

To:

From: Tad Goodenbour

Date: May 22, 2020

RE: (2) Interim Final Rules Issued Tonight By SBA

At around 9:00 tonight, the SBA issued two Interim Final Rules (IFR), copies attached to this email:

1. Requirements – Loan Forgiveness
2. Review Procedures and Related Borrower and Lender Responsibilities

Item 1 above generally follows what was released last Friday in connection with the Application for PPP Loan Forgiveness, Form 3508 and instructions. There are a few notable clarifications that I have listed below:

- Appears to maintain the paid or incurred payroll language that allows for in excess of eight weeks or payroll if using the covered period (CP) instead of the alternative covered period (APCP)
- Payments to furloughed employees during the (CP) or (APCP) are payroll costs eligible for forgiveness. Deemed to earn as they would under their normal schedule.
- Hazard pay (Hero Bonus) is a payroll cost eligible for forgiveness
- Bonuses are eligible for forgiveness
- In determining cap on compensation of an owner-employee during the CP or APCP, his or her 2019 compensation includes employer retirement and employer health care contributions paid on their behalf
- Partners' compensation must be multiplied by 92.35% (partner compensation for the CP or APCP is 8/52nds of his or her 2019 self-employment income from the partnership)
- Specifically states partners and self-employed individuals cannot count retirement contributions or health care costs on themselves as payroll costs eligible for forgiveness
- Non-payroll costs paid after the end of CP under the next billing cycle exception must be prorated to include only period inside of the covered period
- Borrower must notify state unemployment insurance office if claiming the written offer of employment exception to reduction in FTE's during the CP or APCP
- Clarifies that the salary/wage reduction to forgiveness amount is only for the period the employee worked during the CP or APCP. This corrects what is in the Form 3508 instructions.
- Still no indication of how long the FTE and salary/wage reduction safe harbors must be in place either before or after 6/30/2020
- To avoid reduction in FTE under the voluntary termination, terminated for cause or voluntary schedule reduction exceptions, employee is deemed to maintain the same full-time equivalency after the term event as before

The second IFR deals with the administrative procedures regarding the forgiveness process with an emphasis on the timing and responsibility splits between lender and SBA. The IFR is issued in a Q and A format. Key provisions are discussed below.

SBA Review of Individual PPP Loans – This section deals with what loans can be reviewed by the SBA and what the SBA is authorized to review. As expected, they can pull any loan. Remember the \$2 million threshold was to look at the certification. Can review the eligibility to determine if eligible under the CFR and can review the affiliation rules as pertain to that borrower. All certifications on filings are subject to SBA review as are all forms filed including 2483 and the 3508. Can also review the calculations on those two forms (initial application and application for forgiveness respectively)

Timing of SBA Loan Review – Can review any loan at any time. Side note here that borrowers are reminded that they must keep all PPP documentation for six years after the loan is forgiven or paid in full.

Borrower Interaction During the Review – A bit weak here, but if SBA feels documents submitted by borrower may indicate that borrower may be ineligible for the PPP loan or ineligible to receive the amount it did or may be ineligible for the loan forgiveness claimed, then it may request the lender to contact borrower for additional information to support the position taken. Any additional information provided under this request is to be considered by the SBA

Determination That Ineligible For SBA Loan – If SBA so determines, the funds advanced may, at the request of the SBA, be required to be repaid in full. If the non-eligible status is sustained, the nonrecourse provisions go away, and personal liability would attach.

Borrower Appeal Rights – This has been a major question. If the SBA makes an adverse determination as to the borrower (eligibility, loan amount calculation, claimed forgiveness amount) can the borrower appeal. Yes, but there is no process described, only that it would be covered in a later IFR.

Lender Responsibilities – This is mostly lender focused, but a few items:

- Lender must notify SBA of decision on borrower's forgiveness application within 60 days of receipt of the application form borrower
- Borrower may appeal to the SBA an adverse decision by the lender
- If SBA notifies lender it is reviewing a loan, lender must notify borrower within five business days

We are expecting that there will be additional information issued this weekend. If so, additional summaries will be forwarded. Thank you and have a good weekend.