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TO: Clients and Contacts
FROM: Keith C. Durkin
DATE: May 17, 2020
SUBJECT: PPP Loan Forgiveness Application

Treasury recently issued a Paycheck Protection Program (“PPP”) Loan Forgiveness Application Form (the “Forgiveness Application”) that resolves some important questions regarding how borrowers will compute forgivable loan amounts. The application can be found here <https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>. Treasury and the SBA intend to issue additional detailed guidance soon. That guidance may extend the end of the PPP program beyond June 30th and make other material modifications. In the interim, the Forgiveness Application, among other items, clarifies the following for borrowers:

1. **Definition of Paid or Incurred.** The PPP Program allows borrowers to use loan proceeds during the 8 week (56 day) period after loan origination (the “Covered Period”) on payroll costs, utilities, rent, and interest on mortgages encumbering real or personal property (the “Covered Expenses”). Language in the CARES Act required the Covered Expenses be paid or incurred during the Covered Period. The Forgiveness Application states Covered Expenses will be considered paid on the date they are actually paid, and that Covered Expenses incurred during the Covered Period can be paid on the next regular payment date and still qualify for forgiveness.

Example 1: Corporation Z receives a \$2M PPP loan on April 30. Corporation Z’s normally bi-weekly payroll run occurs on May 1 and will include payments to employees for services before Corporation Z’s Covered Period. Corporation Z can use its PPP loan for the May 1 payroll run even though it includes payment for services rendered prior to its Covered Period. The May 1 payroll run is considered paid during the Covered Period and is eligible for forgiveness.

Example 2: Corporation receives a \$2M PPP loan on May 5. Corporation Z’s Covered Period expires on June 30. Corporation Z’s utility bill June services will not be received until July 15. Corporation Z can use its PPP loan proceeds to pay its June utility bill on July 15. The June utility bill is considered incurred during the Covered Period and is eligible for forgiveness.

2. Alternative Payroll Covered Period. Many borrowers received their loans during payroll periods, which means their Covered Period will end during payroll periods. Prior to the Forgiveness Applications, borrowers had to consider utilizing short payroll runs. For administrative convenience, the Forgiveness Application allows borrowers to elect to calculate payroll costs using the 8 week period that begins on the first day of their first pay period following the Covered Period. Essentially, this provision allows the borrower's normal payroll runs to be coterminous with expiration of the borrower's Covered Period, so a borrower does not have to use short payroll runs.

Example 3: Corporation Z receives its PPP loan on Tuesday, April 21. Corporation Z's next normal payroll run will occur on Monday, April 27. Corporation Z can elect an alternative payroll covered period beginning on April 27 and ending on June 22. All payroll paid or incurred between April 27 and June 22 will be forgivable.

3. Expanded Definition of Rent. The Forgiveness Application clarifies that rent for personal property is a forgivable Covered Expense. This will be helpful for borrowers leasing expensive equipment in their business.

4. Calculation of Full-Time Employees. PPP loans are subject to a reduction calculated by multiplying a borrower's forgivable loan amount by a fraction, the numerator of which is the average number of full-time equivalent employees ("FTEs") during the borrower's Covered Period (or the borrower's Alternative Payroll Covered Period) and the denominator is, at the election of the borrower either: (a) the average number of FTEs between February 15, 2019 and June 30, 2019; or (b) the average number of FTEs between January 1, 2020 and February 29, 2020 (collectively, the "Testing Periods").

The Forgiveness Application allows borrowers to calculate FTEs in one of two methods: (a) complex method; and (b) simplified method. For the complex method the following calculation is performed for the Covered Period and each of the Testing Periods - each employee's average number of hours paid per week is divided by 40 and rounded to the nearest tenth with all employee capped at 1. The amounts are then added together, and the fraction explained above is derived and multiplied by the forgivable amount. If the fraction equals 1, then the total forgivable amount is forgiven. If the fraction reduces to, for example, 4/5, then 80% of the forgivable amount is forgiven.

The simplified method allows a borrower to assign 1 to any employee who works 40 or more hours per week and .5 to any employee who works less than 40 hours per week. As explained above, the amounts are then added together, the fraction is derived, and then multiplied by the forgivable amount.

Example 4: Corporation Z employed: (a) 10 employees who worked 40 hours or more per week between February 15, 2019 and June 30, 2019; and (b) 5 employees who worked 40 hours or more per week between January 1, 2020 and February 29, 2020. Corporation Z employs 5 employees who worked 40 hours or more per week during its Covered Period. Corporation Z can elect (b) as its testing period and all of its loan can be forgiven.

Example 5: Same facts above except Corporation Z employs 4 employees who worked 40 hours or more per week during its Covered Period and employed 2 employees who worked part time during its Covered Period who worked 10 hours per week during its Covered Period. Corporation Z can elect the simplified method, elect (b) as its testing period, and all of its loan can be forgiven.

5. FTE Reduction Safe Harbor. A borrower who reduced, terminated, or furloughed any employees between February 15, 2020 and April 26, 2020 can either: (a) rehire those employees prior to June 30, 2020 and have the rehired employees count in the borrower's numerator for purposes of the FTE reduction calculation explained above; or (b) hire new employees prior to June 30, 2020 and have the newly hired employees count in the borrower's numerator for purposes of the FTE calculation reduction explained above. There is no requirement for a borrower to issue backpay to a rehired employee.

Example 6: Corporation Z furloughed 4 employees who worked 40 or more hours per week between February 15, 2020 and April 26, 2020. During Corporation Z's Covered Period, it employed 6 employees who worked 40 or more hours per week. Corporation Z employed: (a) 15 employees who worked 40 hours or more per week between February 15, 2019 and June 30, 2019; and (b) 10 employees who worked 40 hours or more per week between January 1, 2020 and February 29, 2020. Corporation Z can rehire the 4 furloughed employees prior to June 30, 2020 and those employees will qualify for the safe harbor. Accordingly, Corporation Z's forgivable amount will not be affected by any FTE reduction calculation.

6. FTE Reduction Exceptions. Employees who were: (a) terminated for cause; (b) voluntarily resigned employment; (c) voluntarily requested and received a reduction in their hours; or (d) who declined a good-faith written offer for rehire will not disrupt a borrower's FTE reduction calculation. All employees who qualifying in any of the foregoing exceptions will be counted in the borrower's numerator for purposes of the FTE reduction calculation.

Example 7: Corporation Z terminated 4 employees who worked 40 or more hours per week between February 15, 2020 and April 26, 2020. During Corporation Z's Covered Period, it employed 6 employees who worked 40 or more hours per week. Corporation Z employed: (a) 15 employees who worked 40 hours or more per week between February 15, 2019 and June 30, 2019; and (b) 10 employees who worked 40 hours or more per week between January 1, 2020 and February 29, 2020. Corporation Z offers in writing to rehire all 4 of the employees on the same terms prior to their termination, but only 2 employees accept the offer. In this example, the 2 employees who declined to be rehired will be counted in Corporation Z's FTE numerator calculation. Accordingly, the total forgiveness amount requested by Corporation Z will not be affected by any discrepancy in the FTE calculation explained above.