

New PPP Loan Forgiveness Guidance Issued in Advance of Opening of SBA's Loan Forgiveness Portal

While debates in Congress continue regarding extending or providing additional COVID-19 relief legislation, the Small Business Administration (SBA), U.S. Department of the Treasury (Treasury), and lenders under the Paycheck Protection Program (PPP) are preparing for the next wave of activity for PPP loans. Specifically, the deadline to obtain a PPP loan was August 8, 2020, and other key milestones related to PPP loan forgiveness are rapidly approaching. The SBA previously announced that it intends to make an electronic portal available on August 10, 2020, to begin processing PPP loan forgiveness applications, and on August 4, 2020, the SBA and Treasury released [new FAQs](#) regarding loan forgiveness. The new FAQs largely reiterate prior guidance but include some clarifications that may affect borrowers' applications for loan forgiveness. Highlights of these developments and key reminders regarding the loan forgiveness process are provided below.

PPP Loan Forgiveness Process

- Loan forgiveness applications can be submitted on SBA [Form 3508](#), [3508EZ](#), or a lender equivalent form. The "EZ" form provides a streamlined process in that it does not require listing employee-by-employee details, but only certain borrowers are eligible to use the "EZ" form (see instructions to the "EZ" form [here](#)). It remains to be seen whether lenders use forms for loan forgiveness that deviate from the SBA's forms.
- Applications for PPP loan forgiveness and supporting documentation are required to be submitted to the lender that is servicing the applicable PPP loan, not to the SBA directly. Accordingly, PPP borrowers should contact their respective lender or loan servicer to confirm the process that will be required when applying for forgiveness of their PPP loan. We expect that lenders will require that the forgiveness application and all supporting documentation be provided electronically through an online portal specific to that lender.
- Once a complete loan forgiveness application and supporting documents are provided to the PPP lender or loan servicer, they have 60 days to review and process the forgiveness application. When they have completed their review, they are required to notify the SBA regarding their determination of whether all or a portion of the PPP loan may be forgiven. Because of the requirement to report to the SBA within 60 days after receipt of a complete loan forgiveness application, many lenders have been unwilling to accept PPP loan forgiveness applications while the SBA's process was unclear. Lenders are now starting to accept forgiveness applications in anticipation of the SBA opening its online portal. We expect this process to accelerate once the SBA's portal goes live on August 10, 2020.
- The SBA has a period of 90 days after their receipt of the lender's determination of loan forgiveness to remit payment to the lender to give effect to the loan forgiveness. This 90-day period may be extended if the loan is subject to SBA review.
- The SBA has announced that all loans in amounts in excess of \$2 million will be subject to SBA review, meaning that borrowers with loans in excess of \$2 million should expect the forgiveness process to take 150 days or longer. Other loans may also be subject to SBA review on a case-by-case basis.

New FAQs Regarding Loan Forgiveness Generally

- The new FAQs regarding general loan forgiveness (#1-3) address the use of Form 3508EZ by sole proprietors, independent contractors, and self-employed individuals with no employees, confirm the ability to use scanned copies of documents and e-signatures and e-consents, and confirm that payment obligations are deferred for borrowers during the loan forgiveness process.
- Specifically, as long as the borrower submits its application for loan forgiveness within 10 months after the expiration of the borrower's applicable "covered period," the borrower will not be required to make any payments (principal or interest) until the forgiveness amount is remitted to the lender by the SBA. If the loan is fully forgiven, the borrower is not responsible for making *any* payments. This suggests that a borrower will not be required to pay accrued interest on their PPP loan; however, this still remains somewhat uncertain due to language in the CARES Act that provides that only principal is subject to forgiveness and formulas in the SBA's loan forgiveness forms that do not contemplate forgiveness of accrued interest. If a portion of the loan is not forgiven, then the lender is responsible for notifying the borrower of the date on which the borrower's first payment is due. The FAQ does not specify the mechanics for paying accrued interest and whether that would be a lump sum due on the date of the first payment or whether it can be added to principal and amortized over the life of the loan.

