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Asking for Forgiveness: How PPP Loan Forgiveness Works, From Eligibility Through Application

June 3, 2020

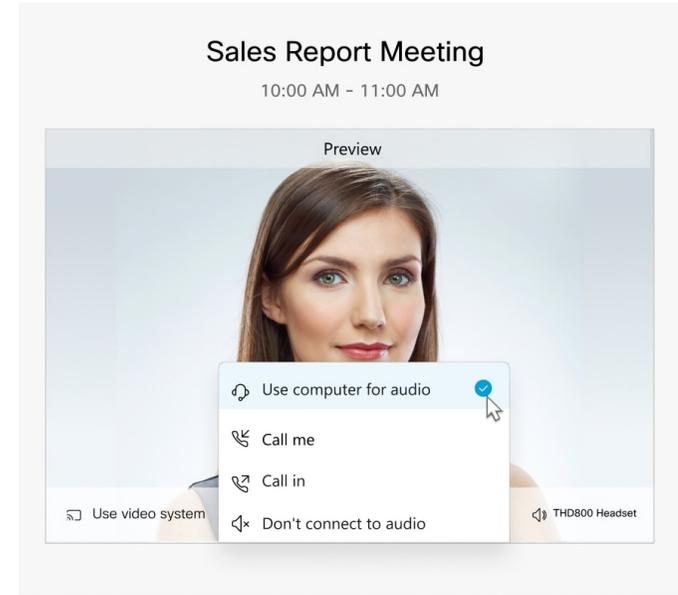
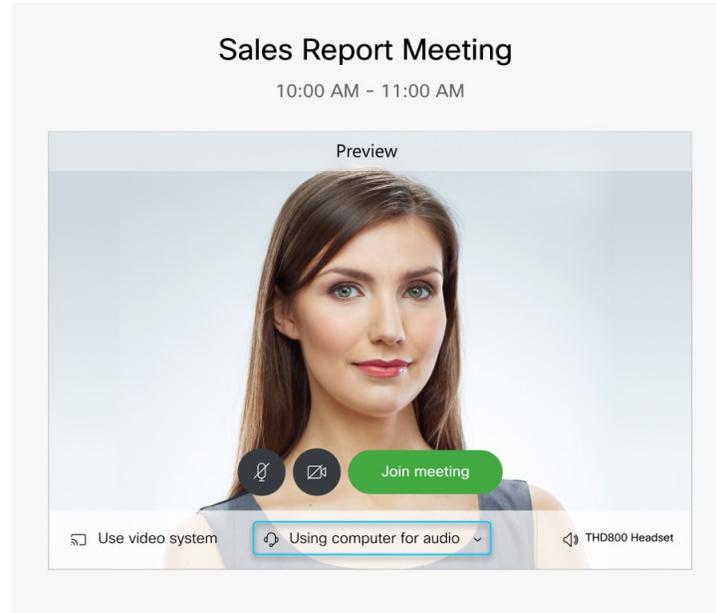
Christopher Pippett
Gabriel Herman

Melissa Sanders
Catherine Mitchell

Moderated by Paul Edelberg

Welcome and thank you for joining us for today's presentation. Our topic is **“Guide to COVID-19 Issues and Relief for your Business.”**

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The CARES Act and SBA Loans

- The CARES Act provides financial support for small businesses and targeted sectors of the economy, along with direct cash payments to many Americans and enhanced resources for medical support.
- Fox Rothschild has assembled a multidisciplinary team of attorneys to guide clients in securing the assistance made available through this massive new law.
- Our deep experience in corporate financing and lending, and specific experience in advising on Small Business Administration loans, enable us to direct clients to the smartest and most strategic options.



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Today's Presenters



Paul B. Edelberg

A partner at Fox Rothschild, Paul focuses his practice on corporate and commercial law for privately owned businesses. He serves a wide range of clients with domestic and international needs, including international trade and cross-border transactions.



Christopher J. Pippett

A Fox Rothschild partner, Chris is chair of the firm's financial services industry practice. He represents financial institutions, including local and regional banks, credit unions and mezzanine and mortgage lenders in business regulatory, commercial and consumer lending and workout issues.



