

SBA and U.S. Treasury Issue Interim Final Rule on Paycheck Protection Program Loan Forgiveness

Hinshaw Alert | 10+ min read

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On December 28, 2020, former President Trump signed the Consolidated Appropriations Act. Over 5,000 pages in length, the legislation (referred to herein as the Economic Aid Act) included revisions and additions to the Paycheck Protection Program (PPP). The new PPP will: (1) accept PPP loan applications from eligible borrowers that did not receive a PPP loan under the earlier program (known as “First Draw Loans”); (2) permit qualifying businesses that received a PPP loan under the earlier program to receive a second PPP loan (known as “Second Draw Loans”); (3) allow existing PPP borrowers not eligible for a Second Draw Loan to spend any remaining PPP funds on permitted expenses, which include additional forgivable expenses; and (4) change PPP rules for existing PPP borrowers, new PPP borrowers, and second draw borrowers in the areas of eligibility, forgivable expenses, and loan forgiveness.

In response to this legislation, the Small Business Administration (SBA) and the U.S. Department of the Treasury issued an interim final rule. The interim final rule consolidates prior rules related to forgiveness and reviews of PPP loans and incorporates changes made by the Economic Aid Act, including with respect to forgiveness of Second Draw Loans. This client alert discusses these updated requirements.

Forgivable Expenses

In addition to the traditional costs that were forgiven under the PPP rules (payroll, interest, utilities, and rent), four new categories of forgivable expenses were added to the list of forgivable expenses: (1) covered operations expenditures, (2) covered property damage, (3) covered supplier costs, and (4) covered worker protection expenditures (the “Covered Expenditures”).

A borrower is eligible for forgiveness of its PPP loan in an amount equal to the sum of the following costs incurred and payments made during the borrower’s covered period, subject to several limitations.

Payroll costs. Payroll costs consist of: (1) compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; (2) cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); (3) payment for vacation, parental, family, medical, or sick leave; (4) allowance for separation or dismissal; (5) payment for the provision of employee benefits consisting of group health care or group life, disability, vision, or dental insurance, including insurance premiums, and retirement; and (6) payment of state and local taxes assessed on the compensation of employees. For an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation, are treated as payroll costs.

Employer Retention Credit. Payroll costs that are qualified wages taken into account in determining the Employer Retention Credit are not treated as eligible payroll costs for loan forgiveness for either a First or Second Draw Loan.

Interest. Interest payments on any business mortgage obligation on real or personal property that was in force before February 15, 2020 (but not the prepayment of interest or the payment of principal) are forgivable.

Rent. Payments on business rent obligations on real or personal property under a lease agreement are forgivable if the obligation was in force before February 15, 2020.

Utilities. Business utility payments for the distribution of electricity, gas, water, transportation, telephone, or internet access are forgivable if the service began before February 15, 2020.

Covered operations expenditures. A covered operations expenditure is forgivable and is defined as a payment for any business software or cloud computing service that facilitates business operations; product or service delivery; the processing, payment, or tracking of payroll expenses; human resources; sales and billing functions; or accounting or tracking of supplies, inventory, records and expenses.

Covered property damage costs. Costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation may be forgiven.

Covered supplier costs. Any expenditure made by a borrower to a supplier of goods for the supply of goods that meets the following tests can be forgiven: the expenditure is (1) essential to the borrower's operations at the time at which the expenditure is made; and (2) made pursuant to a contract, order, or purchase order—(A) in effect at any time before the covered period with respect to the PPP loan; or (B) with respect to perishable goods, in effect before or at any time during the covered period with respect to the PPP loan.

Covered worker protection expenditures. This expenditure can be forgiven if it covers an operating or capital expenditure that facilitates the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the U.S. Department of Health and Human Services, the Centers for Disease Control and Prevention (CDC), or the Occupational Safety and Health Administration (OSHA), or any equivalent

requirements established, or guidance issued, by a state or local government related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) with respect to COVID-19 expires.

These worker expenditures may include:

- the purchase, maintenance, or renovation of assets that create or expand:
 - a drive-through window facility;
 - an indoor, outdoor, or combined air or air pressure ventilation or filtration system;
 - a physical barrier, such as a sneeze guard;
 - an expansion of additional indoor, outdoor, or combined business space;
 - an onsite or offsite health screening capability; or
 - other assets relating to compliance with the requirements or guidance described herein, as determined by the Administrator in consultation with the U.S. Secretary of Health and Human Services and the U.S. Secretary of Labor; and
- these worker protection expenditures may also include new purchases of:
 - covered materials described in Section 328.103(a) of Title 44, Code of Federal Regulations (CFR), or any successor regulation (e.g., surgical N95 filtering facepiece respirators);
 - particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or
 - other kinds of personal protective equipment, as determined by the SBA in consultation with the Secretary of Health and Human Services and the Secretary of Labor.

Residential real property or intangible property are not Covered Expenditures.

Limits on nonpayroll costs. Eligible nonpayroll costs cannot exceed 40 percent of the loan forgiveness amount.

A borrower may receive forgiveness for the Covered Expenditures only if the SBA had not yet remitted a forgiveness payment on the borrower's loan to the borrower's PPP lender as of December 27, 2020.

Forgiveness calculation for borrowers who are individuals with self-employment income who file a Form 1040 Schedule C or F.

