

Institute of Scrap Recycling Industries
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Sorting Out the Paycheck Protection Program

*Loan Forgiveness (including recent
changes in H.R. 7010)*

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IMPORTANT NOTE

- HR 7010 revising the Paycheck Protection Program was signed by President Trump on June 5, 2020.
- SBA will need to issue additional guidance in response to HR 7010
- It is unknown whether SBA will limit changes to HR 7010 modifications or use the opportunity to tweak existing guidance
- This presentation assumes SBA changes will be limited to HR 7010 provisions

PPP BASICS

- “Small business” loans under purview of SBA
 - Businesses with fewer than 500 employees
 - Affiliation rules generally apply
 - Exception for franchises, NAICS 72 (hospitality), SBIC
 - SBA guidance evolved re: employees of foreign affiliates
 - Independent contractors, partners, sole proprietors
- 100% guaranteed by SBA
- Available through December 31, 2020 (funds still are available)
- Eligible costs include payroll, benefits, mortgage interest, rent, utilities, other interest

PPP BASICS

- Maximum loan
 - 2.5 times monthly payroll + EIDL OR \$10 million
- Applicant must certify:
 - The uncertainty of economic conditions makes the loan request necessary to support ongoing operations
 - Funds will be used to pay payroll and eligible expenses
- Certification has proven problematic
 - Standard has evolved from statutory “uncertainty” to “current” conditions, LOC, other available resources
 - Many recipients have returned their loans
 - Reputational damage
 - Name and shame

PPP BASICS

- PPP recipients cannot use the employee retention credit
- PPP recipients can use the employer payroll deferral
- Loans under \$2 million
 - SBA safe harbor; loans \$2 million or more subject to extra scrutiny
 - But, IFR makes clear SBA can review any loan, any time, for any reason
- Series of FAQs and Interim Final Regulations (“IFRs”) from SBA and Treasury provide guidance

PPP FORGIVENESS - GUIDANCE

- SBA Form 3508 loan forgiveness application form released May 15, 2020
- Two IFRs issued May 22, 2020
 - Loan Forgiveness Requirements
 - SBA Loan Review Procedures
- More guidance forthcoming
 - Appeal procedures if loan not forgiven

PPP FORGIVENESS – GENERAL INFO

- Full principal amount of the loan may qualify for loan forgiveness
- Amount forgiven cannot exceed the principal of the PPP loan
- Loan proceeds forgiven are excluded from gross income (not treated as cancellation of indebtedness income)
- Expenses paid with forgiven loan proceeds are not deductible

PPP FORGIVENESS—COVERED PERIOD

- Per HR 7010, recipients now have a longer “covered period” to spend loan proceeds and qualify for full loan forgiveness
 - Earlier of 24 weeks from date of loan origination (disbursement)
OR
 - December 31, 2020
 - Referred to as “24 weeks/December 31” in this deck
- SBA rules allow recipients to choose an alternative covered period for payroll beginning on first day of the first payroll period after the loan disbursement (bi-weekly or more frequent)

PPP FORGIVENESS—COVERED PERIOD

- Longer covered period gives businesses more time to bring back furloughed employees and spend at least 60% of loan proceeds on payroll
- Businesses now have until December 31, 2020 to rehire employees and avoid loan reduction (note this is different than covered period, and 24 week covered period may end earlier)

PPP FORGIVENESS—COVERED PERIOD

- But, recipients must wait until the end of the longer covered period to apply for loan forgiveness unless SBA changes procedure
 - Delays certainty whether loan will be forgiven
 - Requires longer compliance with FTE and wage requirements
- Loan forgiveness may be further delayed if employees not rehired until December 31, 2020
- Existing recipients may elect to stay with the original 8 week covered period and apply for loan forgiveness at the end of that period

PPP FORGIVENESS – PAYROLL COSTS

- Payroll costs:
 - Spent during 24 week/December 31 covered period
 - At least 60% of loan proceeds must be used toward payroll – appears to be a hard cliff, no phase-in
 - Employees must be resident in the US
 - Max payroll/person of \$100,000
 - Wages & salaries (including furloughed employees)
 - Commissions & bonuses
 - Hazard pay
 - Tips

PPP FORGIVENESS – PAYROLL COSTS

- Payroll costs:
 - Vacation, parental, family & sick leave
 - Allowance for separation or dismissal
 - Employee benefits
 - Group health care
 - Retirement
 - Payment of state and local taxes
 - Do not include amounts paid to independent contractors (they apply on their own behalf)

PPP FORGIVENESS – PAYROLL COSTS

- Owner-employee & sole proprietor earnings
 - Presumably works like this, but will need SBA guidance: Lesser of 24/52 of 2019 earnings or \$46,154; or, if fewer than 24 weeks before December 31, 2020, lesser number of weeks/52
- Owner-employee
 - Cap of 2019 cash comp + retirement & health care contributions, up to \$100,000
- Sole proprietors
 - Capped by 2019 net profit, up to \$100,000
- General partners
 - Capped by 2019 net earnings less 179 deduction, unreimbursed partnership expenses, oil & gas depletion, multiplied by .9235 (a SECA tax adjustment), up to \$100,000
- No additional forgiveness for retirement & health insurance for sole proprietors and general partners

PPP FORGIVENESS – PAYROLL COSTS

- Paid and/or incurred
 - Payroll costs may be eligible if either paid or incurred during 24 week/December 31 covered period
 - Covered period begins either:
 - On date of loan disbursement
 - First day of first payroll cycle in the covered period
 - Payroll considered paid when distributed or ACH
 - Payroll costs incurred during last pay period of covered period are eligible if paid on or before the next regular payroll date, even if outside 24 weeks/December 31 covered period
 - Payroll considered incurred on date earned

