

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

Small Business Administration Issues Loan Forgiveness Application; Interim Final Rules To Follow

The Small Business Administration issued a Loan Forgiveness Application and forms with detailed directions on May 15, 2020, providing additional guidance on loan forgiveness calculations.

The Small Business Administration (“SBA”) issued a loan forgiveness application with forms and directions on loan forgiveness calculations. The application includes two required forms: (i) the PPP Loan Forgiveness Calculation Form; and (ii) PPP Schedule A (for eligible payroll costs), that must be submitted to a borrower’s lender. Two other optional forms are included (i) a PPP Schedule A Worksheet; and (ii) an optional PPP Borrower Demographic Information Form. In addition, the application contains detailed information about the documentation that borrowers must submit with the loan forgiveness application and maintain in its records.

Covered Period/Alternative Covered Payroll Period

The application confirms that the Covered Period is the eight (8) week, fifty-six (56) day period running from the day of the loan disbursement. The application clarifies that if the loan was disbursed on multiple days, then the covered period runs from the first disbursement date.

For administrative purposes, the SBA has provided an alternative covered payroll period for employers with bi-weekly or more frequent pay periods. Those borrowers may elect to calculate the eight (8) week period running from the first day of the first pay period following the PPP loan disbursement date. For borrowers who choose to use the Alternative Covered Payroll Period, this period must be used consistently for any area of the application

that refers to use of the Covered Period or Alternative Covered Payroll Period on the application (e.g., health insurance contributions, retirement contributions, state and local taxes and amounts paid to owners up to \$15,385).

Costs Paid or Incurred May be Included in Loan Forgiveness

The Application allows for payroll costs that are paid or incurred to be calculated in the loan forgiveness application. Payroll costs are considered paid either (i) on the day that paychecks are distributed; or (ii) the day the borrower originates an ACH credit transaction. The application also allows for payroll costs incurred but not paid during the last day of the Covered Period or Alternative Covered Payroll Period to be included for loan forgiveness if paid on or before the next regular payroll date. Payroll costs are considered incurred on the day that the employees’ pay is earned.

Eligible non-payroll costs (e.g., interest on mortgage, rent or covered utilities) must be paid or incurred during the Covered Period and paid on or before the next regular billing date (even if the billing date is after the Covered Period).

Number of Employees

Although the information is not relevant for the loan forgiveness determination, the application requests infor-

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

mation about the number of employees at the time of application and at the time of the forgiveness application. Borrowers should review the instructions regarding average full-time equivalency (discussed below) in completing these sections.

Borrower Certifications

The Application requires that borrowers make certain certifications. The certifications include representations that (i) the amount for which forgiveness was requested was used for covered costs; (ii) the amount of forgiveness includes required reductions due to headcount and salary reduction; (iii) not more than 25% of costs were for non-payroll costs; and (iv) no more than \$15,385 was used for compensation owner-employees or self-employed/general partners.

The certification also requires that the borrower verify that the statements on the application are true and correct and that the borrower has verified the payments forming the basis for the loan forgiveness application.

Moreover, the application requires borrowers to certify that they have submitted the required documentation to the lender, including information consistent with documentation provided to the IRS or state or workforce agency.

Finally, the certification again reminds employers of the potential civil and criminal consequences in the event a borrower knowingly uses funds for unauthorized purposes or knowingly makes a false statement to obtain loan forgiveness.

PPP Schedule A Instructions and Worksheet

The instructions to the Schedule A Worksheet detail the calculations required to determine whether any reductions should be applied for loan forgiveness due to headcount or salary reduction.

--Headcount Reduction Timeframes

The instructions set forth the timeframes applicable for the calculation for headcount reduction – for most employers, February 15, 2019 to June 30, 2019 or January 1, 2020 to February 29, 2020. Seasonal employers may use either of the above periods or a consecutive 12-week period between May 1, 2019 and September 15, 2019.

--Average Full-time Equivalent (“FTE”)

To determine the average full-time equivalent, the instructions provide that borrowers should follow the method used on the PPP Schedule A Worksheet. For this calculation, the borrower must use the same period used to determine payroll costs—either the Covered Period or Alternative Covered Payroll Period. The instructions clarify that to calculate average full-time equivalency, the average number of hours per week should be divided by 40 and rounded to the nearest total tenth. The maximum for each employee is capped at 1.0 (meaning that borrowers do not get additional credit for overtime hours worked by employees).

The instructions provide a simplified method to calculate full-time equivalency that may be used at the election of the borrower that assigns a 1.0 for employees who work 40 hours or more per week and .5 for employees who work fewer hours.

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

--FTE Reduction Exceptions

The Worksheet includes instructions on FTE Reduction Exceptions that expands the exceptions previously issued by the SBA and provides further guidance for borrowers who have had headcount reductions outside of the borrower's control. The headcount reduction for loan forgiveness purposes will be offset by (i) any positions for which the borrower made a good faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period which was rejected by the employee; and (ii) any employees who during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours. These individuals should be included on the Worksheet only if the position was not filled by a new employee. As a reminder, prior guidance from the SBA required that the good faith, written offer to employees to return was required to be at the same salary and for the same number of hours as previously worked.

--FTE Reduction Safe Harbor

The Instructions and Worksheet include the safe harbor provisions described under applicable law. A borrower will be exempt from reduction in loan forgiveness based on headcount reduction if the Borrower (i) reduced its full-time equivalent employee level between February 15, 2020 and April 26, 2020; and (ii) restored its full-time equivalent employee levels by not later than June 30, 2020 to the full-time equivalent level in the pay period that included February 15, 2020.

--Salary/Hourly Wage Reduction

The salary/hourly wage reduction needs to be calculated for all employees who (i) received compensation from the borrower at an annualized rate of less than or equal to \$100,000 for all pay periods in 2019 or (ii) who were not employed by the Borrower at any point in 2019. Note that the requirement to calculate salary reduction for employees who were not employed in 2019 is a new requirement not addressed in prior guidance.

The calculation first requires a determination whether pay was reduced more than 25%. The calculation is determined by the following:

the annual salary or hourly wage during the Covered Period or Alternative Payroll Covered Period

divided by:

the average annual salary or hourly wage between January 1, 2020 and March 31, 2020

If the value of this calculation is 75 percent or more, then the borrower is to enter a zero in the column relating to salary/hourly wage reduction (box 3 of the application).

If the value of this calculation is less than 75 percent, then the borrower needs to determine whether the safe harbor for salary/hourly wage reduction is met by comparing:

(a) the annual salary or hourly wage as of February 15, 2020; and

(b) the average annual salary or hourly wage between February 15, 2020 and April 26, 2020

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

If the amount of the annual salary or hourly wage for the period between February 15, 2020 and April 26, 2020 (“b” above) is less than the annual salary or hourly wage as of February 15, 2020 (“a” above), then the borrower must compare the average annual salary or hourly wage as of June 30, 2020. If the June 30th amount is equal to or greater than the annual salary or hourly wage as of February 15, 2020 (“a” above), then the safe harbor is met.

If the safe harbor is not met, then the borrower determines the salary/hourly wage reduction through a multiple step process. The Worksheet requires that the Salary/Hourly Wage Reduction column only need to be completed for employees whose salaries or wages are reduced by more than 25 percent during the Covered Period or Alternative Payroll Covered Period as compared to the period of January 1, 2020 through March 31, 2020.

Required Documentation

The application contains detailed information about the documentation that the borrower must submit with the loan forgiveness application for both payroll and full-time equivalency as well as other documentation that the borrower must maintain but is not required to submit.

The borrower is required to maintain the records relating to the loan application; loan forgiveness; the required certifications regarding the necessity of the loan request and eligibility for the loan; and material compliance with PPP requirements for a period of six (6) years from the date the loan is forgiven or repaid in full and permit authorized representatives of the SBA to access such files.

--Payroll

The loan forgiveness application will need to be accompanied by documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or Alternative Payroll Covered Period, including (i) bank account statements or third party payroll service provider reports documenting cash compensation paid to employees; (ii) tax forms or third party payroll service provider reports including payroll tax filings reported or that will be reported to the IRS (e.g., Form 941); and state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported or that will be reported to the relevant state; and (iii) payment receipts, cancelled checks or account statements documenting the amount of employer contributions to employee health insurance and retirement plans that are included in the forgiveness amount.

--Full-Time Equivalent

In order to demonstrate the number of full-time equivalent employees, the borrower may include payroll tax filings reported or that will be reported to the IRS and state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported or that will be reported to the state for the relevant comparison time periods that the borrower is using. The instructions specify that documents submitted may cover periods longer than the specific time period.

--Non-Payroll

For non-payroll costs, borrowers must submit documentation verifying the existence of obligations/services prior to February 15, 2020 as well as eligible payments from the Covered Period.

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

For business mortgage interest payments – copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period.

For business rent or lease payments – copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the Covered Period.

For business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks or account statements verifying those eligible payments.

--Documentation Required to be Maintained but not Submitted

The borrower is required to maintain the PPP Schedule A Worksheet or its equivalent. In addition, the borrower is required to maintain documentation supporting the listing of each individual employee (i) who received compensation from the borrower at an annualized rate of less than or equal to \$100,000 for all pay periods in 2019; (ii) who were not employed by the Borrower at any point in 2019; and (iii) for any employee who received 2019 compensation at an annualized rate of more than \$100,000.

Documentation also must be maintained supporting FTE Reduction Exceptions including job offers and refusals, firings for cause, voluntary resignations and written requests by employees for reductions in work schedule.

A link to the application can be found here.

<https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

Please contact an attorney in MSF's Employment or Taxation & Estates Groups if you need assistance with respect to this information.



Andrea B. Neuman
Partner | Chair, Employment
212.655.3513 | abn@msf-law.com



Bob G. Goldberg
Partner | Chair, Taxation
(212) 655-3580 | slm@msf-law.com



Gregg M. Kligman
Counsel | Employment
(646) 273 8209 | gmk@msf-law.com



Cassidy Mara
Associate | Employment
(646) 273 8204 | cm@msf-law.com

The information contained in this publication should not be construed as legal advice. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Meister Seelig & Fein LLP are not authorized to practice.