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SBA and Treasury Provide Additional Guidance on PPP Forgiveness – September 4

While Congress has remained deadlocked on legislation to revise and expand the Paycheck Protection Program ("PPP") forgivable loan program, the Small Business Administration ("SBA") and Department of the Treasury ("Treasury") have continued to provide additional guidance on PPP forgiveness issues.

SBA and Treasury recently published some new adjustments to the forgiveness rules:

> Rent Payments to Related Parties. Many businesses lease property from a related entity. The new rules restrict the ability to obtain forgiveness for rent paid to such related parties. For purposes of the rule, a "related party" is a party with "any ownership in common" between the borrower and the property owner.
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> Forgiveness of expenses for rent paid to such a "related party" is limited to the amount attributable to mortgage interest paid on the property by the owner, prorated to reflect the portion of the property leased by the borrower.
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> In light of another new rule (described below) the owner cannot use mortgage costs attributable to the leased portion of property for its own PPP forgiveness.
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> Therefore, where there is a lease among parties with common ownership, the lessor must determine the mortgage interest attributable to the leased portion. The lessee (tenant) may claim that amount (but no more than that amount) as forgivable lease expenses. The lessor (landlord) may not claim that amount as forgivable mortgage interest costs.
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> As with any lease payments, the lease must have been entered into before February 15, 2020 for the lease payments to be forgivable.
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> Mortgage on Leased Property. The new rules also restrict forgiveness for costs attributable to mortgage interest if the mortgage is on property leased by the borrower to tenants. A borrower paying mortgage interest on property that is leased to other parties must reduce the claimed forgiveness for mortgage interest by a percentage based on the percentage of fair market value of the property that is leased. That is, if 25 percent of the property is leased, then mortgage interest can be forgiven on only 75 percent of the interest costs.
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> Owner-Employees. The rules restrict the ability to obtain forgiveness on payroll costs attributable to owner-employees or self-employed persons. These limitations are lower than the overall limit on forgivable payroll for non-owner employees.[1] Accordingly, an employee's status as a "owner" can make a meaningful difference in the forgiveness calculation.
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> The latest revised rules exclude from the definition of "owner" those employees who own less than 5 percent of the equity of a C-corporation or S-corporation. Such persons will

[1] The effective "cap" on forgivable payroll costs paid to owner-employees or self-employed individuals is $20,833 (based on 2.5 months of compensation capped at $100,000 per year) whereas the "cap" on forgivable payroll costs for non-owner employees is $46,154 (based on 24 weeks of compensation capped at $100,000 per year).

not be deemed to be "owners" for purposes of the limitation on forgiveness and their payroll costs can be applied to forgiveness without restriction.

Employees with an ownership interest in an entity taxed as a partnership apparently will still be treated as "owner-employees."

Shared Expenses. If a borrower shares space with another business, then expenses (e.g., utility costs) related to such businesses must be allocated for forgiveness purposes in the same manner as the businesses allocate such expense for tax purposes.

Household Expenses for Home-Based Businesses. A PPP borrower with a home-based business cannot claim household expenses as forgivable unless such expenses would be deductible for tax purposes.

In light of legislation adopted earlier in the year, many borrowers should be able to maximize the forgiveness amount via payroll costs paid over a 24-week period. If payroll costs maximize forgiveness, then the above complications as to lease and mortgage payments may not arise. The new rules provide additional payroll cost flexibility for payments to those owning small amounts of equity.

For those businesses not able to maximize forgiveness via payroll costs, however, these new rules should be heeded since some otherwise-forgivable costs may be excluded.

Vandenack Weaver LLC attorneys can assist with all your PPP questions at 402-504-1300 or info@vwattys.com .