The amount of loan forgiveness can be up to the full principal amount of the loan plus accrued interest. The actual amount of loan forgiveness will depend, in part, on the total amount spent during the covered period on:

- payroll costs including salary, wages, and tips, up to \$100,000 of annualized pay per employee, as prorated for the period during which the payments are made or the obligation to make the payments is incurred (maximum per individual is \$100,000 prorated for the covered period, e.g., for an eight-week covered period a maximum of \$15,385 and for a 24-week covered period a maximum of \$46,154), as well as covered benefits for employees

(but not owners), including healthcare expenses, retirement contributions, and state taxes imposed on employee payroll paid by the employer (such as unemployment insurance premiums), but excluding any qualified wages taken into account in determining the Employer Retention Credit;

- owner compensation replacement, calculated based on 2019 or 2020 net profit; forgiveness of such amounts is limited to either: (1) the prorated portion of 2019 or 2020 net profit for a covered period up to 2.5 months, or (2) 2.5 months' worth ($2.5/12$) of 2019 or 2020 net profit (up to \$20,833) for a covered period greater than 2.5 months, excluding any qualified sick leave equivalent amount for which a credit is claimed under Section 7002 of the Families First Coronavirus Response Act (FFCRA) or qualified family leave equivalent amount for which a credit is claimed under FFCRA Section 7004;
- payments of interest on mortgage obligations on real or personal property if the obligation was incurred before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C or F (business mortgage payments);
- rent payments on lease agreements in force before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C or F (business rent payments);
- utility payments under service agreements dated before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C or F (business utility payments); and
- any Covered Expenditures to the extent they are deductible on Form 1040 Schedule C or F.

A borrower may receive forgiveness for the new Covered Expenditures only if the SBA had not yet remitted a forgiveness payment on the borrower's loan to the borrower's PPP lender as of December 27, 2020.

Payroll Costs Eligible for Loan Forgiveness

Payroll costs incurred and/or paid. In general, payroll costs paid or incurred during the covered period are eligible for forgiveness. For purposes of loan forgiveness, the covered period is the period beginning on the date the lender disburses the PPP loan and ending on a date selected by the borrower that occurs during the period: (1) beginning on the date that is eight weeks after the date of disbursement, and (2) ending on the date that is 24 weeks after the date of disbursement.

Payroll costs are considered paid on the day that paychecks are distributed or the borrower originates an ACH credit transaction. Payroll costs incurred during the borrower's last pay period of the covered period are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, payroll costs must be paid during the covered period to be eligible for forgiveness. Payroll costs generally are incurred on the day the employee's pay is earned (i.e., on the day that the employee worked).

For employees who are not performing work but are still on the borrower's payroll, payroll costs are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work).

The covered periods for a First Draw Loan and a Second Draw Loan cannot overlap.

The borrower must have used all proceeds of the First Draw Loan for eligible expenses before disbursement of the Second Draw Loan.

Payments to furloughed employees and payment of bonuses or hazard pay. If a borrower pays furloughed employees their salary, wages, or commissions during the covered period, those payments are eligible for forgiveness as long as they do not exceed an annual salary of \$100,000, as prorated for the period during which the payments are made or the obligation to make the payments is incurred.

An employee's hazard pay and bonuses are eligible for loan forgiveness subject to the \$100,000 limit discussed above.

Caps on the amount of loan forgiveness for compensation payable to owner-employees and self-employed individuals. Forgiveness is capped at 2.5 months' worth (2.5/12) of an owner-employee or self-employed individual's 2019 or 2020 compensation (up to a maximum \$20,833 per individual in total across all businesses). The individual's total compensation may not exceed \$100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred.

For example, for borrowers that elect to use an eight-week covered period, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at eight weeks' worth (8/52) of 2019 or 2020 compensation (i.e., approximately 15.38 percent of 2019 or 2020 compensation) or \$15,385 per individual, whichever is less, in total across all businesses. For borrowers that elect to use a 10-week covered period, the cap is 10 weeks' worth (10/52) of 2019 or 2020 compensation (approximately 19.23 percent) or \$19,231 per individual, whichever is less, in total across all businesses. For a covered period longer than 2.5 months, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at 2.5 months' worth (2.5/12) of 2019 or 2020 compensation (up to \$20,833) in total across all businesses.

C-corporation owner-employees are capped by the prorated amount of their 2019 or 2020 employee cash compensation and employer retirement and health, life, disability, vision, and dental insurance contributions made on their behalf.

S-corporation owner-employees are capped by the prorated amount of their 2019 or 2020 employee cash compensation and employer retirement contributions made on their behalf. However, the following payments cannot be added: employer health, life, disability, vision, and dental insurance contributions made on their behalf. These payments are already included in the owner-employee cash compensation.

Schedule C or F filers are capped by the prorated amount of their owner compensation replacement, calculated based on 2019 or 2020 net profit. General partners are capped by the prorated amount of their 2019 or 2020 net earnings from self-employment (reduced by claimed Section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by .9235.

For self-employed individuals, including Schedule C or F filers and general partners, the following payments cannot be added: retirement and health, life, disability, vision, or dental insurance contributions. These amounts are included in their net self-employment income and, as a consequence, cannot be separately added to their payroll calculation. Limited liability company (LLC) members are subject to the rules based on their LLC's tax filing status in the reference year used to determine their loan amount.