PPP FORGIVENESS – PAYROLL COSTS

- Forgiveness is reduced if employee count or wages are reduced during 24 week/December 31 covered period
 - *EMPLOYEE COUNT*: Reduction equal to: “1 minus (# FTEs during 24 week/December 31 covered period/ # FTEs during reference period (2/15/19 – 6/30/19 or 1/1/20 – 2/29/20)) * unreduced loan forgiveness amount”
 - *WAGES*: Loan reduced by reduction in wages *exceeding* 25% of salaries/wages from January 1 through March 31, 2020
 - If employees cut before April 26 are restored by December 31, 2020, no reduction
 - Count wages or hours reduction, but not both

PPP FORGIVENESS – PAYROLL COSTS

- What is a full time employee?
 - 40 hour work week
 - Divide hours during reference period by 40; each employee capped at 1.0, even if averaging > 40 hours/week
- Part-time employees?
 - Can calculate FTE equivalent in two ways
 - Actual percentage of FTE (# hours worked/40), capped at 1.0
 - FTE equivalent of .5
 - Determined on a per employee basis, not aggregate

PPP FORGIVENESS – PAYROLL COSTS

- Loan forgiveness not reduced for FTEs who:
 - Were offered job back in writing during covered period for same wages/salary/hours and rejected the offer
 - Recipient keeps good records of same
 - Recipient notifies unemployment office within 30 days
 - Were fired for cause
 - Voluntarily resigned
 - Voluntarily requested and received a reduction in hours

PPP FORGIVENESS - NONPAYROLL

- Non-payroll costs must be:
 - 40% or less of costs paid with loan proceeds
 - Paid during covered 24 week/December 31, 2020 period OR
 - Incurred during covered period and paid on or before the next regular billing date for the costs (even if after the covered period)
 - Prepayment of interest not allowed

PPP FORGIVENESS - NONPAYROLL

- Non-payroll costs
 - Interest on mortgages of real or personal property entered into before February 15, 2020 (no prepayment)
 - Rents/leases of real or personal property entered into before February 15, 2020
 - Utilities with service beginning before Feb. 15, 2020

Electric

Transportation

Gas

Telephone

Water

Internet

PPP FORGIVENESS–APPLICATION PROCESS

- Application process
 - Can apply as soon as covered period complete
 - Recipient submits SBA Form 3508 to lender with substantiation, including:
 - Documentation to verify number of employees and pay rates during covered period
 - Federal employment tax returns
 - State employment tax returns
 - Loan documents, lease agreements, utility bills
 - Substantiation of mortgage interest, rent and utilities paid

PPP FORGIVENESS-APPLICATION PROCESS

- Certification from authorized person
 - Information is correct
 - Loan proceeds were used to pay payroll and eligible expenses
 - Agree to provide additional information the SBA may request pertaining to loan eligibility and loan forgiveness
 - Records supplied are consistent with tax filings
 - Acknowledgement of potential penalties if information incorrect or funds used for unauthorized purposes
- Must retain records for 6 years after forgiveness or loan paid off

PPP FORGIVENESS – LENDER PROCESS

- Lender reviews:
 - Borrower certification in loan application
 - Documentation of expenses
 - Calculations by recipient on loan forgiveness application
 - Lender must conduct a review but can rely on borrower attestations
- Lender must decide within 60 days of receipt of a complete application whether loan forgiveness is allowable and to make recommendation to SBA
 - Some or all of amount applied for
 - Denial without prejudice if SBA is reviewing

PPP FORGIVENESS – LENDER PROCESS

- Lender supplies substantiating documents to SBA
- Lender requests payment from SBA at time of recommendation
- Lender held harmless if attestation from recipient
- If lender recommends non-forgiveness in part/full:
 - Submits explanation to SBA
 - Notifies recipient in writing
 - SBA can review on its own volition
 - Recipient can request an SBA review within 30 days of notice from lender

PPP FORGIVENESS – SBA PROCESS

- SBA remits forgiven amount to lender, plus interest through date of payment, within 90 days of when lender makes recommendation to SBA
- SBA may determine loan not forgiven
 - Recipient ineligible due to terms of CARES Act
 - Ineligible due to SBA rules at the time of loan application
 - Certification not made in good faith
- Lender loses fees if SBA decides borrower is ineligible
- Lender responsible to tell recipient of forgiveness amount

PPP FORGIVENESS – SBA PROCESS

- Things the SBA can review:
 - Eligibility for the loan (including certification)
 - Loan amounts
 - Use of loan proceeds
 - Loan forgiveness amounts
- SBA can request additional information through lender or directly from borrower
 - Lender will provide any information it has to SBA
 - Failure to comply may result in loan not forgiven
 - SBA can pursue repayment or “other remedies”

PPP FORGIVENESS – SBA PROCESS

- SBA has final decision-making authority on loan forgiveness
- SBA can review the loan or the loan application even if loan is under \$2 million *at any time*
 - DOJ action shows SBA is serious about enforcement

PPP FORGIVENESS - REPAYMENT

- Generally, loans are nonrecourse to shareholders, partners and members IF they are eligible recipients
- Any part of the loan not forgiven must be repaid by recipient before 5 year maturity
- Loan repayment deferred until the date the forgiven amount of the loan is paid to the lender
- If recipient fails to apply for loan forgiveness within 10 months of the end of the covered period, must begin making payments on the loan

QUESTIONS?

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