Dickie McCamey

ATTORNEYS AT LAW

6/11/2020 | Articles

UPDATE: Stimulus Relief for Small Businesses – Paycheck Protection Loans Under the CARES Act

Note: The Paycheck Protection Program ("PPP") was further revised by enactment of the Paycheck Protection Program Flexibility Act, signed into law on June 5, 2020. New PPP provisions appear in this article in bold type.

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") recently enacted creates a specific loan program through the Small Business Administration ("SBA") to help small businesses retain employees and pay critical expenses during the COVID-19 crisis. The CARES Act Paycheck Protection Program ("PPP") provided $349 billion of federally guaranteed loans for small businesses. Because the initial $349 billion PPP appropriation was quickly taken up, Congress and the President on April 24, 2020, added $310 billion in additional funding for PPP loans, with $60 billion of that appropriation set aside for PPP loans from small banks, community financial institutions, and credit unions. Applications for this round two of PPP loans can be filed with your financial institution starting April 27, 2020. These loans would be issued by commercial banks and other qualified SBA lenders and available to an expanded group of eligible borrowers through June 30, 2020. The maximum loan amount is $10 million. The loan provisions under the CARES Act are designed to keep small businesses, and their employees, at work. A key provision of these loans is that use of loan proceeds for eligible purposes can allow for loan forgiveness.

The following information is a summary of the PPP loan program.

Who is eligible to obtain a PPP loan?

During the covered period (February 15, 2020, through June 30, 2020), the CARES Act would expand SBA loan eligibility to include certain small businesses and other organizations meeting an employee size requirement. No personal guarantees or collateral are required for a PPP loan, and the loans are non-recourse against any member or shareholder.

Eligible businesses would include:

- any business, 501(c)(3) nonprofit organization, 501(c)(19) veteran's organization, or tribal business concern with 500 employees or fewer (or, if applicable, the SBA's size standards for its industry, whichever is greater).
- businesses in the "Accommodation and Food Services" sector (Sector 72 of NAICS) with 500 or fewer employees per physical location. Sector 72 generally applies to establishments that provide their customers with lodging and/or meals, snacks or beverages for immediate consumption (such as hotels, motels, restaurants).
- sole proprietors, independent contractors, and eligible self-employed individuals (as defined in the Families First Coronavirus Response Act ("Families First Act")) that submit the necessary supporting documentation.

Who is considered an "employee" for purposes of the eligibility requirements?

Under the current proposal, the term "employees" would include those employed on a full-time, part-time or seasonal basis.

How would a business apply for a PPP loan?

There are borrower requirements that an applicant would have to meet when applying for a PPP loan under the CARES Act.

The borrower must make good faith certifications that:

- current economic uncertainty makes the loan request necessary to support the ongoing operations of the business;
- the funds received from the loan will be used for payroll expenses and retention of employees, or for mortgage payments, lease payments, or utility payments;
- the borrower does not already have an application pending for this type of loan for the same purpose;
- during the covered period, the borrower had not received a loan for the same purpose; and
- the applicant was in operation on February 15, 2020, and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

June 30, 2020, is the last date that PPP loan applications can be approved.

How much money could a business receive through a PPP loan under the CARES Act?

The maximum loan amount is $10 million. A borrower would be eligible for the lesser of:

- 2.5 times the borrower's average total monthly payroll expenses that were incurred in the prior 12 months before the loan is made; plus
- the outstanding amount of a loan that was made under the SBA's disaster loan program during the period beginning on January 31, 2020, and ending on the date which the covered loan may be refinanced as part of this new loan program; or
- $10 million.

If the borrower's business was not in existence from February 15, 2019 – June 30, 2019, the borrower is eligible for the lesser of:

- 2.5 times the borrower's average total monthly payroll expenses incurred from January 1, 2020 – February 29, 2020; plus
- the outstanding amount of a loan that was made under the SBA's disaster loan program during the period beginning on January 31, 2020, and ending on the date which the covered loan may be refinanced as part of this new loan program; or
- $10 million.

What is the interest rate for a PPP loan?

The interest rate for the loans ranges from a 0.5 percent fixed rate to a 1.0 percent fixed rate.

How can PPP loan proceeds be used?

Since the program is designed to help keep employees at work, proceeds from a PPP loan may only be used for certain purposes. Permitted uses include:

- “payroll costs” (see below);
- costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance proceeds;
- employee salaries, commissions, or similar compensation;
- interest payments on any mortgage obligation (excluding prepayments of or principal payments on a mortgage obligation);
- rent;
- utilities; and
- interest on any other debt obligation incurred before the covered period (which would begin on February 15, 2020).

No more than 25 percent of loan proceeds may be used for non-payroll costs.

Up to 40 percent of loan proceeds may now be used for non-payroll costs.

What kinds of expenses would qualify as “payroll costs”?