Ownership stake exemption from application of the PPP owner-employee compensation rule. Owner-employees with less than a 5 percent ownership stake in a C- or S- corporation are not subject to the owner-employee compensation rules discussed above.

Nonpayroll Costs Eligible for Loan Forgiveness

Nonpayroll costs incurred and/or paid. A nonpayroll cost is eligible for forgiveness if it was:

- paid during the covered period; or
- incurred during the covered period and paid on or before the next regular billing date, even if the billing date occurs after the covered period.

Example: A borrower that received a loan before June 5, 2020 uses a 24-week covered period that begins on June 1 and ends on November 15. The borrower pays its electricity bills for June through October during the covered period and pays its November electricity bill on December 10, which is the next regular billing date. The borrower may seek loan forgiveness for: (1) its June through October electricity bills, because they were paid during the covered period; and (2) the portion of its November electricity bill through November 15 (the end of the covered period), because it was incurred during the covered period and paid on the next regular billing date.

Advance payments of interest on mortgage obligations. Advance payments of interest on a covered mortgage obligation are not eligible for loan forgiveness.

Principal payments on mortgage obligations are not eligible for forgiveness under any circumstances.

Amounts attributable to the business operation of a tenant or sub-tenant of the PPP borrower. The amount of loan forgiveness for nonpayroll costs may not include any amount attributable to the business operation of a tenant or sub-tenant of the PPP borrower or, for home-based businesses, household expenses. The examples below illustrate this rule.

Example 1: A borrower rents an office building for \$10,000 per month and sub-leases out a portion of the space to other businesses for \$2,500 per month. Only \$7,500 per month is eligible for loan forgiveness.

Example 2: A borrower has a mortgage on an office building it operates out of, leasing a portion of the space to other businesses. The portion of mortgage interest eligible for loan forgiveness is limited to the percentage share of the fair market value of the space not leased out to other businesses. As an illustration, if the leased

space represents 25 percent of the fair market value of the office building, then the borrower may only claim forgiveness on 75 percent of the mortgage interest.

Example 3: A borrower shares a rented space with another business. When determining the amount eligible for loan forgiveness, the borrower must prorate rent and utility payments in the same manner as on the borrower's 2019 tax filings, or if a new business, the borrower's expected 2020 tax filings.

Example 4: If a borrower works out of his or her home, the nonpayroll costs that are eligible for loan forgiveness may only include the share of covered expenses that were deductible on the borrower's 2019 tax filings, or if a new business, the borrower's expected 2020 tax filings.

Rent and mortgage interest payments to a related party. Rent payments can be forgiven, as long as: (1) the amount of loan forgiveness for rent or lease payments to a related party is no more than the amount of mortgage interest owed on the property during the covered period that is attributable to the space being rented by the business; and (2) the lease and the mortgage were entered into prior to February 15, 2020. Any ownership in common between the business and the property owner is a related party for these purposes. The borrower must provide its lender with mortgage interest documentation to substantiate these payments.

While rent or lease payments to a related party may be eligible for forgiveness, mortgage interest payments to a related party are not eligible for forgiveness.

Reductions in the Loan Forgiveness Amount

The PPP rules require that certain reductions in a borrower's loan forgiveness amount must be made if the borrower reduced full-time equivalent employees (FTEs) or employee salary and wages. Borrowers can avoid this deduction if they eliminate the reduction on or before December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, not later than the last day of the borrower's covered period).

The PPP rules also allow exemptions from reductions in loan forgiveness amounts based on employee availability and business activity.

A borrower can avoid this deduction if the borrower: (1) has offered to restore employee hours at the same salary or wages, even if the employees have not accepted, (2) fired an employee for cause, (3) has an employee who voluntarily resigns or voluntarily requests a schedule reduction, (4) eliminates reductions by December 31, 2020 or, for a PPP loan made after December 27, 2020, the last day of the loan's covered period, or (5) has a PPP loan of \$50,000 or less.

The instructions to the loan forgiveness applications and the discussion below explain how these statutory forgiveness reduction formulas work.

A borrower's loan forgiveness amount will be reduced if the borrower reduced the hours of an employee, then offered to restore the reduction in hours, but the employee declined the offer. In calculating the loan forgiveness

amount, a borrower may exclude any reduction in full-time equivalent employee headcount that is attributable to an individual employee if:

- the borrower made a good faith, written offer to restore the reduced hours of such employee;
- the offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the reduction in hours;
- the offer was rejected by such employee; and
- the borrower has maintained records documenting the offer and its rejection.

FTE Reduction Penalty FTEs. A reduction in FTEs during the covered period reduces the loan forgiveness amount by the same percentage as the percentage reduction in FTEs.

For both First and Second Draw Loans, the borrower must first select a reference period: (1) February 15, 2019 through June 30, 2019; (2) January 1, 2020 through February 29, 2020; or (3) in the case of a seasonal employer, either of the two preceding methods or a consecutive 12-week period between February 15, 2019 and February 15, 2020.

If the average number of FTEs during the covered period is less than during the reference period, the total eligible expenses available for forgiveness is reduced proportionally by the percentage reduction in FTEs. For example, if a borrower had 10 FTEs during the reference period and this declined to 8 FTEs during the covered period, the percentage of FTEs declined by 20 percent and thus only 80 percent of otherwise eligible expenses is available for forgiveness (the “FTE Reduction Penalty”).

