

## Updates

May 18, 2020

SBA Releases PPP Loan Forgiveness Application and Implicit Guidance on Requirements for Loan Forgiveness

On May 15, 2020, the Small Business Administration (SBA) released an application for loan forgiveness under the Paycheck Protection Program (PPP). A copy of the forgiveness application can be found [here](#). Businesses that received a PPP loan have been awaiting regulatory guidance on how they can maximize forgiveness of their loan. Under the CARES Act, regulatory guidance on the rules for forgiveness was due to be provided by April 26, 2020, but still has not been issued. In the absence of this guidance, businesses have had to make assumptions about how best to use their PPP loan proceeds to qualify for loan forgiveness. This has created much anxiety, especially since loan forgiveness applies only with respect to amounts spent in the eight-week period after the loan is disbursed and some companies are already six weeks into this eight-week period. The new application for loan forgiveness includes instructions and formulas that suggest how the SBA will process requests for loan forgiveness, but it is not an official rule and it leaves many questions unanswered. Additional clarification may be provided through rulemaking or the SBA's issuance of FAQs, which will likely appear [here](#).

As of May 18, 2020, here is what PPP borrowers and potential applicants need to know.

### **Key Takeaways**

- Interest on PPP loans does not appear to be eligible for forgiveness.
- Borrowers who use a bi-weekly (or more frequent) payroll can use an "alternative payroll covered period" for administrative convenience in calculating their payroll costs eligible for forgiveness, based on the eight-week period beginning on the first day of the regular payroll cycle following the borrower's receipt of a disbursement of their PPP loan proceeds.
- Borrowers will be allowed to include amounts incurred but not paid during the eight-week "covered period" or "alternative payroll covered period," as long as those amounts are paid before the next billing date (for eligible mortgage, rent, or utility payments) or on or before the next regular payroll date (for payroll costs).
- Borrowers can also include compensation paid during the eight-week "covered period" or "alternative payroll covered period," even if those amounts were earned in the days prior to the start of that period. Payment is determined based on the day paychecks are distributed or the day the ACH transaction is originated.

Full time employee equivalents are to be calculated based on a 40-hour standard per FTE; for convenience, borrowers may use 0.5 for any employee who works fewer than 40 hours per week and 1.0 for any employee who works 40 or more hours per week.

- Details regarding *every employee* and their cash compensation and hours worked will need to be provided in applying for loan forgiveness.
- Details regarding salary or wage reductions will need to be provided for (1) any employee who did not receive compensation from borrower at an annualized rate of more than \$100,000 for any pay period in 2019 and (2) any employee who was not employed at any point in 2019.
- Employees who were fired for cause, voluntarily resigned, or voluntarily requested and received a reduction of their hours (and who were not replaced with new FTEs) will not be counted in determining

whether a reduction in FTEs applies to limit forgiveness.

- If an employee's average salary or hourly wage as of June 30, 2020, is equal to or greater than such employee's annual salary or hourly wage as of February 15, 2020, then any reduction in loan forgiveness that would have occurred as a result of the salary or wage reduction that occurred between February 15 and April 26, 2020, is disregarded.
- If the borrower's total FTE as of June 30, 2020, is greater than or equal to the borrower's total FTE for the pay period that included February 15, 2020, the FTE reduction that occurred between February 15 and April 26, 2020, is ignored.
- The dollar-for-dollar reduction in forgiveness stemming from reductions in salary and wages is applied first, and then the resulting amount is further reduced by the percentage reduction in FTE.
- The percentage reduction in FTE is also applied to the otherwise eligible amounts paid for mortgage interest, rent, and utility payments, creating a bigger incentive to bring back employees into full pay status (whether returning them from unpaid furlough or replacing recently terminated employees) so that FTE is maximized *on* June 30, 2020.
- Borrowers will be required to indicate on the cover of their loan forgiveness application whether the borrower, together with its affiliates (but excluding certain affiliates exempted pursuant to the SBA's affiliation rules) received PPP loans in excess of \$2 million in the aggregate, making this a clear threshold for SBA review determinations.
- An authorized officer of the borrower will be required to make a number of representations and certifications relating to accuracy of the calculations.

