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# PAYCHECK PROTECTION FLEXIBILITY ACT: UPDATE FOR NEW LEGISLATION

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### [Paycheck Protection Program](#)

On June 3, 2020, the Senate passed the Paycheck Protection Flexibility Act, previously passed by the House, and has sent it to the President, who is expected to sign. The new legislation modifies some of the terms related to Paycheck Protection Program (PPP) Loan Forgiveness. The main provision is a tripling of the time allotted for PPP loan recipients to spend funds and qualify for forgiveness. This article is an update to Marcum's previous summary about the [Loan Forgiveness Application](#) and includes the previous rules along with the changes in the proposed new law.

The following summary outlines the Paycheck Protection Flexibility Act rules, followed by details of the Payroll Protection Program Loan Forgiveness program, including eligible payroll costs, non-payroll costs, loan forgiveness reductions, and the required consistency in maintaining and submitting tax documents as described within the PPP Loan Forgiveness Application. The goal of the modifications are to make it easier for borrowers to reach full forgiveness.

### **Summary of Proposed Changes:**

- Current PPP borrowers can choose a 24-week period, rather than an 8-week period to spend PPP funds.
- New PPP borrowers will have a 24-week covered period which cannot extend beyond December 31, 2020.
- The payroll expenditure requirement is now 60%, rather than 75%. If at least 60% of loan proceeds are not spent on payroll costs, there is no loan forgiveness.
  - Note that technical modifications in the future could restore partial forgiveness for loans that do not meet the 60% threshold.
- The June 30 deadline to restore workforce levels and wages is extended to December 31.
- There are two new alternatives for a borrower to restore a potential reduction in forgiveness:
  - An inability to find qualified employees to replace those let go, and
  - An inability to restore the business operations to February 15, 2020, levels due to COVID-19-related operating restrictions.
- The PPP loan term is extended from two years to five years. An updated loan agreement with the bank may be required. (Borrowers should reach out to bankers regarding loan modifications.)
- Companies that participate in the Payroll Protection Program Loan program will be eligible to defer the company portion of payroll taxes throughout 2020. This is a change from being eligible for the payroll tax deferral only through the date a company receives loan forgiveness.

## **PAYROLL COSTS – WAGES, HEALTH INSURANCE, RETIREMENT, AND EMPLOYER-LEVEL STATE TAXES**

### **WAGES**

Eligible payroll costs include payroll costs paid and incurred during the covered period, which is the 24-week (previously 8-week) period commencing on the date the business receives PPP funds from a financial institution. Payroll costs are considered incurred on the day an employee's pay is earned. In addition, payroll costs incurred during the 24-week period and paid on or before the next regular payroll date are eligible for forgiveness. This means that each payroll paid during the 24-week period counts

toward forgiveness, as do payroll costs incurred during the last pay period of the 24-week period that are paid in the first regular payroll period following the 24-week period.

Borrowers who pay their employees biweekly or more frequently also have the option to elect an Alternate Covered Period. This period starts with the first day of the employee's pay period, following the date the loan proceeds are received. In other words, if a borrower receives its loan proceeds on April 20 and the first day of the next payroll period is April 26, the borrower may begin the calculation of eligible wages as of April 26. For wage purposes only, the 24-week Covered Period starts then. This alternative calculation does not apply to eligible non-payroll costs (discussed below.) Borrowers with payroll schedules less frequent than biweekly cannot make this election.

Wages are considered paid on the day paychecks are distributed or the day the borrower originates an ACH transaction. The maximum payroll for any one individual during the 8-week period covered by previous legislation was \$15,385. It is currently uncertain how the new legislation will impact the maximum amount an employee can earn that is eligible for forgiveness. It is possible that it will remain at \$15,385. It is also possible that it will be \$46,154 (\$100,000 x 24/52).

We are also uncertain how the maximum compensation of owner-employees, self-employed individuals, and self-employed partners' will be impacted. Before this legislation, the maximum was limited to 8/52 of 2019 compensation, capped at \$15,385 per individual. This meant that owners could not increase their pay during the 8-week period above their 8-week average pay for 2019 and have that increase count toward forgiveness. Future guidance related to the new legislation may increase this amount to 24/52 of 2019 compensation, or it may keep it at 8/52.

There is presently no guidance related to wages for relatives, spouses, or children of owners. It appears that these wage costs will count toward forgiveness. There may be additional guidance in the future that could clarify this further.

The application and Interim Final Rule indicate that increases to employees' wages are allowed, subject to the maximum compensation figure (\$15,385). The maximum compensation figure for an employee may change based on future guidance.

## HEALTH INSURANCE

Eligible costs include costs paid or incurred during the 24-week (previously 8-week) period. These costs include self-insurance programs and employer-sponsored group health plans, reduced by employee

contributions. It appears that accrued costs paid during the 24-week period will count toward forgiveness. There may be additional guidance that may clarify this.

## RETIREMENT

Eligible costs include costs paid or incurred during the 24-week period. There do not appear to be any limitations on retirement contributions, including accrued costs, paid during this period. This may be an opportunity for companies to pay 2019 accrued retirement. There may be additional guidance that could further clarify this interpretation.

## EMPLOYER-LEVEL STATE TAXES

Eligible costs include amounts assessed on employee compensation and paid by the borrower. This appears to include state-level employer taxes paid by the borrower through a payroll company, rather than only taxes paid directly to the state agency. State withholding taxes are not included. Additional guidance could clarify this.

## MINIMUM AMOUNT OF FUNDS TO BE USED FOR PAYROLL COSTS

The new law indicates that 60% of loan proceeds must be used for payroll costs, with up to 40% of loan proceeds eligible to be used for non-payroll costs. If the 60% payroll cost threshold is not met, there is no loan forgiveness. Several Representatives and Senators have indicated they intended the new law to have a sliding scale, rather than a cliff. Further interpretations may be addressed with future guidance.