Exemption from FTE Reduction Penalty. A borrower is exempted from the FTE Reduction Penalty if the borrower can document in good faith:

- an inability to rehire individuals who were employees of the borrower on February 15, 2020; and
- an inability to hire similarly qualified individuals for unfilled positions on or before December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, not later than the last day of the borrower’s covered period).

A borrower must inform the applicable state unemployment insurance office of any employee’s rejected rehire offer within 30 days of the employee’s rejection of the offer.

A borrower should retain the following documents to show compliance with this exemption: (1) the written offer to rehire an individual, (2) a written record of the offer’s rejection, and (3) a written record of efforts to hire a similarly qualified individual.

Exemption from the FTE Reduction Penalty. A borrower may also be exempted from the FTE Reduction Penalty if the borrower can document in good faith an inability to return to the same level of business activity as the borrower was operating at before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, not later than the last day of the borrower’s covered period) by the Secretary of Health and Human

Services, the CDC Director, or OSHA related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID- 19 (COVID Requirements or Guidance).

Borrowers must demonstrate that the reduction in business activity during the covered period stems directly or indirectly from compliance with such COVID Requirements or Guidance in order to avoid the FTE Reduction Penalty. Such documentation must include copies of applicable COVID Requirements or Guidance for each business location and relevant financial records of the borrower.

Example: A PPP borrower is in the business of selling beauty products both online and at its physical store. During the covered period, the local government where the borrower's store is located orders all non-essential businesses, including the borrower's business, to shut down, based in part on COVID-19 guidance issued by the CDC in March 2020. Because the borrower's business activity during the covered period was reduced compared to its activity before February 15, 2020, due to compliance with COVID Requirements or Guidance, the borrower will not be subject to the FTE Reduction Penalty. However, the borrower must maintain records regarding the reduction in business activity and the local government's shutdown orders that reference a COVID Requirement or Guidance as described above.

"FTE" defined. "Full-time equivalent employee" means an employee who works 40 hours or more, on average, each week. The hours of employees who work less than 40 hours are calculated as proportions of a single FTE and aggregated, as explained below.

Calculating the number of FTEs. Borrowers seeking forgiveness must document their average number of FTEs during the covered period and their selected reference period.

If applicable, a borrower must perform this calculation for both its First and Second Draw Loans.

For purposes of this calculation, borrowers must divide the average number of hours paid for each employee per week by 40, capping this quotient at 1. For example, an employee who was paid 48 hours per week during the covered period would be considered to be an FTE employee of 1.

For employees who were paid for less than 40 hours per week, borrowers may choose to calculate the full-time equivalency in one of two ways.

First, the borrower may calculate the average number of hours a part-time employee was paid per week during the covered period. For example, if an employee was paid for 30 hours per week on average during the covered period, the employee could be considered to be an FTE of .75. Similarly, if an employee was paid for 10 hours per week on average during the covered period, the employee could be considered to be an FTE of .25.

Second, borrowers may elect to use a full-time equivalency of .5 for each part-time employee.

Borrowers may select only one of these methods, applying it consistently to all of their part-time employees for the covered period and the selected reference period. In either case, the borrower shall provide the aggregate total of FTEs for both the selected reference period and the covered period by adding together all of the

employee-level FTE calculations. The borrower must then divide the average FTEs during the covered period by the average FTEs during the selected reference period, resulting in the reduction quotient.

Reduction in employees' salary or wages. A reduction in an employee's salary or wages exceeding 25 percent will generally result in a reduction in the loan forgiveness amount, unless an exception applies. For each new employee in 2020 and 2021, as well as each existing employee who was not paid more than the annualized equivalent of \$100,000 in any pay period in 2019, the borrower must reduce the total forgiveness amount by the total dollar amount of the salary or wage reductions exceeding 25 percent of base salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period (the reference period), subject to exceptions for borrowers who restore reduced wages or salaries (the "Compensation Reduction Penalty").

This Compensation Reduction Penalty is calculated on a per employee basis, not in the aggregate. Additionally, this reduction is performed based on the covered period and reference period applicable to the First or Second Draw Loan.

Example: A borrower is using a 24-week covered period. The borrower reduced a full-time employee's weekly salary from \$1,000 per week during the reference period to \$700 per week during the covered period. The employee continued to work on a full-time basis during the covered period, with an FTE of 1. In this case, the first \$250 (25 percent of \$1,000) is exempted from the loan forgiveness reduction. The borrower seeking forgiveness would list \$1,200 as the salary/hourly wage reduction for that employee (the extra \$50 weekly reduction multiplied by 24 weeks).

Example: A borrower has elected to use an eight-week covered period. The borrower reduced a full-time employee's weekly salary from \$1,000 per week during the reference period to \$700 per week during the covered period. The employee continued to work on a full-time basis during the covered period, with an FTE of 1. In this case, the first \$250 (25 percent of \$1,000) is exempted from the loan forgiveness reduction. The borrower seeking forgiveness would list \$400 as the salary/hourly wage reduction for that employee (the extra \$50 weekly reduction multiplied by eight weeks).

Accounting for the reduction based on the FTE Reduction Penalty relative to the Compensation Reduction Penalty. To ensure that borrowers are not doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is not attributable to the FTE reduction.