## Calculation of Maximum Forgiveness Amount

### Maximum Forgiveness Amount

The CARES Act indicated that up to the full principal amount of PPP loans could be eligible for forgiveness. In [prior guidance](#), the SBA indicated that principal *and interest* under PPP loans could qualify for forgiveness, subject to certain restrictions and limitations. The loan forgiveness application form, however, uses the PPP loan amount as a limit on the amount eligible for forgiveness (see lines 9 and 11 of the [PPP loan forgiveness calculation form](#)). As a result, it appears that borrowers will be required to pay any interest accrued on their PPP loan, although such interest accrues at a low rate of 1% per annum.

### Eligible Expenses

The CARES Act indicated that PPP loan proceeds had to be spent on specific eligible expenses to qualify for forgiveness. This included payroll costs,<sup>[1]</sup> payments of interest on covered mortgages, payments of covered rent obligations, and covered utility payments.

- Eligible payroll costs for any employee were capped at a pro-rated portion of \$100,000 (on an annualized basis), which [prior guidance](#) in the form of the SBA's FAQ #7 clarified applied only with respect to cash compensation and not benefits or other non-cash compensation. Accordingly, for an eight-week period, the cash compensation limit would be \$15,385, but that would not limit other payroll costs, including health insurance premiums, employer contributions to retirement plans, and the employer's share of state and local taxes assessed on the employee's compensation. This is confirmed in the forgiveness application, which refers to this \$15,385 limit on cash compensation per employee, and which has separate lines on which to enter the cash compensation (capped at \$15,385 per person), employer health insurance

contributions, employer retirement plan contributions, and employer-paid state and local taxes on employee compensation.

- Eligible payroll costs also include up to \$15,385 in pay for owners of the borrower—including "owner-employees, a self-employed individual, or general partners." The application, however, does not apply any thresholds to an "owner-employee" (for example, the PPP application only required greater than 20% owners to be disclosed), and therefore, employees that own a minority interest may be treated as an "owner-employee."
- To be "covered," the mortgage interest, rent, or utility payment had to be pursuant to an obligation that existed prior to February 15, 2020. The CARES Act also imposed some limits on the kinds of utility payments that would qualify for forgiveness, limiting those to "a service for the distribution of electricity, gas, water, transportation, telephone, or internet access." This would exclude other utility services, such as sewer, trash, and other services that are sometimes included in a triple-net lease. In addition, the form application did not expand the definition of utility payments to cover "21st Century utilities" such as Amazon Web Services.
- The form application does clarify that interest payments can include payments on business mortgage obligations on personal property (as opposed to mortgages that only secure real property) and rent payments can include payments on personal property leases.

The loan forgiveness application uses the term "Cash Compensation" as part of the calculation of eligible payroll costs. Cash Compensation is defined as gross salary, gross wages, gross tips, gross commissions, paid leave (vacation, family, medical, or sick leave, not including leave covered by the Families First Coronavirus Response Act), and allowances for dismissal or separation paid or incurred during the Covered Period or the Alternative Payroll Covered Period, capped at \$15,385 per person. Note that the definition of Cash Compensation does not expressly include bonuses. However, if the goal of the loan program is to encourage employers to pay employees their full pay throughout the covered period, a make-whole bonus to achieve that for salary reductions implemented during the covered period seems consistent with the intent of the program and consistent with the inclusion of other supplemental employer-paid compensation items like commissions and severance.

In each case, the amount eligible for reimbursement had to be spent within the "covered period," which the CARES Act defined as the eight-week period after the PPP loan was originated.

The SBA's [prior guidance](#) also provided that at least 75% of the PPP loan proceeds would have to be paid or incurred on payroll costs, and if more than 25% of the proceeds were spent on non-payroll costs, that would limit forgiveness.

