**FAQs on Paycheck Protection Program**

**Loan Forgiveness Issues**

Nelson D. Cary, Esq.

Suzanne J. Scrutton, Esq.

Cauley P. Simmons, Esq.

Vorys, Sater, Seymour and Pease, LLP

April 27, 2020

Recently, many small businesses that applied for the first wave of Paycheck Protection Program (“PPP”) loans have started to receive their loan approvals, and more importantly, disbursement of funds for the loan. This includes a number of OPRA members. As a result, we and the OPRA staff have begun seeing questions about the use of PPP loan funds. In addition, because a PPP loan may be forgiven under certain circumstances, questions have started to arise regarding those circumstances. These include how to maximize the loan forgiveness amount, which we will refer to in this FAQ as the “LFA.”

While the specific application of the PPP forgiveness criteria will differ depending on a provider’s unique circumstances, some general principles are applicable across-the-board. We have prepared this FAQ in an effort to address the questions we are seeing, or believe it is likely the provider community may have, in light of the conditions Congress and the Small Business Administration (“SBA”) have placed on the PPP.

As in all situations of this type, it is important for providers to seek out qualified legal counsel for advice on their unique circumstances. In addition, we note that the SBA has promised additional guidance on PPP loan forgiveness details. In fact, that guidance was supposed to have been published yesterday. But, it was not. So, please monitor the SBA website for that guidance as it could add to, or change, the answers below.

***How can my agency spend its PPP loan proceeds if it wants to maximize the LFA?***

Providers should use the loan proceeds to pay for:

Payroll costs, including benefits;

Rent, under lease agreements in force prior to 2/15/20;

Mortgage ***interest***, if the loan was prior to 2/15/20; and

Utilities, if the service began prior to 2/15/20.

Providers who are also recipients of an EIDL program loan may also use the proceeds of a PPP loan to refinance the EIDL loan if the EIDL was obtained between 1/31/20 and 4/3/20. If a provider obtained an EIDL during this time and used it for payroll costs, it ***must*** be refinanced by the PPP.

***How much of the loan proceeds must be spent on payroll costs?***

75%

***What is included in “payroll costs”?***

1. Salaries and wages;
2. Employee benefits, including insurance premiums for group health benefits, vacation, allowance for separation or dismissal, and payments for certain types of leaves of absence;
3. Payment for retirement benefits;
4. Payments for taxes assessed by state or local authorities on the compensation of employees.

***What is not included in “payroll costs”?***

1. Compensation of an individual employee in excess of $100,000 per year;
2. Federal taxes (*e.g.*, FICA and income tax) imposed or withheld under the Internal Revenue Code;
3. Compensation of an employee whose principal place of residence is outside the U.S.;
4. Emergency paid sick leave or expanded FMLA leave under the Families First Coronavirus Relief Act (“FFCRA”).

***What about independent contractors or individuals to whom the agency has given an IRS Form 1099?***

Amounts paid to these individuals are ***not*** payroll costs.

***When must my agency spend the money if it wants to maximize the LFA?***

A provider has 8 weeks to spend the money following the date on which the lender disburses the loan proceeds. It may still spend money on permissible uses after that date, but if it does so the PPP becomes an “ordinary” loan.

***What actions will result in a reduction in the LFA?***

Other than not spending the loan in the required timeframe, four primary actions will reduce the LFA:

1. Spending the loan proceeds on anything other than the permissible items noted above (*i.e.*, payroll, rent, mortgage, and utilities).[[1]](#footnote-1)
2. Spending more than 25% of the loan on the four, non-payroll costs noted immediately above.
3. Reducing full-time equivalent employee (“FTEE”) headcount during the 8-week period following the date the loan proceeds is disbursed.
4. Decreasing employee wages and salaries by more than 25% for any employee that made less than $100,000 per year in 2019 during the 8-week period following the date the loan proceeds are disbursed.

***How does the statute or the SBA define a FTEE?***

Neither the statute, the regulations, nor the SBA’s guidance answer this question. We are hopeful that the SBA will issue additional guidance, and that the calculation to determine the number of FTEEs will be simple.

***How does my agency determine if it “reduced” headcount?***

The provider must use, as the “baseline” for this calculation, the average number of FTEEs per month in one of two periods:

2/25/19 to 6/30/19; or

1/1/20 to 2/29/20.

This assumes that the SBA administrator doesn’t determine that the provider is a “seasonal” employer, a determination that, based on our knowledge of the business operations of most providers, seems quite unlikely.

