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New PPP Loan Forgiveness Applications, Including "EZ" Form For Eligible Borrowers, Released

by Anthony J. Zeoli

A FREEBORN & PETERS LLP CLIENT ALERT

On June 5, 2020, H.R. 7010, entitled the "Paycheck Protection Program Flexibility Act" (*the "**PPPFA**"*), was signed into law. As discussed in a prior alert, the PPPFA significantly modified certain of the existing rules related to the forgiveness of PPP loans in an effort to provide borrowers more flexibility with respect to the use of PPP loan proceeds.

In response to the PPPFA, the U.S. Small Business Administration (SBA) (*in cooperation with the U.S. Department of Treasury*) has issued an updated Forgiveness Application (*and related application instructions*). Generally speaking, the new application is essentially the same as the prior version other than the changes necessary to reflect the forgiveness rules changes provided in the PPPFA; including:

- providing for the use of either the original 8-week or the extended 24-week forgiveness period in calculating the respective amounts;
- lowering the minimum percentage spent on "payroll" costs from 75% to 60%; and
- providing for the two new "full time equivalent employee" (FTE) reduction safe harbors created by the PPPFA.

In addition to the above revised application, what will be a relief to many borrowers is the fact that the SBA also released a much simpler "EZ" Forgiveness Application (*and related application instructions*). This simplified application can be used by:

- a borrower that is a self-employed individual, independent contractor, or sole proprietor who had no employees at the time of the PPP Loan application (and did not include any employee salaries in the computation of average monthly payroll in their PPP Loan application);

<u>OR</u>

- a borrower that:

  1. during their applicable “forgiveness period,” did not reduce the annual salaries or wages of their employees (excluding employees who are paid more than $100,000 annually) by more than 25%;

  <u>AND</u>

  2. either:

  - did not reduce the number of their employees, or the average paid hours of their employees, between January 1, 2020 and the end of their their applicable “forgiveness period” (*excluding employee reductions that arose from an inability to rehire prior employees and the borrower being unable to hire a similarly qualified person and reductions in employee hours where the borrower offered to restore such hours but the respective employee declined*);

  <u>OR</u>

  - was unable to operate during their applicable “forgiveness period” at the same level of business activity as before February 15, 2020, due to compliance with requirements established by HHS, CDC, or OSHA related to the COVID-19 pandemic during the period March 1, 2020, through December 31, 2020.

At first glance the above requirements may seem a bit onerous for non-individual borrowers but they are actually pretty flexible and will most likely apply to many borrowers. In any case, those borrowers who are eligible to use the ”EZ” Forgiveness Application will find that it requires fewer calculations and less documentation, and is overall much simpler than, the full application above.

There are a few other points regarding both of the new applications that are worth noting:

- For borrowers with a biweekly (*or more frequent*) payroll schedule, the prior “Alternative Payroll Covered Period” rules still apply whether such borrower elects to use the 8-week or the 24-week forgiveness period (*provided that, if using the latter, the “forgiveness period” can not extend beyond December 31, 2020*).

- The prior application and related guidance only referred to amounts that were “paid” during the “forgiveness period” as being includable in the amount eligible for forgiveness. In both of the new applications, the term “paid or incurred” is used instead. While that may not seem like a big change to many, it clears up prior ambiguities regarding borrowers who maintain an “accrual basis” of accounting and whether amounts actually needed to be paid during the “forgiveness period” in order to be eligible for forgiveness.

- Despite some initial concerns regarding the language of the PPPFA eliminating the possibility of partial loan forgiveness, the “Forgiveness Amount Calculation” rules provided in both application instructions appear to still allow for partial loan forgiveness.

We will continue to follow this and the other CARES Act programs and offer updates as further developments arise. If you have any questions, please contact Anthony Zeoli (azeoli@freeborn.com) or another member of the Freeborn & Peters LLP CARES Act team.

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Anthony Zeoli is a Partner in the Corporate Practice Group and the Leader of the Emerging Industries Team. He concentrates his practice in the areas of banking and commercial finance, securities, real estate, and general corporate law. Anthony's commercial finance practice includes the representation of borrowers and lenders in: secured and unsecured lending transactions; corporate reorganizations and restructuring; syndicated commercial financing transactions; and loan workouts.

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