Since the passage of the CARES Act, questions have been raised as to whether these eligible expenses had to be incurred *and* paid during the "covered period," or if payment obligations could be accelerated and paid during the covered period to qualify for forgiveness. For example, "payroll costs" include an "allowance for dismissal or separation," which could include a lump-sum severance payment. Some analogized from this to suggest that other eligible payments could be accelerated or prepaid and count toward forgiveness as long as they were paid in the covered period (and were below the \$15,385 per person cap). The loan forgiveness application suggests some clarification on this point.

Under the loan forgiveness application, borrowers can include both (1) payroll costs *paid* during the covered period (or the Alternative Payroll Covered Period, as discussed below) and (2) payroll costs *incurred* during the covered period (or the Alternative Payroll Covered Period, as discussed below). This allows for payroll costs that are paid at the beginning of the covered period relating to an earlier payroll period to be included, as well as payroll costs that are incurred during the eight-week period but not paid until after the eight-week period (as long as they are paid on or before the next regular payroll date).

Similarly, with respect to covered mortgage obligations, covered rent obligations, and covered utility payments, the loan forgiveness application allows the borrower to include payments made during the covered period and those incurred during the covered period and paid on or before the next regular billing date, even if that is after the end of the covered period. With respect to covered mortgage obligations, the application form specifically says that prepayments of interest and payments of principal cannot be included in this calculation. The application form is silent, however, as to prepayments or accelerated payments as to covered rent obligations and covered utility payments, including any modifications to payments resulting from amendments to existing leases and existing loan obligations.

### **Covered Period and the New Alternative Payroll Covered Period**

As noted above, the CARES Act contemplated that eligible expenses would have to be paid and incurred in an eight-week "covered period" following the date the PPP loan was originated. The loan forgiveness application provides borrowers greater flexibility regarding the time period to be used in calculating loan forgiveness.

Specifically, for payroll costs, the application allows the borrower who runs a bi-weekly (or more frequent) payroll to use an "Alternative Payroll Covered Period" in calculating the payroll costs that qualify for forgiveness. Rather than limiting the borrower to the eight-week period beginning on the date the PPP loan was disbursed, this allows the borrower to use an eight-week period beginning on the first date of their first pay period following the PPP loan disbursement date. This modification to the "covered period" should help considerably from an administrative perspective for businesses that pay employees on a weekly or bi-weekly basis, since it will allow them to tie their forgiveness request to specific payroll periods, rather than the arbitrary PPP loan disbursement date. However, it is not clear whether an employer who uses different payroll cycles for employees (such as semi-monthly for exempt employees and weekly for non-exempt employee) could use the Alternative Payroll Covered Period for all employees, or just those who are on the more frequent payroll cycle.

The shift of the eight-week period to accommodate payroll periods does not, however, apply to the calculation of the expenses eligible for forgiveness with respect to payments for covered mortgage obligations, payments for covered rent obligations, and covered utility payments. For those calculations, the borrower will be required to use the eight-week "covered period" beginning on the first date proceeds on the PPP loan were disbursed.

### **Calculation of Estimated Forgiveness Amount**

Under the CARES Act, the first step in determining loan forgiveness is to calculate an estimated forgiveness amount, which is the sum of payroll costs, payments for covered mortgage obligations, payments for covered rent obligations, and covered utility payments. The loan forgiveness application takes the same approach, but allows eligible borrowers to use the new Alternative Payroll Covered Period (so long as it is used consistently throughout the application) and the clarified approach as to payments actually paid during the covered period or Alternative Payroll Covered Period, *and* payments incurred during the covered period or Alternative Payroll Covered Period, as applicable. These modifications to the calculations should be helpful for borrowers not only from an administrative perspective, but also to help include more eligible expenses than would have applied under a strict application of the eight-week covered period.

