinations, borrowers must only include employees who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount over \$100,000.

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However, the loan forgiveness amount will not be reduced if, during the period beginning on February 15, 2020, and ending on April 26, 2020, there is a reduction in the number of FTEs or total salary or wages, and the reduction is eliminated no later than June 30, 2020. In addition, the loan forgiveness amount will not be reduced because of a reduction in the number of FTEs due to (1) any positions for which the borrower made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period which was rejected by the employee; and (2) any employees who during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned or (c) voluntarily requested and received a reduction of their hours.

1. Reduction in Number of Full-Time Employees. The loan forgiveness amount will be reduced by multiplying (a) the forgivable costs by (b) the quotient obtained by dividing (a) the average number of FTEs per month during the Covered Period or Alternative Payroll Covered Period, as applicable, by (b) at the election of the borrower, (i) the average number of FTEs per month from February 15, 2019 to June 20, 2019 or (ii) the average number of FTEs per month from January 1, 2020 to February 29, 2020. If the borrower is a seasonal employer, the denominator is either of the periods in clauses (i) or (ii), or any consecutive twelve-week period between May 1, 2019 and September 15, 2019.

The Application provides two alternative methods for calculating a borrower's number of FTEs:

- For each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth. The maximum for each employee is capped at 1.0.
  - Assign a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours per week.
2. Reduction in Total Salary or Wages. The amount of loan forgiveness will also be reduced by the amount of any reduction in total salary or wages of any employee during the Covered Period or Alternative Payroll Covered Period, as applicable, that is in excess of 25 percent of the total salary or wages during the period from January 1, 2020 through March 31, 2020.

## Certifications

The person signing the loan forgiveness application is required to make various certifications, including, among others, that:

- The forgiveness amount requested, including all applicable reductions, does not include nonpayroll costs in excess of 25% of the amount requested and does not exceed eight weeks' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at \$15,385 per individual.
- The Borrower understands that if the funds were knowingly used for unauthorized purposes, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges.

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- The Borrower has accurately verified the payments for which the Borrower is requesting forgiveness.
- The Borrower has submitted required documentation verifying payroll costs, the existence of obligations and service (as applicable) prior to February 15, 2020, and eligible nonpayroll costs payments.
- The information provided in the forgiveness application and supporting documents and forms is true and correct in all material respects, and they understand that knowingly making a false statement to obtain forgiveness of the PPP loan is punishable by imprisonment and/or fines.
- The tax documents submitted to the Lender are consistent with those submitted to the IRS and/or state tax or workforce agency.
- The Borrower understands the SBA may request additional information to evaluate the Borrower's eligibility for, and loan forgiveness of, the PPP loan, and that failure to provide such information may result in a determination that the borrower was ineligible for the PPP loan or a denial of the loan forgiveness application.

## **Documentation Requirements**

The Application lists documents to be submitted with the Application, including:

- PPP Schedule A;
- documentation verifying payroll costs eligible for forgiveness, such as bank account statements or third-party payroll service provider reports, tax forms and cancelled checks;
- documentation showing the average number of FTE employees on payroll per month employed by the borrower for the relevant time periods; and
- documentation relating to nonpayroll costs eligible for forgiveness verifying existence of the obligations/services prior to February 15, 2020, and eligible payments from the Covered Period, such as copies of lender amortization schedule and receipts or cancelled checks, current lease agreement and receipts or cancelled checks and invoices for business utilities from February 2020 and those paid during the Covered Period and receipts or cancelled checks.

The Application also lists documents that borrowers must retain but are not required to be submitted with the Application. This includes the PPP Schedule A Worksheet and supporting documentation, and documentation regarding employee job offers and refusals, firings for cause, voluntary resignations, and written requests by any employee for reductions in work schedule.

The Application provides that borrowers must retain certain information in their files for six years after the date the PPP loan is forgiven or repaid in full, and permit authorized SBA representatives, including representatives of SBA's Office of Inspector General, to access such files upon request. This

information includes all records relating to the PPP loan, including documentation submitted with the PPP loan application, documentation supporting the certifications as to the necessity of the PPP loan request and eligibility for a PPP loan, documentation necessary to support the loan forgiveness application, and documentation demonstrating material compliance with PPP requirements.

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[i] For additional details about the PPP please refer to Gibson Dunn’s Frequently Asked Questions to Assist Small Businesses and Nonprofits in Navigating the COVID-19 Pandemic and prior Client Alerts about the Program: SBA “Paycheck Protection” Loan Program Under the CARES Act; Small Business Administration and Department of Treasury Publish Paycheck Protection Program Loan Application Form and Instructions to Help Businesses Keep Workforce Employed; Small Business Administration Issues Interim Final Rule and Final Application Form for Paycheck Protection Program; Small Business Administration Issues Interim Final Rule on Affiliation, Summary of Affiliation Tests, Lender Application Form and Agreement, and FAQs for Paycheck Protection Program, Analysis of Small Business Administration Memorandum on Affiliation Rules and FAQs on Paycheck Protection Program and Small Business Administration Publishes Additional Interim Final Rules and New Guidance Related to PPP Loan Eligibility and Accessibility.



*Gibson Dunn’s lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors:*

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