

Are We There Yet? – Part Deux

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We recently wrote about a series of revisions to existing Paycheck Protection Program (PPP) guidance from the U.S. Small Business Administration (SBA) and the U.S. Department of the Treasury. The revisions were generally made to conform existing PPP rules to the substantive changes made to the PPP when the Payroll Protection Program Flexibility Act of 2020 (Flexibility Act) was enacted on June 5, 2020.

The SBA has continued to issue rules, and although the most recent guidance is largely non-substantive, two of the open questions we identified in our previous alert have been answered and are worth quickly addressing:

1. Although the maximum amount of PPP loan proceeds that can be used for cash compensation paid to an owner-employee to remain eligible for forgiveness is capped based on an equivalent amount of the individual's 2019 compensation, the meaning of "owner-employee" was never defined. In particular, it was not clear whether the term was intended to refer to only S-corporation owners or applied in the context of C-corporations as well. While the term still has not been defined, the SBA's June 26 interim final rule answers the question affirmatively – providing that "C-corporation owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health insurance contributions made on their behalf." This rule does not reference any threshold level of ownership to qualify as an "owner-employee." As a result, absent further clarification, it appears that an employee of a C-corporation (or an S-corporation for that matter) who owns even a *de minimis*, non-controlling equity interest in the employer would be deemed an owner-employee for purposes of the payroll compensation cap.
2. The Flexibility Act introduced an exemption from the reduction in PPP loan forgiveness due to reduction in a borrower's full-time equivalent (FTE) headcount during the covered period if the borrower was unable to operate at its February 15 level of business activity due to compliance with federal guidance from the Department of Health & Human Services (HHS), the Centers for Disease Control and Prevention (CDC) or the Occupational Safety and Health Administration (OSHA) regarding sanitation, social distancing and any other worker or customer safety measures related to COVID-19. The SBA's June 26 interim final rule, however, expressly expands the availability of this exemption to compliance with requirements and guidance at the state and local government level as well. Accordingly, a borrower will be exempt from a reduction in loan forgiveness based on FTE reductions if the borrower can document that the reduced FTE level stems from a decline in business activity due to compliance with state and local government re-opening/operating orders that are based in part on COVID-related guidance from any of the three federal agencies.

Finally, it is worth noting that the deadline to apply for a PPP loan has been extended to August 8. With approximately \$130 billion in funds approved for the program still available as the original deadline expired on June 30, Congress passed a temporary extension of time to apply for a PPP loan. President Trump signed the legislation on July 4 giving

businesses that have not yet applied for a PPP loan extra time to do so. While there have been preliminary discussions on how to make use of the remaining funds (including a proposal to allow certain categories of borrowers to take out a second PPP loan), no changes appear imminent. But, as with all matters PPP, tomorrow is another day and we will continue to follow and update you as appropriate on PPP (including any Part II), so don't touch that dial.

If you have questions or would like more information, please contact Ryan J. Udell (udellr@whiteandwilliams.com; 215.864.7152), Adam J. Chelminiak (chelminiaka@whiteandwilliams.com; 215.864.7078) or another member of the Corporate and Securities Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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