### **Reductions to Forgiveness Amount**

Under the CARES Act, after an estimated forgiveness amount is calculated, it is then subject to downward adjustments based on headcount reductions or reductions in wages or salary amounts. Specifically, these would apply with respect to the following:

- **Headcount Reductions:** Any reduction in the borrower's average number of full-time equivalent employees (FTEs) per month during the eight-week period after the loan was originated, compared to, at the borrower's election, either (1) during the period of February 15, 2019, through June 30, 2019, or (2) during the period of January 1, 2020, through February 29, 2020.
- **Payroll Reductions:** Any reduction by more than 25% in the total salary or wages of an employee who was paid in 2019 wages or salary at an annualized rate of pay of \$100,000 or less and of an employee who was not employed in 2019, which reduction is in effect during the eight-week period after the loan is made, compared to the total salary or wages the employee received during the most recent full quarter in which the employee was employed before such eight-week period (i.e., the quarter ended March 31, 2020).

If there were payroll reductions, the amount of otherwise eligible payroll costs would be reduced by the amount of the reduction in total salary or wages in excess of 25%.

If there were headcount reductions, the entire amount of the loan eligible for forgiveness (including mortgage interest, rent, and utilities) would be reduced by multiplying the potential forgiveness amount by a fraction comprising the borrower's average number of FTEs during the eight-week "covered period" divided by the borrower's average number of FTEs in the applicable comparison period.

The loan forgiveness application provides some clarity as to how these adjustments are to be calculated.

### **Headcount Reductions and Calculation of Full-Time Equivalent Employees**

Although the CARES Act referred to the borrower's "average number of full-time equivalent employees," this term was not defined in the CARES Act or existing SBA regulations and left many to speculate as to how this would be calculated. The loan forgiveness application form clarifies this by saying that, for each employee, this is calculated by entering the average number of hours paid per week (as opposed to "per month", under the CARES Act), dividing by 40, and rounding to the nearest tenth, but this number cannot exceed 1.0. For example, an employee who is paid for an average of 32 hours per week would be treated as 0.8 FTEs ( $32/40 = 0.8$ ). An employee who is paid overtime for working 50 hours per week would be treated as 1.0 FTEs ( $40/40 = 1.0$ ). Note that this calculation is based on employees, so an owner who receives pay (such as an owner-employee, self-employed individual, or general partner) would not be included in these calculations, even though their pay is an eligible payroll cost.

Notably, this calculation is not based on the number of hours worked by the employee, but instead is calculated based on the number of hours for which they are paid per week (capped at 40). For employers who have been subject to shutdown or shelter-in-place orders but have continued to pay their employees' wages or salaries, this will be welcome information. For employers who have placed employees on furlough and have continued to provide benefits, but not wages or salary pay, this could be troubling since it means that the employees would not be counted as FTEs. However, there is a way to unwind this limitation on forgiveness as described further below. It is not clear from the form how to treat an employee who is on a leave of absence and being paid through a third-party insurance, such as disability insurance or workers' compensation. It is also unclear how to treat an employee who has been terminated but is receiving salary continuation as severance during the applicable period, as that person is being paid and those severance payments are eligible Cash Compensation.

The loan forgiveness application also creates a new exception with respect to this formulaic reduction to forgiveness. Specifically, if the borrower's FTEs were reduced with respect to employees fired for cause (not defined), employees who voluntarily resigned, or employees who voluntarily requested and received a reduction of their hours, and if the borrower did not replace those workers during the applicable period, then these reductions are not to be included in the calculation of the reduction to loan forgiveness. While it is not clear, it seems reasonable that someone who is taking a voluntary leave of absence for a non-COVID-19 reason (e.g., maternity leave) would be counted in this category. It is not clear whether a performance-based termination would count as a termination for cause, particularly if the employer did not contest (on the basis of for-cause termination) the unemployment application filing made by that employee.

The loan forgiveness application also provides that, if the borrower made a good-faith written offer to rehire an employee that was rejected by the employee, and if that individual was not otherwise replaced by the employer, the FTE reduction corresponding to that employee would not reduce the borrower's forgiveness. The loan forgiveness application provides that the offer to rehire the employee must occur during the covered period or Alternative Payroll Covered Period, whereas prior SBA [guidance](#) in the form of FAQ #40 did not say that this had to occur during the covered period. As discussed further below under "FTE Reduction Safe Harbor" and "Salary/Hourly Wage Reduction Safe Harbor," the CARES Act contemplated that rehiring or restoring wages or salaries for employees by June 30, 2020, so as to "eliminate" headcount reductions or reductions in wages or salaries would make the borrower exempt from the corresponding reduction in forgiveness. It was previously thought that this exemption for employees who refuse to return to work would similarly be measured by the June 30, 2020, deadline, rather than be limited to the covered period.