Example: An hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE of 1) and the borrower reduced the employee's hours to 20 hours per week during the covered period (FTE of .5). There was no change to the employee's hourly wage during the covered period. Because the hourly wage did not change, the reduction in the employee's total wages is entirely attributable to the FTE reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee.

Restoration of reductions made to employee salaries and wages or FTE employees. If certain employee salaries and wages were reduced between February 15, 2020, and April 26, 2020 (the safe harbor period), but the borrower eliminates those reductions by December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, by the last day of the borrower's covered period), the borrower is exempt from the Compensation Reduction Penalty.

Similarly, if a borrower eliminates any reductions in FTEs occurring during the safe harbor period by December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, by last day of the borrower's covered period), the borrower is exempt from the FTE Reduction Penalty.

The elimination of the FTE Reduction Penalty and/or the Compensation Reduction Penalty does not change or affect the requirement that at least 60 percent of the loan forgiveness amount must be attributable to payroll costs.

Employee fired for cause, voluntarily resigns, or voluntarily requests a schedule reduction. When a borrower fires an employee for cause, or the employee voluntarily resigns, or voluntarily requests a reduced schedule during the covered period (FTE Reduction Event), the borrower may count such employee at the same full-time equivalency level before the FTE Reduction Event when calculating the FTE Reduction Penalty. Borrowers that avail themselves of this exemption must maintain records demonstrating that each such employee was fired for cause, voluntarily resigned, or voluntarily requested a schedule reduction.

Borrowers with a loan of \$50,000 or less. A borrower with a loan of \$50,000 or less, other than any borrower that together with its affiliates received First Draw Loans totaling \$2 million or more, or Second Draw Loans totaling \$2 million or more, is exempt from the FTE Reduction Penalty and the Compensation Reduction Penalty.

Documentation Requirements

Document to be submitted for forgiveness. The loan forgiveness application form details the documentation each borrower must submit with its Loan Forgiveness Application (SBA Form 3508, 3508EZ, 3508S as applicable, or the lender equivalent). The applicant also provides the documentation each borrower is required to maintain and make available upon request, and the documentation each borrower may voluntarily submit with its loan forgiveness application.

An eligible borrower that received a loan of \$150,000 or less should use SBA Form 3508S and is not, at the time of its application for loan forgiveness, required to submit any application or documentation in addition to the certification and information required by Small Business Act Section 7A(l)(1)(A).

An eligible borrower that received a Second Draw Loan of \$150,000 or less and is using SBA Form 3508S must, before or at the time of its application for loan forgiveness, submit documentation sufficient to establish that the borrower experienced a 25 percent aggregate reduction in revenue as provided in the interim final rule on Second Draw Loans, unless the borrower provided such documentation at the time of its application for the Second Draw

Loan. Such documentation may include relevant tax forms, including annual tax forms. Or, if relevant tax forms are not available, a copy of the applicant's quarterly income statements or bank statements.

Special certifications for Second Draw Loans. For Second Draw Loans, all borrowers must certify on their loan forgiveness application that the borrower used all First Draw Loan amounts on eligible expenses prior to disbursement of the Second Draw Loan.

For Second Draw Loans exceeding \$150,000, the borrower must submit its loan forgiveness application for the First Draw Loan before or simultaneously with the loan forgiveness application for the Second Draw Loan, even if the calculated forgiveness amount for the First Draw Loan is \$0.

Documentation for individuals with self-employment income who file a Form 1040, Schedule C or F. A borrower that received a loan of \$150,000 or less that uses SBA Form 3508S, must submit the certification and information required by Small Business Act Section 7A(l)(1)(A) and, for a Second Draw Loan, 25 percent aggregate revenue reduction documentation if such documentation was not provided at the time of the application.

All other borrowers must submit the certification required by Small Business Act Section 7A(e)(3), and (if the borrower has employees) Form 941 and state quarterly business and individual employee wage reporting and unemployment insurance tax forms or equivalent payroll processor records that best correspond to the covered period (with evidence of any retirement and group health, life, disability, vision, and dental insurance contributions).

Whether or not the borrower has employees, the borrower must submit evidence of business rent, business mortgage interest payments on real or personal property, business utility payments, or payments for a Covered Expenditure during the covered period if the borrower used loan proceeds for those purposes. This documentation may include cancelled checks, payment receipts, transcripts of accounts, purchase orders, orders, invoices, or other documents verifying payments on nonpayroll costs.

For all loans, the 2019 or 2020 Form 1040 Schedule C or F that the borrower provided at the time of the PPP loan application must be used to determine the amount of net profit allocated to the owner for the covered period.

Lender Hold Harmless

A lender may rely on any certification or documentation submitted by a PPP applicant or an eligible PPP borrower that received a PPP loan that: (1) is submitted pursuant to all applicable statutory requirements, regulations, and guidance related to a PPP loan; and (2) attests that the PPP applicant or eligible PPP borrower, as applicable, has accurately provided the certification or documentation to the lender in accordance with the statutory requirements, regulations, and guidance described above.

With respect to a lender that relies on a borrower certification or documentation meeting these requirements, an enforcement action may not be taken against the lender, and the lender shall not be subject to any penalties relating to loan origination or forgiveness of the PPP loan, if:

- the lender acts in good faith relating to loan origination or forgiveness of the PPP loan based on that reliance; and
- all other relevant federal, state, local, and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the PPP loan.

Loan Forgiveness Process

To receive loan forgiveness on either a First or Second Draw Loan, a borrower must complete and submit a loan forgiveness application to its lender (or to the lender servicing its loan).

For Second Draw Loans exceeding \$150,000, the borrower must submit its loan forgiveness application for the First Draw Loan before or simultaneously with the loan forgiveness application for the Second Draw Loan, even if the calculated amount of forgiveness on the First Draw Loan is \$0.

The lender will have 60 days from its receipt of a complete application to review the application and make a decision regarding loan forgiveness. The review does not commence until the lender determines that the application is complete. If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for, the lender must request payment from the SBA at the time the lender issues its decision to the SBA.

The SBA will, subject to any SBA review of the borrower's loan(s) or loan application(s), remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender provides its decision to the SBA.

If the SBA determines that the borrower was ineligible for the PPP loan (for example, because the borrower lacked an adequate basis for the certifications that it made in its PPP loan application), the loan will not be forgiven.

Economic Injury Disaster Loan (EIDL). The EIDL Advance Amount received by a borrower will not reduce the amount of forgiveness to which the borrower is entitled and will not be deducted from the forgiveness payment amount that the SBA remits to the lender.

The lender must notify the borrower of the forgiveness amount. If only a portion of the loan is forgiven, or if the forgiveness request is denied, the borrower must repay any remaining balance due on the loan on or before the loan's maturity date.

The lender must notify the borrower of remittance by the SBA of: (1) the loan forgiveness amount (or that the SBA determined that no amount of the loan is eligible for forgiveness), and (2) the date on which the borrower's first payment is due, if applicable.

If the SBA determines that the full amount of the loan is eligible for forgiveness and remits the full amount of the loan to the lender, the lender must mark the PPP loan note as "paid in full" and report the status of the loan as

“paid in full” on the next monthly SBA Form 1502 report filed by the lender.

The general loan forgiveness process described above applies only to loan forgiveness applications not reviewed by SBA prior to the lender’s decision on the forgiveness application. The SBA’s procedures for reviewing PPP loan applications and loan forgiveness applications is discussed below.

Borrower loan forgiveness application deadline. A borrower may submit a loan forgiveness application any time on or before the loan’s maturity date if the borrower has used all of the loan proceeds for which the borrower is requesting forgiveness, except that a borrower applying for forgiveness of a Second Draw Loan exceeding \$150,000 must submit the loan forgiveness application for its First Draw Loan before or simultaneously with the loan forgiveness application for its Second Draw Loan.

Loan repayment. If the borrower does not apply for loan forgiveness within 10 months after the last day of the maximum covered period of 24 weeks, or if the SBA determines that the loan is not eligible for forgiveness (in whole or in part), the PPP loan is no longer deferred and the borrower must begin paying principal and interest. If this occurs, the lender must notify the borrower of the date the first payment is due. The lender must report that the loan is no longer deferred to the SBA on the next monthly SBA Form 1502 report filed by the lender.

SBA Review of PPP Loans

The SBA is authorized to review the following:

Borrower eligibility. The SBA may review whether a borrower is eligible for the PPP loan based on the provisions of the CARES Act, the Economic Aid Act, the rules and guidance available at the time of the borrower’s PPP loan application, and the terms of the borrower’s loan application. See PPP FAQ 17 (posted April 6, 2020). These include, but are not limited to, the SBA’s regulations under 13 CFR 120.110 (relating to ineligible businesses, as modified and clarified by the PPP Interim Final Rules) and 13 CFR 121.301(f) (the SBA’s affiliation rules) and the information, certifications, and representations on the Borrower Application Form and the Loan Forgiveness Application Form.

With respect to a Second Draw Loan, this may include a review of whether the borrower experienced the required 25 percent revenue reduction.

Loan amounts and use of proceeds. The SBA may review whether a borrower calculated the loan amount correctly and used the loan proceeds for eligible payroll and non-payroll expenses as specified in the CARES Act and the Economic Aid Act.

Loan forgiveness amount. The SBA may review whether a borrower is entitled to loan forgiveness in the amount claimed on the borrower’s Loan Forgiveness Application.

When the SBA will undertake a loan review. The SBA may, in its discretion and at any time, undertake a review of any PPP loan. For example, the SBA may review a loan if the loan documentation submitted to the SBA by the

lender, or any other information, indicates that the borrower may be ineligible for a PPP loan or to receive the loan amount or loan forgiveness amount so claimed. The SBA may review and audit PPP loans of \$150,000 or less and access any records the borrower is required to retain. The SBA may, in its discretion, review a borrower's First and Second Draw Loan at the same time or at different times.

The SBA has stated that it intends to review all PPP loans greater than \$2 million.

Record retention – Borrowers. For loans exceeding \$150,000, the borrower must retain PPP documentation in its files for six years after the date the loan is forgiven or repaid in full.

For loans of \$150,000 or less, the borrower must retain records relevant to the form that prove compliance with the requirements of the Small Business Act—for employment records, for the four-year period following submission of the loan forgiveness application, and for other records, for the three-year period following submission of the loan forgiveness application.

All borrowers must permit authorized representatives of the SBA, including representatives of its Office of Inspector General, to access such files upon request. Additionally, all borrowers must provide documentation independently to a lender to satisfy relevant federal, state, local, or other statutory or regulatory requirements or in connection with an SBA loan review.

