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LEGAL UPDATES

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## SBA Issues Promised Guidance on PPP Loan Forgiveness and on SBA's Loan Review Procedures

On May 15, 2020, the Small Business Administration (SBA) and Department of Treasury released the long-awaited application pertaining to the Paycheck Protection Program's (PPP) loan forgiveness. In a May 18, 2020 alert, we identified several key takeaways and noted the SBA's intent to issue further guidance to assist borrowers as they complete the application. As promised, the SBA issued two interim final rules on May 22, 2020 providing additional guidance on both the application and the process to obtain forgiveness. We have highlighted several key points from these rules below.

### **Decisions Regarding Forgiveness; SBA's Loan Review Procedures**

For loans not subject to review by the SBA, the forgiveness process could take up to 5 months and even longer for loans reviewed by the SBA. After a borrower submits a complete application for forgiveness to its lender, the lender has 60 days to review the application and submit its decision to the SBA. In making its determination, the interim final rule requires the lender to confirm receipt of the borrower certifications contained in the loan forgiveness application, confirm receipt of documentation verifying payroll and nonpayroll costs – as specified in the loan forgiveness application instructions – and confirm the borrower's calculations on the loan forgiveness application including by reviewing the documentation submitted with the application. The lender's decision may take the form of an approval, in whole or in part; a denial; or if directed by the SBA, a "denial without prejudice" due to a pending SBA review of the loan. The guidance indicates that any unforgiven amount must be repaid on or before the two-year maturity of the loan, although borrowers should carefully review their loan documents to determine the specific repayment requirements imposed by its lender. A borrower may

request that the SBA review a lender's decision denying forgiveness within 30 days of receiving the denial notice from the lender. The SBA then, subject to any SBA review of the loan or loan application, has up to 90 days to remit the appropriate forgiveness amount to the lender.

As indicated on the loan forgiveness application, the audit threshold is based on whether the borrower, together with its affiliates, received PPP loans with an original principal amount in excess of \$2 million. This new interim final rule also confirms that the SBA may review a PPP loan of any size – regardless of whether a forgiveness application has been submitted – at any time in its discretion. For example, the SBA may review a loan if the loan documentation submitted to the SBA by the lender or any other information indicates that the borrower may be ineligible for a PPP loan, or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower. If the SBA reviews a PPP Loan, the SBA will notify the lender in writing and the lender is required within five (5) business days to notify the borrower in writing of receipt and to provide certain information to the SBA including the loan application, the forgiveness application, and all supporting documentation. If the SBA determines that a borrower was ineligible for the PPP loan, was ineligible for the PPP loan amount obtained or for the loan forgiveness amount claimed, the SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate. The SBA may also seek repayment of the outstanding PPP loan balance or pursue other available remedies.

The borrower may appeal the SBA's determinations, and the SBA has indicated that it intends to issue a separate interim final rule addressing this appeal process. The interim final rule does not impose a time frame on the SBA for its review of any PPP Loan.

### **Additional Clarification on Payroll Costs Eligible for Forgiveness**

In general, payroll costs paid or incurred during the eight consecutive week covered period (whether the "covered period" or "alternative payroll covered period") are eligible for forgiveness. The loan forgiveness application – and now this interim final rule – explain when payroll costs are "paid" and when they are "incurred" under these available covered periods. The SBA has further clarified that:

for employees who are not performing work but are still on the borrower's payroll, payroll costs are "incurred" based on the schedule established by the borrower (typically, each day that the employee would have performed work);

payroll costs eligible for forgiveness include salary, wages or commissions paid to furloughed employees, so long as they do not exceed an annual salary of \$100,000, as prorated for the covered period; and

if an employee's total compensation does not exceed \$100,000 on an annualized basis, the employee's hazard pay and bonuses are eligible for loan forgiveness.

