

Paycheck Protection Program Borrower Considerations and Best Practices

For small business owners who have successfully navigated the Paycheck Protection Program ("PPP") application process, there are a number of considerations in order to maximize the benefits of a PPP loan and to minimize potential risks associated therewith.

- *Documentation.* It is critical to maintain accurate documentation regarding the payment of payroll costs, mortgage interest, rent expenses, and utility expenses during the eight week period beginning on the date the loan is originated. This should include payroll payment documentation; canceled checks for mortgages, rent, and utilities; invoices for rent or utilities; bank account information for a segregated PPP-only account (*see below bullet point*); and any other documentation that will help substantiate that the proceeds of a PPP loan were used for allowable purposes.
- *Segregation of Funds.* It is a best practice to segregate the PPP loan proceeds into a separate operating account. Doing so will ensure ease of tracking and verifying that the funds were used for allowable purposes to determine the amount of PPP loan forgiveness. Further, the SBA has stated in the Interim Final Rule ([available here](#)) that if funds are not used for an allowable purpose, that "[i]f you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud." As such, it makes the most sense to completely segregate the PPP funds from the normal operating funds of the business.
- *Understand the 75% Rule.* In the Interim Final Rule, SBA has issued guidance that at least 75% of the loan forgiveness amount must be attributable to payroll costs. Borrowers should ensure they understand what items fall within the term "payroll cost" and seek clarification from counsel where needed. Business owners should make sure that at least 75% of the loan proceeds go towards payroll costs.
- *COVID-19 Impact File.* Maintain a running list of adverse effects that COVID-19 has had on your small business. Although not required by the CARES Act, this will ensure that, should the need arise, the borrower can demonstrate that its business has been adversely affected by COVID-19. This file need not be overly detailed.
- *Understand the "covered period".* For purposes of loan forgiveness, the covered period is the period between the date of origination of the loan and eight weeks thereafter. Borrowers should bear in mind that they should be ready to apply for forgiveness to their lender at the end of the eight-week period to receive loan forgiveness.
- *Communication with Lender.* Communication with your lender is critical. You should understand the bank's expectations in terms of required documentation to be provided during the term of the loan, as well as what information will be required at the end of the eight-week period for purposes documenting the amount that will be forgiven.
- *Employee Retention and Pay.* Make informed decisions regarding employee retention. Under the CARES Act, the amount of forgiveness of the loan may be reduced in certain

circumstances if the borrower's headcount of employees is reduced. There will also be loan forgiveness reduction if the pay of certain workers is reduced. Employers should seek clarification and guidance from counsel where necessary in order to ensure that any employment decisions take into account the possibility of a reduction in loan forgiveness.

- *Credit for Re-Hires.* Consider hiring back workers recently laid off. There is a "grace period" under the CARES Act where employees that were recently laid off can be rehired without potential reduction in forgiveness. (See above bullet point.) Borrowers should seek counsel and carefully scrutinize this question to make strategic decisions for purposes of their loan forgiveness.
- *CARES Act Compliance.* Ensure PPP compliance by not utilizing the Employee Retention Credit or Payroll Tax Deferral provided in the Act. If a small business has also obtained an Economic Injury Disaster Loan ("EIDL"), it is vital for a borrower to ensure that the proceeds of the PPP loan and the proceeds of an EIDL loan are not used for the same purposes.
- *Families First Coronavirus Response Act.* Ensure adequate records are maintained regarding the payment of employees under the Families First Coronavirus Response Act, as these amounts will make adjustments to a small business's payroll cost.

Contact Us

Reach out to Fraser Stryker's business attorneys for more information. We are here to help:



Mark L. Brasee
mbrasee@fraserstryker.com
(402) 978-5306



Neil P. Hassler
nhassler@fraserstryker.com
(402) 978-5374

This article has been prepared for general information purposes and (1) does not create or constitute an attorney-client relationship, (2) is not intended as a solicitation, (3) is not intended to convey or constitute legal advice, and (4) is not a substitute for obtaining legal advice from a qualified attorney. Always seek professional counsel prior to taking action.