## NON-PAYROLL COSTS – RENT, MORTGAGE INTEREST, AND UTILITIES

Non-payroll costs must be paid or incurred during the 24-week (previously 8-week) period and paid on or before the next regular billing date, even if that falls outside of the 24-week period. Non-payroll costs may not be pre-paid, but it does appear that accrued costs may be allowed.

For practical purposes, it appears that non-payroll costs paid during the 24-week Covered Period may be included as part of the loan forgiveness application, in addition to the portion incurred during the 24-week period that is paid on the first bill following the 24-week period.

Borrowers can elect to exclude any amount of non-payroll costs as part of their loan forgiveness application. Given the new 24-week period, many companies may be able to meet full loan forgiveness using only payroll costs, which may reduce the administrative burden of documenting and tracking non-payroll costs.

## RENT

Eligible costs include rent or lease payments pursuant to an obligation in force before February 15, 2020, for real or personal property. Vehicle and equipment leases will count.

## MORTGAGE INTEREST

Eligible costs include interest on any business mortgage obligation in place before February 15, 2020, for real or personal property. Vehicles and equipment will count.

## UTILITIES

Eligible costs include electricity, gas, water, telephone, internet, and transportation costs where service began before February 15, 2020. There is still no guidance regarding what costs are included in "transportation," other than gas for business vehicles, which was indicated in previous guidance.

## LOAN FORGIVENESS REDUCTIONS

### FULL-TIME EQUIVALENTS (FTE)

The new law adds an exemption from a reduction in the forgiveness amount for reduced FTEs to the extent the borrower is unable to re-hire a former employee or hire a similarly qualified employee, and if the business is unable to restore business operations to February 15, 2020, levels due to COVID-19 operating restrictions. Further guidance may indicate how to document a company's qualification for this exemption.

The FTE calculation uses a 40-hour workweek as a base. Any employee working more than 40 hours counts as one employee. Any employee working less is a fractional employee, calculated using a 40-hour denominator, rounded to the nearest tenth. Borrowers can also elect to count all part-time employees as 1/2-FTE.

For employers who have not reduced the number of employees or average paid hours of employees between January 1, 2020, and the end of the Covered Period, there is no FTE reduction, and the look-back period does not apply.

To calculate whether the FTE during the 24-week Covered Period was reduced, the borrower will need to compare FTE to the look-back period chosen by the borrower (either January 1 – February 29, 2020, or February 15 – June 30, 2019). Any reduction in FTE during your 24-week period will decrease your loan forgiveness proportionately, with a few exceptions:

#### **FTE is not reduced for anyone who:**

1. Receives a good-faith written offer of employment that is rejected.
2. Was terminated for cause.
3. Voluntarily resigned.
4. Voluntarily requested a reduction of hours.
5. Is unable to hire a former employee or hire a similarly qualified employee.
6. Is unable to restore business operations to February 15, 2020, levels due to COVID-19-related operating restrictions.

**FTE Safe Harbor** – If the average FTE from February 15 – April 26, 2020, is less than the FTE on February 15, 2020 (because the FTE was reduced during this period), and the December 31, 2020 [June 30, 2020], FTE is greater than or equal to the February 15, 2020, FTE, loan forgiveness does not need to be reduced. If the average FTE from February 15 – April 26, 2020, is more than the FTE on February 15, 2020, this safe harbor cannot be used.

## **WAGE REDUCTION**

The wage reduction calculation is computed on an employee-by-employee basis. Employees who earned more than \$100,000 annualized during any pay period in 2019 are excluded from this calculation. This means that if a weekly employee earned more than \$1,923.08 in any 2019 pay period, s/he is excluded from the wage reduction calculation.

For all other employees, individual wages earned from January 1 – March 31, 2020, should be annualized. Multiply this number by 75% for each employee. Next, annualize the individual employee's wages for the 24-week period. If the 24-week annualization is more than 75% of the first calculation, there is no wage reduction. If the 24-week annualization is less, use 24/52 of the annualized dollars that are below 75% of the first calculation to reduce the loan forgiveness.

**Wage Reduction Safe Harbor** – If the employee's annualized wages from February 15 – April 26, 2020, are less than the annualized wages on February 15, 2020 (because wages were reduced during this period), and the employee's December 31, 2020 [June 30, 2020], annualized wages are greater than or equal to the employee's February 15, 2020, annualized wages, loan forgiveness does not need to be reduced. If the employee's annualized wages from February 15 – April 26, 2020, are more than the employee's annualized wages on February 15, 2020, this safe harbor cannot be used.

## CONSISTENCY WITH TAX DOCUMENTS

Borrowers certify on the loan application that their tax documents are consistent with their tax filings with the IRS and state agencies. For example, a Schedule C that excludes bonus / Section 179 depreciation for loan forgiveness purposes, but includes bonus / Section 179 depreciation for tax filing purposes, cannot be submitted.

## CONCLUSION

The PPP Loan Forgiveness Application provides borrowers with a foundation for planning and compliance in the use of their loan proceeds. Borrowers will undeniably have their own specific situations that will still need to be addressed with their banks and advisors. Applying the above interpretation of the PPP Loan Forgiveness Application will be the best path forward as we wait for any additional information from the SBA.

**If you have any questions concerning the application or this update, please contact your Marcum Tax Professional or a member of the Marcum SBA Task Force at [info@marcumllp.com](mailto:info@marcumllp.com).**

## WHY ENGAGE MARCUM?

Having Marcum on your team will help protect your responsibility and create necessary proof of compliance with the terms of the Paycheck Protection Program Loan Forgiveness Plan.

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