Record retention – Lenders. Lenders must comply with applicable SBA requirements for records retention. For federally regulated lenders this means compliance with the requirements of their federal financial institution regulator. For SBA supervised lenders (as defined in 13 CFR 120.10 and including PPP lenders with authority under SBA Form 3507) this means compliance with 13 CFR 120.461.

Response to the SBA's decision. If loan documentation submitted to the SBA by the lender, or any other information, indicates that the borrower may be ineligible for a PPP loan or to receive the loan amount or loan forgiveness amount claimed by the borrower, the SBA will require the lender to contact the borrower in writing to request additional information. The SBA may also request information directly from the borrower. The lender will provide any additional information provided to it by the borrower to the SBA.

Failure to respond to the SBA's inquiry may result in a determination that the borrower was ineligible for a PPP loan or to receive the loan amount or loan forgiveness amount so claimed.

Ineligible borrower. If the SBA determines that a borrower is ineligible, the SBA will direct the lender to deny the loan forgiveness application. An SBA determination that a borrower is ineligible for a First Draw Loan may also result in an SBA determination that the borrower is ineligible for any Second Draw Loan. The SBA may direct the lender to deny any loan forgiveness application submitted for the Second Draw Loan.

Further, if the SBA determines that the borrower is ineligible for the loan amount or loan forgiveness amount claimed by the borrower, the SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate. The SBA may also seek repayment of the outstanding PPP loan balance or pursue other available remedies.

The Loan Forgiveness Process for Lenders

SBA Form 3508. When a borrower submits SBA Form 3508 or the lender's equivalent form, the lender must confirm:

- receipt of the borrower's certifications;
- receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the form;
- the borrower's calculations on the submitted form, including the dollar amount of the: (1) cash compensation, non-cash compensation, and compensation to owners claimed on Lines 1, 4, 6, 7, 8, and 9 on PPP Schedule A, and (2) business mortgage interest payments, business rent or lease payments, business utility payments, covered operations expenditures, and the covered expenditures claimed on Lines 2 through 8 on the PPP Loan Forgiveness Calculation Form, by reviewing the documentation submitted with the form; and
- that the borrower made the calculation on Line 14 of the form correctly, by dividing the borrower's eligible payroll costs claimed on Line 1 by .6.

SBA Form 3508EZ. When the borrower submits SBA Form 3508EZ or the lender's equivalent form, the lender must confirm:

- receipt of the borrower's certifications;
- receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the form;
- the borrower's calculations on the submitted form, including the dollar amount of the payroll costs, business mortgage interest payments, business rent or lease payments, business utility payments, and the covered expenditures claimed on Lines 1 through 8 of SBA Form 3508EZ or the lender's equivalent form, by reviewing the documentation submitted with the form; and
- that the borrower made the calculation on Line 11 of the form correctly, by dividing the borrower's eligible payroll costs claimed on Line 1 by .6.

SBA Form 3508S. When a borrower submits SBA Form 3508S or the lender's equivalent form, the lender must:

- confirm receipt of the borrower's certifications; and
- in the case of a Second Draw Loan for which the borrower did not provide documentation of revenue reduction with its application and the lender did not conduct a review of the documentation at the time of the application, confirm the dollar amount and percentage of the borrower's revenue reduction by performing a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning the borrower's revenue reduction.

Lender's review procedures. The borrower must: (1) provide an accurate calculation of the loan forgiveness amount and, (2) attest to the accuracy of its reported information and calculations on the Loan Forgiveness

Application. Unless all of the required documentation is submitted to the lender, the borrower will not receive forgiveness.

A lender does not need to independently verify the borrower's reported information if the borrower: (1) submits documentation supporting its request for loan forgiveness (if required), and (2) attests that it accurately verified the payments for eligible costs.

The borrower: (1) is responsible for providing an accurate calculation of the loan forgiveness amount, and (2) must attest to the accuracy of its reported information and calculations on the form. A lender may rely on the borrower's certifications.

Lenders are expected to perform a good-faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning amounts eligible for loan forgiveness. For example, a minimal review of calculations based on a payroll report by a recognized third-party payroll processor would be reasonable. By contrast, if payroll costs are not documented with such recognized sources, more extensive review of calculations and data would be appropriate. The borrower will not receive forgiveness unless it submits to the lender all of the required documents.

If the lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue.

For a Second Draw Loan, if the lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documentation regarding the required revenue reduction, the lender should work with the borrower to correct the problem.

Timeline for the lender's decision. The lender must issue a decision to the SBA on a loan forgiveness application not later than 60 days after receipt of a complete application. The lender may approve (in whole or in part), deny, or (if directed by the SBA) deny without prejudice due to a pending SBA review of the loan for which forgiveness is sought. In the case of a denial without prejudice, the borrower may ask the lender to reconsider its application, unless the SBA has determined that the borrower is ineligible for a PPP loan.

When the lender issues its decision to the SBA approving the application (in whole or in part), it must include the following:

- For applications submitted using the SBA Form 3508 or the lender's equivalent form:
 - the PPP Loan Forgiveness Calculation Form;
 - PPP Schedule A;
 - the PPP Borrower Demographic Information Form (if submitted to the lender); and
 - SBA Form 3508D, if applicable.
- For applications submitted using the SBA Form 3508Z, 3508S, or the lender's equivalent form, the lender must submit the completed form along with:
 - the Borrower Demographic Information Form (if submitted to the lender); and

- the SBA Form 3508D, if applicable.