### **Details of Exemption From Loan Forgiveness Reduction Calculation for Employees Rejecting Offer of Rehire or Restoration**

Although the CARES Act requires a reduction in a borrower's loan forgiveness amount for a reduction in the number of full-time equivalent employees (FTEs) – now defined as employees who work 40 hours or more, on average, each week – the SBA previously announced that employees whom the borrower offered to rehire are generally exempt from the loan forgiveness reduction calculation. The new interim final rule extends this exemption if a borrower previously reduced the hours of an employee and offered to restore the employee's hours at the same salary or wages. In calculating the loan forgiveness amount, a borrower may exclude any reduction in FTE headcount that is attributable to an individual employee if:

1. the borrower made a good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the "covered period" or the "alternative payroll covered period";
2. the offer was for the same salary or wages and the same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;
3. the offer was rejected by such employee;
4. the borrower has maintained records documenting the offer and its rejection; and
5. the borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the employee's rejection of the offer.

The SBA has noted that further information regarding how borrowers will report information concerning rejected rehire offers to state unemployment insurance offices will be provided on the SBA's website.

### **Additional Forgiveness Guidance**

Some additional highlights from the SBA's interim final rule include:

The amount of loan forgiveness for owner-employees and self-employed individuals' payroll compensation can be no more than the lesser of 8/52 of 2019 compensation or \$15,385 per individual in total across all businesses. In particular, owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health care contributions made on their

behalf; Schedule C filers are capped at the amount of their owner compensation replacement, calculated based on 2019 net profit; and general partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses and depletion from oil and gas properties) multiplied by 0.9235.

Nonpayroll costs are eligible for forgiveness if they were paid during the “covered period” or incurred during the “covered period” and paid on or before the next regular billing date, even if the billing date is after the “covered period.” The 25% cap on nonpayroll costs remains in place.

Advance payments of interest on covered mortgage obligations are not eligible for loan forgiveness. It remains to be the case that principal on mortgage obligations is not eligible for forgiveness.

In general, a reduction in FTEs during the “covered period” or the “alternative payroll covered period” reduces the loan forgiveness amount by the same percentage as the percentage reductions in FTEs.

In calculating its number of FTEs, borrowers divide the average number of hours paid for each employee per week by 40, capping this quotient at 1. For part-time employees, borrowers may calculate full-time equivalency either by (1) using the average number of hours the part-time employee was paid per week or (2) using a full-time equivalency of 0.5 for each part-time employee. Borrowers may select only one of these two methods, and must apply that method consistently to all part-time employees.

A reduction in an employee’s (including each new employee in 2020 and each existing employee who was not paid more than the annualized equivalent of \$100,000 in any pay period in 2019) salary or wages in excess of 25% of his or her salary or wages between January 1, 2020 and March 31, 2020, will generally result in a reduction in the loan forgiveness amount equal to the amount of salary or wage reduction in excess of 25% of the employee’s base salary or wages. This reduction in loan forgiveness applies only to the portion of the decline in employee salary and wages that is not attributable to the FTE reduction. The SBA has indicated that this approach will help ensure that borrowers are not doubly penalized for reductions.

If an employee’s salary or wages were reduced between February 1, 2020 and April 26, 2020, or if a borrower reduces its FTEs during the same period, and then the borrower eliminates those reductions

by June 30, 2020, the borrower is exempt from any reduction in loan forgiveness that would otherwise be required.

When an employee is fired for cause, voluntarily resigns, or voluntarily requests a reduced schedule during the covered period or the alternative payroll covered period (FTE reduction event), the borrower may count such employee at the same full-time equivalency level before the FTE reduction event when calculating the FTE reduction penalty. Such employees are exempt from the calculation of the FTE reduction penalty.

For a discussion of other PPP rules relating to forgiveness, please see our Frequently Asked Questions.

### **Contact Us**

If you have further questions or require more information regarding this update, please contact Kirstin Salzman, Jessica Zeratsky, Christopher W. Peterson or your Husch Blackwell attorney.

### **Comprehensive CARES Act and COVID-19 Guidance**

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis.