

SBA Provides Guidance Regarding PPP Loan Forgiveness, but Questions Remain

Articles, COVID 19: Answers to Business Challenges April 22, 2020

On April 2, 2020, the Small Business Association (SBA), in consultation with the Department of the Treasury, published its Interim Final Rule ("Rule") announcing the Paycheck Protection Program. While the Rule provided some helpful (and surprising) interpretations of the program, lenders and borrowers still had many questions.

In response to these questions, the SBA has been providing additional guidance in the form of Frequently Asked Questions on the Department of the Treasury's website. The guidance is updated frequently, with the most recent update occurring on April 17, 2020. This guidance is important because the SBA states that: 1) borrowers and lenders may rely on the guidance as the SBA's interpretation of the CARES Act and of the Rule and; 2) the U.S. Government will not challenge lender actions that conform with the guidance.

Though borrowers and lenders should review the guidance in its entirety (and continue to check for updates), two important clarifications for borrowers that will seek forgiveness are set forth below:

16. Question: How should a borrower account for federal taxes when determining its payroll costs for purposes of the maximum loan amount, allowable uses of a PPP loan, and the amount of a loan that may be forgiven?

Answer: Under the Act, payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax. For example, an employee who earned \$4,000 per month in gross wages, from which \$500 in federal taxes was withheld, would count as \$4,000 in payroll costs. The employee would receive \$3,500, and \$500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the \$4,000 in wages are excluded from payroll costs under the statute.

* * * *

20. Question: The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week period; when does that eight-week period begin?

Answer: The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.

Though this guidance is helpful, questions regarding steps borrowers must take to ensure loan forgiveness remain. For example, Section 1106 of the CARES Act provides that "costs incurred and payments made" within the 8-week covered period will be forgiven, but the SBA has not clarified whether an expense must be incurred and paid within the eight-week period to be eligible for forgiveness or whether "costs incurred" and "payments made" during the eight-week period are both forgivable. This is an important question because, under the former interpretation, a borrower could not use the funds to pay employees for work performed prior to receiving the loan. Until the SBA provides further guidance, borrowers and lenders must proceed with caution.

For additional information contact Christopher L. Voltz by phone (412-594-5580) or email.

Please note: Tucker Arensberg, P.C. is open for business and available to address your business needs. Our lawyers are working from home to comply with the Governor's directives. Check the website for a listing of our attorneys and to stay current with our News and Insights around the coronavirus. You can access all the recent articles using this link.