

### SBA Issues Guidance and Updated Documents for Extended 24-Week Covered Period, Releases Simplified PPP Forgiveness Application, and Announces All PPP Loans Over \$150,000 Will Be Publicly Disclosed

In light of the passing of the Paycheck Protection Program (PPP) Flexibility Act (Flexibility Act) earlier this month, the Small Business Association (SBA) issued its highly anticipated guidance on June 17, 2020 pertaining to changes made to the PPP. While some questions remain, the SBA provided key guidance regarding the extended 24-week covered period, as well as issued a new Form EZ Forgiveness Application.

Furthermore, on June 19, 2020, the SBA and the Department of Treasury announced that in the interest of transparency to the public, the SBA will disclose the business names, addresses, NAICS codes, zip codes, business type, demographic data, non-profit information, jobs supported and loan amount ranges for all PPP loans over \$150,000. For loans below \$150,000, totals will be released, aggregated by zip code, by industry, by business type and by various demographic categories.

Below are the takeaways from the SBA's June 17 issued guidance:

#### **Employee Salary Cap is Increased for 24-Week Covered Period**

The Flexibility Act extended the length of the covered period from eight to 24 weeks, while allowing borrowers that received PPP loans before June 5, 2020 to elect to use the original eight-week covered period. For borrowers who elect the 24-week period, or receive PPP monies on or after June 5, 2020, the guidance places a cap of \$46,154 for each employee's salary, wages, and tips.

#### **Owner Compensation Replacement is Capped at 2.5 Months' of 2019 Net Profit for 24-Week Period**

With respect to compensation caps for owners, forgiveness is limited to 2.5 months' worth (2.5/12) of 2019 net profit (up to \$20,833) for a 24-week covered period, excluding any qualified sick leave equivalent amount for which a credit is claimed under the Families First Coronavirus Response Act (FFCRA). The SBA's rationale for this limitation is to prevent a potential windfall for owners who have employees. For owner-borrowers with no employees, this limitation will have no effect, because the maximum loan amount for such borrowers already includes only 2.5 months of their payroll. The forgiveness application extends this limitation to owner-employees and general partners and we expect further clarification given the discrepancy between the Interim Rule and the forgiveness application.

#### **Loan Forgiveness Application Amended to Include 24-Week Period**

The PPP Forgiveness Application has been amended to reflect that the covered period is either (1) the 24-week (168-day) period beginning on the PPP Loan Disbursement Date, or (2) if the borrower received its PPP loan before June 5, 2020, the borrower may elect to use an eight-week (56-day) covered period. Further, borrowers may also still utilize the alternative covered period that was previously introduced by the SBA. The alternative covered period is the 24-week (168-day) period (or for loans received before June 5, 2020 at the election of the borrower, the eight-week (56-day) period) that begins on the first day of their first pay period following their PPP loan disbursement date. The application also reflects the increased salary caps.

## Clarification on December 31, 2020 Safe Harbor, but Questions Remain Regarding Full-Time Equivalent Employee Reductions

The Flexibility Act extended the safe harbor to restore salaries and full-time equivalent (FTE) employee headcounts to December 31, 2020. However, it remained unclear whether salaries and FTEs were required to be restored and maintained by the safe harbor date, even after the submission of the forgiveness application if submitted prior to December 31, 2020.

For salary reductions, the forgiveness application clarifies that the safe harbor is met when average annual salaries or hourly wages are restored **as of the earlier** of December 31, 2020 or the date the forgiveness application is submitted. For example, if the date of the forgiveness application is October 31, 2020, and salaries have been restored to February 15, 2020 levels at the time of the forgiveness application on October 31, 2020, then the safe harbor is met. If the forgiveness application is submitted after December 31, 2020, the salaries must be restored by December 31, 2020 to February 15, 2020 levels in order to satisfy the safe harbor.

As for reductions in FTE employees, the answer is not as clear-cut. For the FTE reduction safe harbor, the forgiveness application does not include the same “earlier date” language as discussed above for employee salaries. Therefore, it is unclear whether borrowers must maintain February 15, 2020 level FTE headcounts until December 31, 2020, even if the forgiveness application is submitted before December 31, 2020. Thus, the following situation remains unclear: if a borrower restores FTE headcounts by, for example, October and applies for forgiveness in October, can the borrower lay off employees in November after the submission of their forgiveness application and not receive a forgiveness reduction penalty? Said another way, what if an employee has been rehired by the borrower, but later furloughed again before December 31, 2020?

## Loan Forgiveness Application Form EZ

The SBA has issued the new Form EZ version of the PPP forgiveness application. Borrowers may apply for PPP forgiveness using this [SBA Form 3508EZ](#) if they can satisfy one of the following three qualifiers:

- The borrower 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 the borrower application form.
- The borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the covered period (or the alternative payroll covered period) compared to the period between January 1, 2020 and March 31, 2020 **AND** the borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period. Note that under this qualifier, the SBA instructs borrowers to ignore reductions that arose from an inability to rehire individuals who were employees on February 15, 2020 if the borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020, as well to ignore reductions in an employee’s hours that the borrower offered to restore and the employee refused.
- The borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the covered period (or the alternative payroll covered period) compared to the period between January 1, 2020 and March 31, 2020 **AND** the borrower was unable to operate during the covered period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the CDC, or OSHA, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.

## What Is Not Answered?

Many of the questions outlined in our previous information memo, available [here](#), remain outstanding. For example, the SBA guidance is silent as to whether a borrower could cut the extended 24-week period short and apply for forgiveness early if they have used all of their PPP funds prior to the expiration of the 24-week period.

The attorneys at Bond, Schoeneck & King can help by answering your questions regarding the changes to the PPP and how it effects your business. Please contact [Jeffrey B. Scheer](#), any of the [attorneys](#) in the [Business and Transactions practice](#), or the attorney at the firm with whom you are regularly in contact.



Bond has prepared this communication to present only general information. This is not intended as legal advice, nor should you consider it as such. You should not act, or decline to act, based upon the contents. While we try to make sure that the information is complete and accurate, laws can change quickly. You should always formally engage a lawyer of your choosing before taking actions which have legal consequences. For information about our firm, practice areas and attorneys, visit our website, [www.bsk.com](http://www.bsk.com). • Attorney Advertising • © 2020 Bond, Schoeneck & King PLLC

[CONNECT WITH US ON LINKEDIN: SEARCH FOR BOND, SCHOENECK & KING, PLLC](#)

[FOLLOW US ON TWITTER: SEARCH FOR BONDLAWFIRM](#)