From: O'Reilly, Brian <boreilly@BKD.com>
Sent: Tuesday, June 23, 2020 9:07 AM
To: Brian O'Reilly <boreilly@BKD.com>
Subject: New PPP guidance released overnight

Good morning,

Late last night, the SBA posted two new pieces of guidance on the Paycheck Protection Program (PPP). First, the SBA released guidance making conforming revisions to interim final rules (IFRs) issued on May 22, 2020 with Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures Interim Final Rule. Then, a procedural notice was released providing guidance on the refinancing of EIDL loans with PPP loan proceeds. Here are BKD's top takeaways on this latest guidance:

Revised IFR on loan forgiveness and review procedures: Similar to last week's release of the revised Form 3508, *Paycheck Protection Program Loan Forgiveness Application*, this updated guidance makes changes to reflect the *Paycheck Protection Plan Flexibility Act of 2020* (PPPFA) while also providing substantive and generally borrower friendly clarifications:

- Flexibility on filing for forgiveness: The updated IFR provides **borrowers may generally submit Form 3508 or Form 3508EZ at any time on or before the maturity date of the loan, including BEFORE the end of the covered period (CP) as long as all of the loan proceeds have been used for which forgiveness is requested**. In other words, while the choice of CPs for those receiving PPP loans prior to June 5, 2020 remains at eight and 24 weeks, you no longer are required to wait to the end of this period to file for loan forgiveness, a positive development for many who have been hoping for some flexibility in this area. There is one important caveat**: if you end up with more than a 25 percent reduction in salaries/hourly wages during your CP that reduces your loan forgiveness amount for even a single employee, you must calculate the reduction in your forgiveness amount for the entire CP** (or alternative payroll covered period (APCP) if elected). Based on our experience, however, this exception will likely only apply in a limited number of cases as many borrowers do not face this limitation on the forgiveness amount.

- Cap on payroll costs for owner-employees and self-employed individuals: The revised IFR brings some much needed clarity to a significant area of disagreement and uncertainty following the enactment of the PPPFA and last week's release of the revised forgiveness application. The following is a summary of the limits on owner compensation (note: **each owner-employee and self-employed individual only gets one $20,833 limit regardless of the number of businesses they have interests in that may have obtained PPP loans**):
    - C-corporation owner-employee: **$20,833** cash compensation, employer contribution to retirement plan and health insurance premiums paid on their behalf **or, if less, 2.5/12^{ths} of the 2019 amounts for these items.**
    - S-corporation owner-employee: **$20,833** cash compensation and employer contribution to retirement plan on their behalf (cannot include medical insurance premiums) **or if less, 2.5/12ths of the 2019 amounts for these items.**
    - Self-employed individuals filing Schedules C and/or F: **Owner compensation replacement based on the net profit on the 2019 Schedule C or F**, *i.e.*, 2.5/12^{ths} of the net profit reported on 2019 Schedule C or F, **limited to $20,833**. Health insurance and retirement contributions may not be included in this amount.
    - Partners: **Self-employment income from the partnership or LLC as reported on 2019 Schedule K-1, line 14a, reduced by any section 179 depreciation, unreimbursed partnership expenses and certain oil and gas depletion, the net of which is multiplied by 92.35 percent, limited to $20,833.** Similar to Schedules C or F filers, health insurance and retirement contributions may not be included in this amount

- FTE reduction safe harbors: The revised IFR provides guidance on implementing the two safe harbors provided under the PPPFA to avoid reductions in loan forgiveness due to a reduction in full-time equivalents (FTEs) during the CP or APCP in comparison to the borrower's selected reference period:
    - Unfilled positions: Under this safe harbor, borrowers who are able document an inability to rehire employees employed on February 15, 2020 or an inability to hire similarly qualified employees for unfilled positions on or before December 31 can avoid an FTE reduction. The revised guidance simply provides **a borrower must maintain the written offer to rehire, the written record of the rejection and a record of the efforts the borrower took to hire a similarly qualified worker** to satisfy this safe harbor.
    - Decline in activity: Under this safe harbor, borrowers can also avoid an FTE reduction if they can document the inability to return to the same level of business activity as they were operating at on February 15, 2020 due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers of Disease Control and Prevention or the Occupational Safety and Health Administration related to the maintenance of standards of sanitation, social distancing or any other work or customer safety requirements related to COVID-19 that was issued between March 1, 2020 and December 31, 2020. **The latest guidance is very general and provides the documentation to support a decline must include copies of applicable COVID-19 requirements or guidance for each business location and relevant borrower financial records.** The revised IFR also **widens the safe harbor to include requirements issued by local governments** by providing the underlying mandates will be considered to have come from one of the three listed entities above regardless of the agency issuing the mandate.

Guidance on refinancing of EIDL loans with PPP loan proceeds: This procedural notice issued last night by the SBA confirms and clarifies a requirement under previously issued guidance regarding the interaction between EIDL and PPP loans. The notice clarifies this guidance only applies to borrowers who received an EIDL loan between January 31, 2020 and April 3, 2020 as follows:

- An EIDL loan may **not** be refinanced with a PPP loan when the PPP borrower received the EIDL loan before January 31, 2020 or after April 3, 2020
- An EIDL loan is not required to be refinanced with a PPP loan when the borrower received the EIDL funds between January 31, 2020 and April 3, 2020 **and the borrower used the EIDL loan for purposes other than payroll costs**
- A PPP loan must be used to refinance the full amount of an EIDL loan when the PPP borrower received the EIDL loan funds between January 31, 2020 and April 3, 2020 and the PPP borrower **used the EIDL loan funds to pay payroll costs**. The amount of the EIDL loan that is required to be refinanced does not include the amount of any "EIDL Advance Amount" since this amount is not required to be repaid; however, amount of any "EIDL Advance Amount" received will reduce the borrower's PPP forgiveness (note: it is only the advance amount that reduces PPP forgiveness, not the entire amount of the EIDL loan),

Please let me know how we can help with questions or additional resources on the latest developments or on the PPP in general.

Thanks again and stay well!

Brian

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