Breaking NEWS – May 18, 2020 – SBA Provides Guidance on Loan Forgiveness

The SBA just issued a Loan Forgiveness Application (Form 3508), which provides detailed instructions for borrowers and the calculation of loan forgiveness for Paycheck Protection Program ("PPP") loans. This is critical for those of you who have already received funds and have been spending based on the informal guidance that seemed to be changing daily.

Consistent with what had been communicated previously, expenses spent in the covered period (the eight-week period starting on the date loan disbursements were received) there are two broad categories of costs that are eligible for forgiveness, payroll (salaries and certain related benefits and taxes) and non- payroll (rent, utilities, and interest on mortgages).

An "alternative payroll covered period" was introduced for administrative convenience, which allows the borrower to elect to calculate eligible payroll costs using the eight-week period that begins on the first day of their first pay period following their PPP loan disbursement date

Many clients asked us whether the costs were based on "payment date" or when the expense was "incurred". The good news is that clarifications were made which allows forgiveness of costs incurred and payments made during the covered period if they were "paid" or "incurred". This provides some flexibility and allows forgiveness of certain costs incurred prior to the loan disbursement date and paid during the covered period as well as certain costs incurred during the covered period and paid after that period.

Payroll costs are considered "paid" on the day that paychecks are distributed, or the borrower originates an ACH credit. Payroll cost are considered "incurred" on the day that the employee's pay is earned. If paid on or before the next regular payroll date, then those payroll costs incurred but not paid during the last pay period would be eligible for forgiveness.

Eligible nonpayroll costs can also be paid during the covered period or incurred during that period and paid on or before the next regular billing date, even if the billing date is after the covered period.

The following clarifications were made to the full-time equivalent ("FTE") calculation (remember to obtain full loan forgiveness, average weekly FTE's of the covered period should be equal or higher than average weekly FTE's of a historical period that was the lower of January 1, 2020 to February 29, 2020 or February 15, 2019 to June 30, 2019):

- FTE Safe Harbor – If the borrower had reductions in its employees between February 15, 2020 and April 26, 2020 and restores the FTE employee levels to the FTE employee level that existed on February 15, 2020 no later than June 30, 2020, there would be no reductions to loan forgiveness.

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- FTE exceptions – The new rules clarify that a borrower is not penalized for FTE reductions that result from the following circumstances:
    - ◊ Reductions related to any positions for which the borrower made a good-faith, written offer to rehire an employee during the Covered Period that was rejected by the employee; and
    - ◊ Reductions related to any employees who during the Covered Period were fired for cause, voluntarily resigned, or who voluntarily requested and received a reduction of their hours.
- The instructions require a calculation of FTE's by taking the number of hours paid to each employee per week, dividing by 40 and rounding to the nearest tenth, which would be capped at 1.0 per employee. An alternative simplified method may also be utilized that assigns 1.0 for employees who work 40 hours or more and .5 for employees who work fewer hours.
- A salary or wage safe harbor is provided for those employees who made $100,000 or less and experienced a wage reduction in excess of 25% if their annualized average salary is restored by June 30, 2020.

For those clients asking about the type of documentation the lender would require, please note that the Schedule A of the PPP loan forgiveness application outlines those documentation requirements:

- Bank account statements and/or detailed third-party payroll service provider reports showing cash compensation paid to employees and the number of employees.
- Quarterly payroll tax filings or equivalent third-party payroll service reports in lieu of payroll tax filings and/or state quarterly business and individual employee wage reports and unemployment insurance tax filings (including the equivalent third-party payroll service reports).
- Payment receipts, cancelled checks or account statements showing payments to health and retirement plans
- Copies of invoices for utilities and rent/lease payments, copy of lease agreements, and copy of cancelled checks
- Mortgage statement showing the interest and principal breakdown

At the time of this writing, Treasury Secretary Mnuchin announced that the administration is working on expanding the loan period for the Paycheck Protection Program (PPP) to give small businesses more time to spend funds.

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