

WVMA LEGAL BRIEFS

NEW RULES FOR PAYCHECK PROTECTION PROGRAM BORROWERS

By: Bryan C. Esch

DeWitt LLP Law Firm

In the April edition of Legal Briefs, in an article titled “How to Get Federal Funding of Your Employee Wages,” Brian Anderson summarized the Paycheck Protection Program (“PPP”) through which the federal government provided loan funding for businesses, including veterinary clinics, that were harmed by the COVID-19 pandemic. PPP loans provided easily obtained funding to enable eligible borrowers to pay qualifying payroll, rent, and utility expenses. If a veterinary clinic that received PPP loan funding satisfies certain requirements to maintain pre-pandemic employment and payroll levels, its PPP loan may be forgiven by the U.S. Small Business Administration (“SBA”) and its PPP lender. If a PPP loan is not forgiven, it will then be a low interest (1%), 2-year loan.

Originally, PPP loans had to be used on eligible expenses within 8 weeks of obtaining the loan, but Congress modified the Program to extend the covered period from 8 weeks to 24 weeks to enable more PPP borrowers to benefit from the program. PPP borrowers have 10 months from the date of the loan to apply for forgiveness without making any PPP loan payments.

Recently, the SBA issued new rules that significantly simplify the steps certain PPP borrowers need to take to obtain forgiveness of their PPP loans and to establish required procedures for changes of ownership of an entity that obtains PPP funds.

The rules make it significantly easier for PPP borrowers with PPP loans less than \$50,000 (“Small Loans”) to apply for and obtain forgiveness of their PPP loans. If your PPP loan is a Small Loan, the SBA has made the following three exceptions to the general PPP forgiveness rules:

- Small Loan borrowers now may file a simple, one page loan forgiveness form (Form 3508S) that requires less documentation and fewer calculations from the borrower.
- Small Loan borrowers are exempt from reductions in the amount of forgiveness available because of payroll and employment reductions. Therefore, if you are a Small Loan borrower and you use all of your PPP loan for eligible expenses, your entire PPP loan will be forgiven, upon submitting your forgiveness application, even if you reduced the number of employees you employed or the total amount of your payroll during the PPP period.
- The PPP lender for a Small Loan borrower will no longer be required to verify the borrower data or calculations for the forgiveness application.

For PPP loans that are not Small Loans, the amount of the PPP loan that may be forgiven is determined by taking the amount of the PPP loan spent on eligible payroll and other eligible expenses during the 24 week PPP period and reducing the eligible amount by a percentage based on how much the borrower reduced its payroll costs by salary cuts and reductions in staff. The SBA clarified in the new rules that, for PPP loans that are not Small Loans, PPP lenders only need to verify borrower cost used to justify PPP forgiveness up to the amount required to reach the amount for which the PPP borrower seeks forgiveness. PPP borrowers will still need to submit all payroll documents, documents showing the

number of full-time equivalent employees, and evidence of the payment of any eligible non-payroll expenses with their PPP loan forgiveness application.

The new SBA rules also clarify how changes of ownership of PPP borrowers will be handled. For purposes of the PPP loan, a “change of ownership” is when (1) at least 20 percent of the stock or other equity of the PPP borrower is sold or transferred, in one or more transactions, including to an affiliate or an existing owner, (2) the PPP borrower sells or otherwise transfers at least 50 percent of its assets, in one or more transactions, or (3) a PPP borrower is merged with or into another entity.

If the PPP loan is fully satisfied or forgiven, there are no restrictions on a change of ownership. If the PPP loan is not fully satisfied or forgiven, and the sale is structured as a sale of equity or a merger, the PPP borrower does not need prior approval of the change of ownership from the SBA if the sale or other transfer is of less than 50% of the equity of the PPP borrower. Also, if the PPP borrower is selling or otherwise transferring more than 50% of its equity or assets, and the PPP loan is not fully satisfied or forgiven, the PPP borrower does not need prior approval of the change of ownership from the SBA if the PPP borrower completes a forgiveness application and submits it to the PPP lender and an interest bearing escrow account controlled by the PPP lender is established with funds equal to the outstanding balance of the PPP loan.

SBA approval of any change of ownership involving the sale of 50 percent or more of the assets of a PPP borrower will be conditioned on the entity purchasing the assets assuming all of the PPP borrower’s obligations under the PPP loan.

If SBA approval of a change of ownership is not required, the PPP lender still must notify the SBA within 5 business days of the completion of the change of ownership transaction.

The new SBA rules provide additional clarity for PPP borrowers. It is important that you consult your attorney, accountant, or PPP lender to ensure that you correctly apply for PPP forgiveness and handle changes of ownership correctly.