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Today's Presenters



Melissa T. Sanders

A partner at Fox Rothschild, Melissa advises corporate clients on a wide range of business matters, with a focus on mergers and acquisitions, private placements of securities, financing transactions and ownership transition programs.



Gabriel B. Herman

An associate at Fox Rothschild, Gabe's practice focuses on representing clients in corporate, mergers and acquisitions, and commercial finance work. He has significant experience working with Small Business Administration lenders.



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Today's Presenters



Catherine Bell Mitchell

A Fox Rothschild associate, Catherine primarily assists lenders in real estate financing and counsels developers and investors in the acquisition, disposition and leasing of commercial properties.



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PPP-Overview: Where Are We Now?

- Purpose: “Keeping American workers paid and employed.”
- Launch: April 3, 2020: \$349B – exhausted in 2 weeks
- Second tranche: April 24: \$310B
- Estimate: \$150B left in PPP program as of June 1
- More than 16 releases of FAQs and 4 interim regulations
- Paycheck Protection Program Flexibility Act
 - Extend Covered Period to 24 weeks
 - Only 60% to payroll costs
 - Deferral of payroll taxes



Permitted Use of Proceeds

- PPP identifies specific, permitted uses of loan proceeds:
 - Payroll
 - Rent/mortgage interest
 - Utilities



What Is Included in Payroll?

- Salaries
- Cash tips
- Vacation pay, parental, family, medical or sick leave
- Allowance for separation or dismissal (severance)
- Payments for group health care and retirement benefits
- Payments of state or local tax on the compensation



What Is Excluded From Payroll?

- Employee compensation in excess of \$100K
- Employer portion of payroll taxes
- Compensation for an employee residing outside the U.S.
- Sick leave wages or qualified family leave wages for which the employer receives credit under the Families First Coronavirus Response Act



Preparing for Review or Audit of PPP Loan

- U.S. Treasury has stated that all loans in excess of \$2M will be audited.
- Smaller loans may also be reviewed even if forgiveness is not sought. All loans for which forgiveness is sought will be reviewed.
- Scope of audits and reviews is not known. Expect that any audits will be rigorous. Further, an interim rule published on May 24, 2020 states that loans may be reviewed for:
 - Borrower eligibility
 - Accuracy of certifications, representations and warranties
 - Use of proceeds
 - Eligibility for loan forgiveness



Additional Details Regarding Review of PPP Loan

- If SBA reviews a loan, it will notify the lender in writing. The lender must then notify the borrower in writing within five business days of receipt of the SBA's notification
- Individuals who made false statements or failed to disclose material facts in order to receive excess funds may be subject to penalties, up to and including criminal prosecution
- In addition, the SBA can pursue individual shareholders, members, or partners of a PPP borrower for nonpayment of a PPP loan if the borrower was not eligible for the loan



Roadmap to Support Your PPP Loan

- Review the necessary certifications on the loan application and confirm that you were and are able to meet them
 - This includes certifications as to eligibility and the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
 - Additional certifications are set forth on page 4 of the forgiveness application.



Roadmap to Support Your PPP Loan

- Adopt board resolutions that document your rationale for applying for the loan and retaining the funds
- Keep meticulous records of the use of the PPP proceeds
- Run projections for several months to demonstrate need for PPP loan to support ongoing operations
- Do projections to show need to:
 - Furlough or layoff employees
 - Borrow against line of credit
 - Utilize reserves



Roadmap to Support Your PPP Loan

- Document adverse impacts on business, such as:
 - Concerns with cash flow/AR collections
 - Inefficiency of remote workforce
 - Difficulty/increased cost of hiring new employees
 - Projects delayed or cancelled
- Retain all correspondence from clients, vendors regarding:
 - Changes in projects
 - Modified payment cycles
 - Access to supplies



Loan Forgiveness – Requirements

- 75% of proceeds must be used to cover payroll costs during the covered period (e.g., the 8-week period following loan origination)
- Remaining proceeds must be used for permitted uses. However only certain uses will be forgiven:
 - Covered mortgage interest payments – may be forgiven
 - Covered rent – may be forgiven
 - Covered utilities – may be forgiven
 - Interest on debt incurred prior to February 15, 2020 – may be forgiven
 - Refinancing of EIDL loan – depends on when the EIDL loan was taken out and whether it was used for payroll costs