The lender must confirm: (1) that the information provided by the lender to the SBA accurately reflects its records for the loan, and (2) that the lender has made its decision in accordance with the requirements discussed above in this section. For a Second Draw Loan of \$150,000 or less, if applicable, the lender must confirm: (1) that it has reviewed the revenue reduction documentation provided by the borrower, and (2) the dollar amount and percentage of the borrower's revenue reduction.

If the borrower is entitled to forgiveness of some or all of the amount applied for, the lender must request payment from the SBA at the time the lender issues its decision to the SBA. The SBA will, subject to any SBA review of the borrower's loan(s) or loan application(s), remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to the SBA.

The EIDL Advance Amount received by the borrower will not reduce the amount of forgiveness to which the borrower is entitled and will not be deducted from the forgiveness payment amount that the SBA remits to the lender.

The lender is responsible for notifying the borrower of remittance by the SBA of the loan forgiveness amount (or that SBA determined that no amount of the loan is eligible for forgiveness) and the date on which the borrower's first payment is due, if applicable.

When the lender issues its decision to the SBA determining that the borrower is not entitled to forgiveness in any amount, the lender must provide the SBA with the reason for its denial, together with the items listed above that are to be filed with SBA Form 3508 or the lender's equivalent form, the items listed above in this section for that form.

For applications submitted using the SBA Form 3508EZ, 3508S, or the lender's equivalent form, lenders should include the items listed above in this section for that form.

The lender must confirm that: (1) the information provided by the lender to the SBA accurately reflects lender's records for the loan, and (2) the lender has made its decision in accordance with the requirements discussed above in this section. For a Second Draw Loan of \$150,000 or less, if applicable, the lender must confirm: (1) that it has reviewed the revenue reduction documentation provided by the borrower, and (2) the dollar amount and percentage of the borrower's revenue reduction.

The lender must also notify the borrower in writing that the lender has issued a decision to the SBA denying the loan forgiveness application and provide the SBA with a copy of the notice. The notice to the borrower must: (1) include the reasons that the lender concluded that the borrower is not entitled to loan forgiveness in any amount, and (2) inform the borrower that the borrower has 30 calendar days from receipt of the notification to seek, through the lender, the SBA review of the lender's decision. The SBA reserves the right to review the lender's decision in its sole discretion.

Within 30 days of notice from the lender, a borrower may notify the lender that it is requesting that the SBA review the lender's decision in accordance with the interim rules. The lender must notify the SBA of the borrower's request for review within five days of the lender's receipt of the request.

The SBA will notify the lender if the SBA decides to review the lender's decision or if the SBA declines a request for review.

If the borrower does not timely request SBA review, or the SBA declines the request for review, the lender is responsible for notifying the borrower of the date on which the borrower's first payment is due.

If the SBA accepts a borrower's request for review, the SBA will notify the borrower and the lender of the results of the review. If the SBA denies forgiveness in whole or in part, the lender is responsible for notifying the borrower of the date on which the borrower's first payment is due.

Notice to a lender that the SBA is reviewing a loan. The SBA may, in its discretion and at any time, review any PPP loan of any size. The SBA may review the borrower's First and Second Draw Loan at the same time or at different times. If the SBA undertakes such a review, the SBA will notify the lender in writing, and the lender must notify the borrower in writing within five business days of receipt.

The SBA has stated that it intends to review all PPP loans greater than \$2 million.

Within five business days of receipt of such notice, the lender shall transmit to the SBA electronic copies of the following:

- the Borrower Application Form (SBA Form 2483, 2483-SD, or the lender's equivalent form) and all supporting documentation provided by the borrower, including revenue reduction documentation provided by the borrower on a Second Draw Loan;
- the Loan Forgiveness Application (SBA Form 3508, 3508EZ, 3508S, or the lender's equivalent form), and all supporting documentation provided by the borrower (if the lender has received such application), including revenue reduction documentation provided by the borrower on a Second Draw Loan of \$150,000 or less if not provided at the time of loan application. If the lender receives the borrower's loan forgiveness application after it receives notice that the SBA has commenced a loan review, the lender must transmit electronic copies of the application and all supporting documentation provided by the borrower to the SBA within five business days of receipt;
- The lender must also request that the borrower provide the lender with the documentation that the instructions to the Loan Forgiveness Application Form (SBA Form 3508, 3508EZ, 3508S, or the lender's equivalent) directs the borrower to maintain but not submit (documentation listed under "Documents that Each Borrower Must Maintain but is Not Required to Submit"). For Second Draw Loans of \$150,000 or less where the borrower has not submitted a loan forgiveness application, the lender must also request that the borrower provide the lender with revenue reduction documentation, if not previously provided to the lender.

- The lender must submit documents received from the borrower to the SBA within five business days of receipt from the borrower.
- a signed and certified transcript of account;
- a copy of the executed note evidencing the PPP loan;
- any memorandum or other analysis that the lender prepared in making its decision on the borrower's loan forgiveness application, if applicable; and
- any other documents related to the loan requested by SBA.

If the SBA has notified the lender that the SBA has commenced a loan review, the lender should issue a forgiveness decision to the SBA not later than 60 days after receipt of the complete loan forgiveness application from the borrower, unless otherwise directed by the SBA.

Related People



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Related Capabilities

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