New FAQs Regarding Payroll Costs

- FAQs #1-3 under the heading "Loan Forgiveness Payroll Costs FAQs" confirm that payroll costs paid during the "covered period" are eligible for forgiveness, even if "earned" or accrued prior to the "covered period," that payroll costs incurred during the "covered period" but paid by the next regular payroll date are eligible for forgiveness, and that this could require including payroll costs from a partial payroll period at the end of the borrower's "covered period" (or Alternative Payroll Covered Period, if applicable).
- FAQs #4-5 under this heading confirm that gross compensation (not net compensation) should be used in calculating payroll costs, and that this can include payments made by the employer with respect to lost tips, lost commissions, bonuses, and hazard pay, subject to a limit on cash compensation of \$100,000 on an annualized basis per employee. Note that this \$100,000 limitation does not apply to non-cash compensation that is eligible as part of "payroll costs," such as the employer's contributions toward retirement plans or healthcare plans.
- FAQs #6 and 7 under this heading detail the scope of healthcare benefits expenses and retirement benefits expenses that are permitted for forgiveness. Importantly, these FAQs provide that the acceleration and payment of benefits for periods outside of the Covered Period or Alternative Payroll Covered Period will not be eligible for forgiveness.
- For owner-employees of PPP borrowers, there are special rules regarding the portion of their "payroll costs" that are eligible for loan forgiveness. For other employees, the forgivable cash compensation limits are \$15,385 for an 8-week covered period or \$46,154 for a 24-week covered period. For owner-employees, the limit for an 8-week covered period is the same \$15,385 amount, but the limits for a 24-week covered period depend on the owner-employee's 2019 employee cash compensation and the borrower's legal entity type. FAQ #8 under the heading "Loan Forgiveness Payroll Costs FAQs" provides significant clarification regarding the treatment of owner-employees across differing entity types as summarized in the chart below; however, it remains unclear how much of an ownership interest in the business is required to be considered an "owner."

	Base Cash Compensation	Employer Paid State and Local Taxes	Employer Contributions to Health Insurance	Employer Retirement Contributions	Other
C-corporation	2.5/12 x 2019 employee cash compensation	Yes	Yes	2.5/12 x 2019 employer contribution	\$20,833 cap for cash compensation; cap does not apply to non-cash compensation (lines 6-8 of Schedule A)
S-corporation	2.5/12 x 2019 employee cash compensation	Yes	Yes if < 2% stake; No if >= 2% stake (or if family member of such an owner)	2.5/12 x 2019 employer contribution	\$20,833 cap for cash compensation; cap does not apply to non-cash compensation (lines 7-8 of Schedule A)
Self-employed Schedule C/F	2.5/12 x 2019 net profit on Form 1040	No	No	No	Must submit 2019 Form 1040 Schedule C/F with forgiveness application if not submitted with loan application
General Partners	2.5/12 x 2019 net earnings subject to self-employment tax x 0.9235, but only if made during applicable covered period	No	No	No	Must submit 2019 Form 1065 K-1 with forgiveness application if not submitted with loan application
LLC	Follow instructions that apply to how the business was organized for tax filing purposes for tax year 2019				

New FAQs Regarding Non-payroll Costs

- With respect to non-payroll costs, FAQs #1-3 under the heading "Loan Forgiveness Nonpayroll Costs FAQs" confirm prior guidance regarding amounts paid or accrued during the "covered period"—specifically, that eligible non-payroll costs that were paid during the "covered period" (even if accrued prior to the "covered period") are allowed, and that eligible non-payroll costs incurred during the

"covered period" but paid after the "covered period" are allowed, as long as they are paid by the next regular billing date. These FAQs also reiterate that the Alternative Payroll Covered Period cannot be used when calculating non-payroll costs. Importantly, these FAQs and prior guidance do not expressly address how to treat non-payroll costs (such as rent) that are paid in advance, rather than being paid in arrears. In the absence of guidance from the SBA on this point, many borrowers will likely seek forgiveness with respect to the full amount paid during the "covered period" since bank records and other supporting documentation can be provided to support the payment of such expenses and since there is no clear guidance on how to prorate or otherwise address such expenses that were paid before the covered period for usage during the covered period.

- FAQ #4 under this heading provides that interest on unsecured credit is not eligible for loan forgiveness, but is a permissible use of PPP loan proceeds. More importantly, this reiterates language from the SBA's Interim Final Rule #3 that includes an auto loan as an example of a business mortgage on real or personal property. Although a "mortgage" is typically understood to refer only to a security interest in real property, this language seems to add further support for the inclusion of interest on any secured loan incurred before February 15, 2020, as a forgivable expense.
- With respect to lease obligations and mortgage interest, prior guidance specified that the underlying lease obligation or debt obligation must have been in place prior to February 15, 2020, for the payments to be eligible for loan forgiveness. FAQ #5 under the heading "Loan Forgiveness Nonpayroll Costs FAQs" clarifies that if such preexisting lease or mortgage obligation was renewed or refinanced after February 15, 2020, payments on such renewed or refinanced obligations would be eligible for loan forgiveness.
- In defining "covered utility payments," the CARES Act referred to transportation. Some have speculated that this could be read broadly to include a wide variety of transportation expenses, such as mileage reimbursement, etc. The SBA's Interim Final Rule #3 referred to gas for a business vehicle as an example of a "utility" expense. However, FAQ #6 under this heading provides that the reference to "transportation" is meant to refer to transportation utility fees assessed by state and local governments, not costs of business transportation generally.

New FAQs Regarding Loan Forgiveness Reductions

- FAQ #1 under the heading "Loan Forgiveness Reductions FAQs" reiterates an exception to the reduction to loan forgiveness that would otherwise apply based on a reduction to the borrower's number of full-time equivalent employees (FTEs). Importantly, this notes that if the borrower is relying on the exception based on efforts to rehire a previously released employee, then the borrower must maintain documents showing the written offer to rehire the individual, a written record of the offer's rejection, and a written record of the borrower's efforts to hire a similarly qualified individual.
- For seasonal employers, FAQ #2 under this heading clarifies that if the borrower elects a 12-week period between May 1, 2019, and September 15, 2019, to calculate its loan amount, it must use that same time period as the reference period for calculating any reduction to loan forgiveness.
- With respect to completing the "long-form" SBA Form 3508, FAQ #3 under this heading provides a needed fix with respect to an aspect of the form that otherwise did not work correctly. Specifically, Table 1 of the PPP Schedule A Worksheet calls for employee-by-employee information regarding employees who made less than or equal to \$100,000 on an annualized basis for all pay periods in 2019 or were not employed by the borrower in 2019. At the bottom of Table 1, a line calls for the number of "FTE Reduction Exceptions." Table 2 of the PPP Schedule A Worksheet calls for information regarding employees who made more than \$100,000 on an annualized basis for any pay period in 2019, but does not include a line for "FTE Reduction Exceptions." This could imply that offering to rehire employees who made more than \$100,000 on an annualized basis for any pay period in 2019 would not be counted as an "FTE Reduction Exception." The new FAQ addresses this by saying that FTE Reduction Exceptions for

employees who made more than \$100,000 on an annualized basis for any pay period in 2019 should be included in the "FTE Reduction Exception" line in Table 1, even though information about those employees otherwise would not appear in Table 1.

- FAQ #4 under this heading provides examples of how reductions to the salary or hourly wage of employees who make less than \$100,000 on an annualized basis affect the loan forgiveness calculation. This includes clarification that, if an employee paid an hourly wage had a reduction in hours, but no reduction in hourly wage, there would be no loan forgiveness reduction based on a wage reduction; however, this could still result in a reduction to loan forgiveness under the formulaic FTE reductions, unless a safe harbor applies.
- FAQ #5 under this heading also clarified that, insomuch as it pertains to loan forgiveness, decreases in salaries or hourly wages cannot be offset by increases in other forms of compensation, and only the cash payment amounts will be considered.

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