Loan Forgiveness – Reductions

- Reduction in full-time equivalent employees
 - Calculated based on the number of employees during covered period divided by the number of employees during one of two other periods – either February 15, 2019, to June 20, 2019, OR January 1, 2020, to February 29, 2020
 - If employees were laid off prior to April 26 but are rehired, a reduction may be cured
 - Employees who were laid off and offered employment and refused will not result in reduction as long as the employment offer is in writing and there is documentation of the employee's refusal



Loan Forgiveness – Process

- Borrowers must affirmatively submit a request to their lenders
- Request should include documents verifying the following items during the covered period:
 - Number of full-time equivalent employees
 - Employee pay rates
 - Payments on rent, mortgage interest and utilities
- Lenders are expected to do a good-faith review



Loan Forgiveness – Process

- Lenders are directed to work with the borrower to remedy any errors in calculation or material omissions of supporting documents
- Extent of review will depend in part on source of information. For example, a third-party payroll report by a recognized payroll company will require less review than reports where companies do not use such a provider.



Loan Forgiveness – Process

- Lenders have 60 days after receipt of all documentation to submit a decision on forgiveness to the SBA. Decisions: approval, denial, denial without prejudice
- Exception: If the SBA notifies a lender that SBA is reviewing a loan, the lender may not approve until loan review is complete
- If the lender determines the borrower is entitled to forgiveness in full or in part, the SBA will remit the appropriate forgiveness amount to the lender, plus any interest accrued, within **90 days** after the lender delivers its decision to SBA
- However, SBA remitting funds is subject to the SBA's review of the loan or application



Loan Forgiveness – Process

- Lenders must provide the SBA with the reason for any denial
- Lenders also must notify the borrower in writing
- Within 30 days of notice from the lender, a borrower may request that the SBA review the lender's decision. Appeal process to be determined
- Borrower must retain PPP documentation for six years and permit authorized representatives of the SBA to access such files upon request





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PPP Rehire Rules

Salary/Wage Reduction Safe Harbor

Requirements:

- 1) Restore wages to Jan. 1, 2020 – March 31, 2020 levels
- 2) By June 30, 2020



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FTE Reduction Safe Harbor

Requirements:

- 1) Borrower Reduced FTE Employees
- 2) During Safe Harbor Period (February 15 – April 26)
- 3) FTE Employees Restored by June 30
- 4) & = FTE Employees in February 15 Pay Period



FTE Reduction Exception #1

Employees Rejecting Offers to Rehire (or Offers to Re-Establish Hours):

- 1) Good faith, written offer during covered period
- 2) Offer for same salary/wages and hours
- 3) Employee rejects offer
- 4) Borrower documents offer and rejection
- 5) Borrower informs state unemployment office



FTE Reduction Exception #2

During covered period, employees who:

- 1) Are fired for cause
- 2) Voluntarily resign
- 3) Request and receive reduction in hours

will not reduce loan forgiveness



Q: Do I have to rehire the same employees?

A: No!

Q: Can I lay off employees after June 30?

A: Yes, and employees may claim unemployment at that time.

Q: Will the 75% payroll costs requirement still apply?

A: Yes.

Q: Can I rehire independent contractors?

A: No, because their compensation would not be “payroll costs.”



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Potential Changes From H.R. 7010

Paycheck Protection Program Flexibility Act (if passed by Senate in current form) would:

1) Change the Covered Period to earlier of:

a) 24 weeks

or

b) December 31

2) Change Rehire & Wage Restoration Date to: December 31

3) Add exemption for employee unavailability



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PPP Loan Forgiveness Calculation Form

Business Legal Name ("Borrower")	DBA or Tradename, if applicable	
Business Address	Business TIN (EIN, SSN)	Business Phone
	Primary Contact	E-mail Address

SBA PPP Loan Number: _____ Lender PPP Loan Number: _____

PPP Loan Amount: _____ PPP Loan Disbursement Date: _____

Employees at Time of Loan Application: _____

Employees at Time of Forgiveness Application: _____

EIDL Advance Amount: _____ EIDL Application Number: _____

Payroll Schedule: The frequency with which payroll is paid to employees is:

Weekly Biweekly (every other week) Twice a month Monthly Other _____

Covered Period: _____ to _____

Alternative Payroll Covered Period, if applicable: _____ to _____

If Borrower (together with affiliates, if applicable) received PPP loans in excess of \$2 million, check here:

Forgiveness Amount Calculation:

Payroll and Nonpayroll Costs

Line 1. Payroll Costs (enter the amount from PPP Schedule A, line 10): _____

Line 2. Business Mortgage Interest Payments: _____

Line 3. Business Rent or Lease Payments: _____

Line 4. Business Utility Payments: _____

Adjustments for Full-Time Equivalency (FTE) and Salary/Hourly Wage Reductions

Line 5. Total Salary/Hourly Wage Reduction (enter the amount from PPP Schedule A, line 3): _____

Line 6. Add the amounts on lines 1, 2, 3, and 4, then subtract the amount entered in line 5: _____

Line 7. FTE Reduction Quotient (enter the number from PPP Schedule A, line 13): _____

Potential Forgiveness Amounts

Line 8. Modified Total (multiply line 6 by line 7): _____

Line 9. PPP Loan Amount: _____

Line 10. Payroll Cost 75% Requirement (divide line 1 by 0.75): _____

Forgiveness Amount

Line 11. Forgiveness Amount (enter the smallest of lines 8, 9, and 10): _____

Loan Forgiveness Application

- Instructions and Summary (pg 1- 2)
- Forgiveness Calculation Form (pg 3)
- Borrower Certifications (pg 4)
- Instructions for Completing Schedule A (pg 5)
- Schedule A (pg 6)
- Instructions for Schedule A Worksheet (pg 7-8)
- Schedule A Worksheet (pg 9)
- Documents to be Provided (pg 10)



Loan Forgiveness Application: New Developments

- Covered Period **or** “Alternative Covered Period”
 - “Covered Period” – 8-week period beginning on disbursement date; or
 - “Alternative Payroll Covered Period” – 8-week period beginning on the first day of first pay period after disbursement date
- Eligible and Non-Eligible Payroll Costs:
 - Costs paid **and** costs incurred during the covered period
 - Eligible cost incurred but not paid during the covered period, must be paid before next payroll/billing date



Loan Forgiveness Application: New Developments (cont'd)

- Forgiveness Amount
 - Distinct from loan amount
 - Does not include more than 25% non-payroll costs
 - 3:1 ratio between forgivable payroll cost and non-payroll costs
 - If not prepaid, non-used portion of loan proceeds will convert to a term loan
- Compensation to owners: Capped at the lesser of \$15,385 or the 8-week equivalent of a 2019 compensation



Loan Forgiveness Application: FTE Calculations

- Guidance on Full Time Equivalent Employee Calculations
 - Employees paid for 40 or more hours per week are full-time and count as 1 FTE
 - For employees working < 40 hours a week, the average number of hours paid per week divided by 40 and rounded to nearest tenth and averaged for the period
- Alternative FTE Calculation
 - Simplified method which uses .5 for any employee working less than 40 hours per week



Loan Forgiveness Application: FTE Reductions

- FTE Reduction Exceptions: No reduction in FTE on account of employees who:
 - Rejected a good-faith written offer of rehire at same salary or wages and same number of hours as earned by such employee in the last pay period prior to reduction in hours
 - Fired for cause
 - Voluntarily resigned or requested and received a reduction in hours
- Borrower must:
 - Maintain records of the offer and rejection
 - Inform the applicable state unemployment insurance office of the employee's rejected offer within 30 days of the rejection



Loan Forgiveness Application: Safe Harbors and Calculating Reduction

- No reduction if the borrower reduced its FTE/Salary or Wages levels between February 15, 2020, and May 26, 2020, and **restores** its FTE/Salary or Wages levels by June 30, 2020, to the FTE/Salary or Wage levels in the pay period that included February 15, 2020
 - June 30, 2020 is the Safe Harbor date independent of when proceeds were disbursed.
 - Employees who earned > \$100,000 annualized based on a single pay period in 2019 are not counted.



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