“Payroll costs” would mean the sum of:

- employee compensation (e.g., salary, wages, commissions, cash or equivalent);
- payment for vacation, parental, family, medical or sick leave;
- allowance for dismissal or separation;
- payment for group health benefits, including insurance premiums;
- payment for any retirement benefit;
- state and local payroll taxes; and
- the sum of any compensation paid to a sole proprietor or independent contractor (i) that is a wage, commission, income net earnings from self-employment or similar compensation, and (ii) that does not exceed $100,000 in one year, prorated for the covered period.

Payroll costs would not include: individual employee wages or salary above $100,000 per year (prorated for the covered period); certain federal taxes; compensation to employees whose principal place of residence is outside of the U.S.; and sick and family leave wages for which credit is allowed under the Families First Act.

Would these loans be eligible for forgiveness?

Yes. The amount of the loan eligible for forgiveness would be equal to the sum of payments made for specific expenses during an 8-week period beginning upon first loan disbursement:

- payments made toward mortgage interest
- payments made toward covered rent
- payments made toward payroll costs
- payments made toward utility expenses

Note that the amount forgiven could not exceed the principal amount of the loan. No more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs. **Again, up to 40 percent of the loan forgiveness amount may now be non-payroll costs.**

The covered period for loan forgiveness is extended from 8 weeks after the date of loan disbursement to 24 weeks after the date of loan disbursement, providing substantially greater flexibility for borrowers to qualify for loan forgiveness. Borrowers who have already received PPP loans as of June 5 retain the option to use an 8-week covered period.

What if the business cuts back on staff or wages? Is the loan still eligible for forgiveness?

Possibly. The forgiveness amount could be reduced if a borrower reduces staff or salaries within certain thresholds.

If a borrower reduces full-time employees, the forgiveness amount would be reduced by an amount determined by the following equation:

- The total forgiveness amount, **multiplied by**:
- The average number of full-time employees of borrower per month during the covered period, **divided by**:
    - at borrower's option, (1) the average number of full-time employees of borrower per month between February 15, 2019, and June 30, 2019, or (2) the average number of full-time employees of borrower per month between January 1, 2020, and February 29, 2020; or
    - if the borrower is a "seasonal employer" (as determined by the SBA), the average number of full-time employees per month between February 15, 2019, and June 30, 2019.

If a borrower reduces salaries or wages, the forgiveness amount would be reduced by the total amount of reductions in salaries or wages during the covered period in excess of 25 percent of the employee's total salary or wages during the most recent full quarter the employee was employed before the covered period (note that for purposes of this equation, "employees" include only those who, for any pay period in 2019, were paid at an annualized rate of $100,000 or less).

The new law provides a safe harbor from reductions in loan forgiveness based on reductions in full-time equivalent employees for borrowers that are unable to return to the same level of business activity the business was operating before February 15, 2020, due to compliance with certain COVID-19 requirements or guidance issued between March 1, 2020, and December 31, 2020, and also provides a safe harbor from reductions in loan forgiveness to provide protections for borrowers that are unable to rehire similarly qualified employees for unfilled positions by December 31, 2020.

What if the borrower rehires its employees and raises salaries once things improve?

The forgiveness reduction penalties would not apply if, for employees or salaries reduced between February 15, 2020, and 30 days after the enactment of the CARES Act, the borrower rehires employees or raises salaries (or both, if the situation demands) back to their previous levels by June 30, 2020.

December 31, 2020, is the new deadline for borrowers to rehire employees to avoid loan forgiveness reduction.

What will be the process for loan forgiveness?

A borrower would need to apply for loan forgiveness to the lender. While additional details and forms have not yet been developed, the forgiveness application would require, at a minimum, the following:

- documentation of the number of full-time employees and salaries or wages paid during the relevant periods, including federal payroll filings and state payroll, income and unemployment insurance filings; • documentation of qualifying expense;
- certification by an eligible representative of borrower that (1) the documentation submitted is true and correct, and (2) the forgiveness amount was indeed used for qualifying expenses; and
- any other documentation determined necessary by SBA.

After an application is submitted, the lender has 60 days to make a determination of forgiveness amount. Lenders will then work with the SBA to be reimbursed for the forgiven amount. Loan forgiveness amounts are not considered income for federal income tax purposes.

The SBA has issued a standard loan forgiveness application. The SBA has 90 days after the lender's forgiveness determination to confirm loan forgiveness.

Would a borrower have to start making payments right away?

Possibly not. If the borrower's business was in operation on February 15, 2020, and has a pending or approved loan on or after the date the CARES Act is enacted, then the business is presumed to be eligible to defer payments for at least six months to one year. The SBA is expected to issue additional guidance on deferrals within 30 days of the CARES Act.

The payment deferral period has been extended to the date that loan forgiveness amounts are received by the lender, or 10 months after the end of the covered period for borrowers not applying for loan forgiveness.

For more information, please contact Ronald J. Brown at 412-392-5488.

Ronald J. Brown
412-392-5488
rbrown@dmclaw.com

Harlan S. Stone