### **Reduction in Wages or Salary**

The CARES Act indicated that forgiveness would be reduced based on reductions of "total salary or wages" in excess of 25% for employees who were paid wages or salary at an annualized rate of not more than \$100,000 in 2019. The reduction was to be based on a comparison of total salary or wages in the covered period, compared to the most recent full quarter. It was unclear in the CARES Act whether the comparison of salary and wages would be as of the end of the prior quarter (e.g., to give effect to any Q1 raises), or on some other basis. This portion of the CARES Act suggested the potential of a dollar-for-dollar reduction in forgiveness, but the calculation of this reduction to forgiveness also was unclear. The loan forgiveness application form clarifies these determinations.

With respect to the comparison of annual salary and hourly wages during the covered period (or Alternative Payroll Covered Period) to the prior quarter, the loan forgiveness application applies an average annual salary or hourly wage for the covered period (or Alternative Payroll Covered Period) and the first calendar quarter of 2020, rather than the actual amount paid. To apply this test, for each employee who (1) either (i) was not employed in 2019 or (ii) had an annualized pay rate of not more than \$100,000 in 2019, and (2) experienced a reduction in annual salary or hourly wage rate during the Covered Period or Alternative Payroll Covered Period as compared to the first quarter of 2020, the borrower will need to (i) calculate the employee's average annual salary or hourly wage during the covered period or Alternative Payroll Covered Period, as applicable, and then (ii) compare that to the employee's average annual salary or hourly wage for the period from January 1, 2020, through March 31, 2020. If this comparison reveals a decrease of 25% or more during the Covered Period or Alternative Payroll Covered Period, then forgiveness would be reduced. The amount of the reduction is not on a dollar-for-dollar basis from the first dollar reduced, but instead only takes into account the reduction on a dollar-for-dollar basis of the reduction in excess of 25%. If, for example, an employee's annualized average salary was reduced from \$90,000 to \$63,000, representing a 30% reduction, then the forgiveness available would be reduced by an amount based on (1) the annual salary reduction in excess of 25% (\$4,500 in our example, since 75% of \$90,000 would be \$67,500), (2) *multiplied by 8*, and (3) *divided by 52*, for a total reduction in

forgiveness of \$692 ( $\$4,500 \times 8/52$ ). This represents eight weeks of the salary reduction, using the SBA's average approach.

Notably, the formula provided by the SBA focuses on a reduction to the rate of annual salary and hourly wages, not actual cash compensation paid. As a result, it appears that a reduction in hours worked for an hourly employee, in the absence of a change to his or her rate of pay, would not trigger an adjustment to the forgiveness amount under this formula; however, a reduction in hours actually paid during the applicable period would reduce the FTE calculation above. Accordingly, this approach appears to solve for potential double-counting that could have otherwise occurred with respect to a reduction in hours worked for employees that receive an hourly wage or a reduction in salary actually paid for exempt employees who are put on unpaid furlough. If an hourly employee experiences a greater than 25% decrease in their hourly wage rate, then there is a formulaic reduction to forgiveness that would be based on the average number of hours worked per week between January 1, 2020 and March 31, 2020.

### **FTE Reduction Safe Harbor**

In addition, the CARES Act provided a mechanism for borrowers who engaged in a headcount reduction (including layoffs, reduced number of paid hours, or unpaid furlough) in the period between February 15, 2020, and April 26, 2020, to mitigate the reduction in loan forgiveness, if they "eliminated" the reduction in FTEs by June 30, 2020.