***How does my agency determine if it “reduced” salaries?***

The provider must use, as the “baseline” for this calculation, the most recent, full quarter during which the employee was employed. It is unknown whether the quarter is simply a rolling, 3-month period, or if it is intended to refer to a calendar year quarter (*e.g.*, January 1 to March 31). Hopefully, the SBA’s further guidance on forgiveness issues will address this question.

***What if my agency made headcount reductions (e.g., layoffs, furloughs, etc.) or reduced salaries/wages between 2/15/20 and 4/26/20?***

The SBA has adopted a “rehire” rule that gives a borrower until 6/30/20 to restore these reductions without suffering a reduction in the LFA. Notably, however, this rule only addresses the LFA. It does not give the provider a basis on which to avoid the rule that it must spend 75% of the loan on payroll costs during the 8-week period.

***Why is the rule on salary reductions different from the rule on headcount reductions?***

It is an important distinction to note. For the provider that reduced salaries between 2/15/20 and 4/26/20, the regulation essentially permits a reduction of up to 25% to remain in effect after 6/30/20 without negatively affecting the LFA.

For a provider that did not make such reductions, however, it is of questionable utility. It will depend upon how large the provider’s loan amount is and thus how much the provider must spend on payroll costs in the next 8 weeks. It is very possible that any such reduction would simply make it harder to meet the 75% requirement for payroll costs.

***What if an employee resists returning to work because doing so will mean the employee will actually receive less money?***

Particularly for employees at the lower end of a provider’s pay scale, this could be a real challenge. The combination of state unemployment benefits and the CARES Act’s $600 per week federal unemployment compensation supplement could easily exceed the amount the employee could earn through employment. Theoretically, because work is available, the employee’s eligibility for unemployment compensation should cease if the employee refuses to return to work, but the Ohio Department of Job and Family Services has not provided general guidance on how employers should raise this situation if it occurs. Providers should consult, therefore, with qualified employment law counsel for advice on how to proceed.

***What if the only employees my agency has on layoff are day services or transportation employees and there is no work for them to do even if they returned?***

The SBA guidance does not, at least as of today, address what would happen in this scenario. Providers should consult, therefore, with qualified employment law counsel for advice on how to proceed.

***Can we modify our pay program or add bonuses that may not have existed before we received the PPP loan disbursement in order to increase the amount we spend on “payroll costs” during the 8-week period?***

The SBA guidance does not, at least as of today, address what would happen in this scenario. Providers should consult, therefore, with qualified counsel for advice on how to proceed.

***Are there any spreadsheets or calculators that would help my agency conduct this complicated, LFA analysis?***

We are aware of a number of lenders that have developed spreadsheets to help a borrower quickly calculate the LFA using various assumptions. A provider’s best option, however, is to check with its lender because each provider will submit its application for forgiveness to its lender.

***How does my agency request loan forgiveness?***

The provider should submit an application and required documentation to the lender servicing the loan. At this time, the SBA has not issued a generic application, and so we believe that this process will involve an application that each lender develops. There is currently no specified timeframe in which the application must be submitted. The lender has 60 days from the date it receives the application to issue a decision on the amount of the loan that will be forgiven.

***Will my agency owe interest on the amount of the loan forgiven?***

No.

***Will my agency owe interest on any other amounts?***

Yes. Interest accrues from the date of the loan at the annualized rate of 1%. Providers will need to begin making payments on the loan six months after the loan is made on any amount not forgiven. The loan is due in two years.

***Is there a prepayment penalty if my agency wants to pay back the loan sooner, or if my agency does not want the money or does not think it can spend the money in the fashion required by the deadline required?***

No. There is no prepayment penalty. In that scenario, however, the provider may be liable for interest payments at the 1% annualized rate for whatever period of time the provider held the disbursed funds.

***Where can my agency find more information and resources about Covid-19-related issues?***

Any provider looking for information about the business, employment, or regulatory aspects of this disease is welcome to visit [www.vorys.com/coronavirus](http://www.vorys.com/coronavirus) and sign-up for our weekly webinars addressing a variety of legal issues arising out of this pandemic.

1. Providers should note that spending PPP funds on anything besides the permissible uses and interest payments on certain other types of debt could result in significant, additional liability for the provider, including fraud charges if done knowingly or, in certain situations, personal recourse against a shareholder, member, or partner. [↑](#footnote-ref-1)