

COVID-19 Alert

CARES ACT PAYCHECK PROTECTION PROGRAM LOANS SEPTEMBER 2, 2020 UPDATE

SEPTEMBER 2020

This continues our efforts to provide updates on the Paycheck Protection Program (PPP) loan offerings created by the CARES Act and overseen by the Small Business Administration (SBA).

WHAT IS NEW?

On August 24, 2020, SBA issued a new Interim Final Rule (IFR) addressing a handful of PPP loan forgiveness topics. In addition, since we last provided an update, SBA has issued an IFR establishing procedures for appealing SBA PPP loan review decisions and added to its general FAQs for the PPP.

NEW IFR ON LOAN FORGIVENESS TOPICS

SBA's [August 24 IFR](#) is titled "Business Loan Program Temporary Changes; Paycheck Protection Program – Treatment of Owners and Forgiveness of Certain Nonpayroll Costs" (the New Forgiveness IFR). We encourage you to review the New Forgiveness IFR directly, but offer this quick summary:

Treatment of Owners

Our [August 11 update](#) addressed SBA's then just issued "[Frequently Asked Questions \(FAQs\) on PPP Loan Forgiveness](#)." Those FAQs set out certain limitations on items of compensation paid to or for the benefit of the borrower's owners that could be taken into account for purposes of determining PPP loan forgiveness. The limitations varied, depending on the status of the borrower as a C corporation, S corporation, or partnership for tax purposes.

The New Forgiveness IFR provides an exemption to those special limitations in the case of certain owners of borrowers taxed as C or S corporations. In particular, "owner-employees with less than a 5 percent ownership stake in a C- or S-Corporation are not subject to the owner-employee compensation rule." The upshot appears to be to treat these smaller stakeholders the same as any other employee, thereby carving them out from additional filters on eligible cash compensation and employer-provided retirement plan contributions applicable to "owners."

Clarification of Nonpayroll Costs

The amount of PPP loan forgiveness requested by a borrower for Nonpayroll Costs "may not include any amount attributable to the

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business operation of a tenant or sub-tenant of borrower or, for home based-business, household expenses.” A series of examples are offered:

- In the case of a borrower that subleases part of its space, only the portion of the rent paid by the borrower for the portion of the space it continues to occupy is eligible.
- Similar treatment is provided for mortgage interest expense where a part of the mortgaged premises is leased to a third party. E.g., if the borrower occupies 75% of the mortgaged premises and leases the other 25%, only 75% of the otherwise eligible mortgage interest expense may be claimed for forgiveness purposes.
- Similar treatment also applies for rent and utility costs for shared space. The amount eligible for forgiveness for the borrower will be based on the proration applied by the relevant parties in seeking deductions for the expenses in their 2019 tax filings (or anticipated 2020 tax filings in the case of a new business).
- For a borrower who works from home, only the share of covered expenses that were deductible on the borrower’s 2019 tax filings (or anticipated 2020 tax filings in the case of a new business) may be claimed.

Rent and Mortgage Interest Paid to Related Parties

In the case of rent paid to a “related party,” “no more than the amount of mortgage interest owed on the property during the Covered Period that is attributable to the space rented by the business” may be claimed. The applicable lease must have been entered into prior to February 15, 2020, and the borrower is responsible for providing its PPP lender with mortgage interest documentation to substantiate the claimed amount. Note that if the landlord is also a PPP borrower, it will not be eligible to claim the same amount for its own forgiveness application; whether the landlord can continue to claim the same amount as a deduction item for tax purposes is not addressed. The tenant will not be able to claim a deduction for the rent payment to the extent it gives rise to PPP loan forgiveness (see our [May 1 update](#)).

Mortgage interest paid to a “related party” is not eligible for forgiveness.

A “related party” is a party with “[a]ny ownership in common” with the borrower.

NEW IFR ON APPEALS PROCEDURES

SBA has issued an IFR titled “[Appeals of SBA Loan Review Decisions under the Paycheck Protection Program](#).” Again, we encourage you to review this IFR directly; it is lengthy and highly technical, and applying it to any given situation will be fact specific. Some quick observations:

- The IFR creates a new graft on to the procedural rules for SBA’s Office of Hearings and Appeals (OHA) for special use in the PPP.

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- The IFR addresses appeals only as to certain SBA loan review decisions under the PPP. In particular: "This subpart defines the term SBA loan review decision as an official written decision by SBA, after SBA completes a review of a PPP loan, that finds a borrower (1) was ineligible for a PPP loan; (2) was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses; (3) is ineligible for PPP loan forgiveness in the amount determined by the lender in its full or partial approval decision issued to SBA (except for the deduction of any Economic Injury Disaster Loan advance in accordance with section 1110(e)(6) of the CARES Act); and/or (4) is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA." Specifically excluded are appeals of forgiveness decisions made by lenders, as opposed to SBA; there is a separate mechanism for requesting SBA review of a lender decision to deny forgiveness in whole or part.
- Filing an appeal does not have the effect of extending the deferral period of the PPP loan. That is, a borrower that files an appeal must commence payment while the appeals process plays out.
- The deadline for filing the appeal is 30 calendar days following the first of borrower's receipt of (a) the final SBA loan review decision, or (b) notification by its lender of the final SBA loan review decision.
- Note that OHA decisions are generally published without redaction on OHA's website. A borrower will need to take care to request redaction of confidential business and financial information or personally identifiable information that might wind up in the decision.

NEW GENERAL PPP FAQs

SBA re-issued its FAQs generally applicable to the PPP on [August 11, 2020](#). The new version adds FAQs 50 and 51. FAQ 51 provides for payments for group health care benefits to include payments for vision and dental benefits.

PRIOR UPDATES

For our previous PPP articles, please see [April 1, 2020](#), [April 3, 2020](#), [April 9, 2020](#), [April 16, 2020](#), [April 24, 2020](#), [May 1, 2020](#), [May 6, 2020](#), [May 13, 2020](#), [May 18, 2020](#), [June 1, 2020](#), [June 4, 2020](#), [June 12, 2020](#), [June 22, 2020](#), [June 26, 2020](#), [July 7, 2020](#), and [August 11, 2020](#).

We are interested to hear your experiences with the PPP.

Please contact the Reid and Riege attorney with whom you regularly work, or a member of our Business Services practice listed to the right, for more up to date information, or questions about your unique circumstances.

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