The loan forgiveness application adopts and implements this concept as to FTE reductions in what it refers to as the "FTE Reduction Safe Harbor," which provides that, "the Borrower is exempt from the reduction in loan forgiveness based on FTE employees described above if both of the following conditions are met: (1) the Borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and (2) the Borrower then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the Borrower's pay period that included February 15, 2020." The loan forgiveness application provides additional clarity that if the borrower's total FTE as measured on June 30, 2020, is greater than or equal to the borrower's total FTE for the pay period that includes February 15, 2020, then the headcount reduction that occurred between February 15, 2020 and April 26, 2020 results in no loss of forgiveness.

As under the CARES Act, this Safe Harbor appears to compare apples to oranges, since the FTE reduction to forgiveness compared average FTEs during the eight-week covered period (or Alternative Payroll Covered Period) to either, at the borrower's option, the period of February 15, 2019, through June 30, 2019, or the period of January 1, 2020, through February 29, 2020. However, the language of the loan forgiveness application is consistent with the CARES Act on this point.

### **Salary/Hourly Wage Reduction Safe Harbor**

In addition, the CARES Act provided a mechanism for borrowers who engaged in a reduction in salary rates and hourly wage rates of employees making less than \$100,000 in 2019 (or new hires in 2020) in the period between February 15, 2020, and April 26, 2020, to mitigate the reduction in loan forgiveness, if they "eliminated" the reduction in the pay rates of the impacted employees by June 30, 2020.

The loan forgiveness application adopts and implements this concept as to salary and hourly wage reductions in what it refers to as the "Salary/Hourly Wage Reduction Safe Harbor," which is calculated on a per-employee basis. Specifically, if the "average annual salary or hourly wage as of June 30, 2020," is equal to or greater than the "annual salary or hourly wage as of February 15, 2020," then the Safe Harbor is met, and no dollar for dollar reduction is applied. This seems to be the case even if the employee is not made whole for the reduction in pay during the covered period or Alternative Payroll Covered Period. Note that "average" appears to be a typo, as the loan forgiveness application provides no guidance for what period the average should be taken to determine the

average as of June 30, 2020. This interpretation is consistent with the statutory language in the CARES Act, which simply states that the reduction must be "eliminated" by "not later than June 30, 2020.

## **Documentation Requirements**

### **Applying for Forgiveness**

To apply for forgiveness, the borrower will need to complete the loan forgiveness application and provide the completed form, together with the required supporting documents, to their lender. These materials do not go directly to the SBA, but instead go to the lender that is servicing the PPP loan. Lenders may create electronic portals to allow for this information to be provided electronically.

Based on borrowers' experience with the PPP loan application process, we know that each lender will be implementing this process differently, and it will be important to communicate with your lender to understand their particular requirements. Under the CARES Act, forgiveness decisions are due to be made by the lender within 60 days after the borrower applies for forgiveness; however, it is likely that a lender would not consider this time period as beginning until the full application for forgiveness and all required documents have been provided.

## **Documentation Requirements**

The CARES Act provided that, to apply for forgiveness, the borrower is required to submit the following documentation to the lender that is servicing the PPP loan:

- Documentation verifying the number of FTEs on payroll and pay rates for the applicable pay periods, including payroll tax filings reported to the IRS (Form 941) and state income, payroll, and unemployment insurance filings;
- Documentation, including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, covered lease obligations, and covered utility payments; and
- A certification from a representative of the borrower stating that (1) the documentation presented is true and correct and (2) the amount for which forgiveness is requested was used to retain employees, make interest payments on covered mortgage obligations, make payments on covered rent obligations, or make covered utility payments.

The loan forgiveness application imposes similar requirements and also requires that the borrower provide to its lender documentation verifying the existence of mortgage obligations, rent or lease obligations, and utility services, in each case, prior to February 15, 2020.

In addition, the loan forgiveness application provides that each borrower must maintain, but is not required to submit to its lender: (1) documentation supporting the listings of employees subject to salary or hourly wage reductions; (2) documentation supporting the listings of employees that received in any single pay period in 2019 compensation at an annualized rate of more than \$100,000; (3) documentation regarding any employee job offers and refusals, firings for cause, voluntary resignations, and written requests by any employee for reductions in work schedule; and (4) documentation supporting the borrower's use of the FTE Reduction Safe Harbor.

## **Payroll Cost Details**

The CARES Act provides for adjustments to loan forgiveness based on headcount reductions and reductions in wages or salaries, as discussed above. To facilitate tracking of this information, the loan forgiveness application requires borrowers to provide detailed information about their payroll costs, including identifying all employees by name and social security number (last four digits), and scheduling their cash compensation during the covered period (or Alternative Payroll Covered Period), average hours worked compared to a 40-hour work week so as to reflect an "Average FTE" amount, and any applicable salary or hourly wage reduction. In particular, the form specifically requires documentation regarding pay for any employee who received during a single pay period in 2019 compensation at an annualized rate of more than \$100,000. This may require careful attention to employees who earn commissions. It is unclear whether this would include signing bonuses or other large supplemental compensation payments that caused aggregate pay in 2019 to exceed \$100,000. The form notes that the documentation supporting these calculations will need to be consistent with tax documents submitted to the IRS and/or state tax or workforce agencies. It also includes an authorization for the lender to share the tax information with the SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for purpose of ensuring compliance with PPP requirements and all SBA reviews.

Due to the level of detail required and the certifications as to the accuracy of this information, it will be important for borrowers to work closely with their payroll providers or service organizations to ensure that this information can be properly assembled and provided on a timely basis. Many payroll providers established reporting capabilities custom-tailored to the PPP loan application form to help borrowers apply for PPP loans, and many borrowers will need to turn to them again in gathering this information for the loan forgiveness application. Although this may help expedite gathering the information, PPP borrowers should keep in mind that the borrower is responsible for the accuracy of the information provided to their lender and the SBA.

## **Other Observations**

### **\$2 Million Threshold for Loan Reviews and Necessity Certification**

Since the SBA issued [guidance](#) on April 23, 2020, in FAQ #31 clarifying how they intend to interpret the "necessity" certification included in the PPP loan application, much discussion has focused on the topic of "necessity" and safe harbors that the SBA has offered that allow borrowers to be "deemed" to have made the certification in good faith if they return their loan proceeds by May 18, 2020, or if, together with their affiliates, they borrowed less than \$2 million under the PPP. This \$2 million threshold was first referenced on April 29, 2020, in FAQ #39, in which the SBA said it intends to "review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's forgiveness application." It was again referenced on May 13, 2020, in FAQ #46 when the SBA announced that borrowers who, together with their affiliates, received PPP loans less than \$2 million would be "deemed to have made the required certification concerning the necessity of the loan request in good faith."

Notably, this \$2 million threshold has not been referenced in formal rulemaking and was not referenced in the CARES Act; however, the \$20 million limit on borrowing by corporate groups that was referenced in one of the SBA's [interim final rules](#) does not appear anywhere in the loan forgiveness application. The inclusion of the \$2 million threshold in the application form makes it clear that the SBA intends to use that as a threshold for review determinations.

## Resources

- [PPP Loan Forgiveness Application](#)
- [CARES Act](#) - Section 1102 addresses eligibility and other PPP loan requirements, while Section 1106 addresses loan forgiveness
- [U.S. Treasury CARES Act Resources](#)
- [PPP Loan FAQ](#) - Published on an incremental basis beginning on April 8, 2020

## ENDNOTE

[1]"Payroll Costs" were defined as (A) the sum of payments of any compensation with respect to employees that is a (i) salary, wage, commission, or similar compensation, (ii) payment of cash tip or equivalent, (iii) payment for vacation, parental, family, medical, or sick leave, (iv) allowance for dismissal or separation, (v) payment required for the provisions of group health care benefits, including insurance premiums, (vi) payment of any retirement benefit, or (vii) payment of state or local tax assessed on the compensation of employees; and (B) the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in 1 year, as prorated for the covered period. Eligible "Payroll Costs" were subject to limitations, providing that "Payroll Costs" do not include (i) the compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period, (ii) taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period, (iii) any compensation of an employee whose principal place of residence is outside of the United States, (iv) qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (Public Law 116–127), or (v) qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act (Public Law 116–127).

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