



SBA Publishes Long-Awaited PPP Loan Forgiveness Application & Instructions (May 18, 2020)

For the millions of borrowers under the Federal Paycheck Protection Program (there are 2,571,167 approved loans as of May 19, 2020) critical questions surround whether their particular use of the loan proceeds during the 8-week covered period will prohibit having the loans forgiven (converted to a grant) by the government. The SBA published its Loan Forgiveness Application and related instructions on May 18, 2020. The Loan Forgiveness Application and related instructions provide borrowers with guidance on eligible uses for the funds and explains the information that needs to be included in the loan forgiveness application to lenders, which can be filed after the 8-week covered period ends. Some questions left open by the law and previous interpretative guidance provided by the regulators have been covered and/or clarified in the Loan Forgiveness Application and related instructions.

DEFINING THE 8 -WEEK COVERED PERIOD

SBA clarified some confusion over when the 8 week (56-day) covered period starts by allowing borrowers to choose either (i) the date the loan funds were disbursed, or (ii) if payroll is made weekly or biweekly, the date on which the first payroll period begins after the date the loan funds were disbursed. Allowing the alternative covered period to coincide with payroll periods should facilitate borrowers reporting of payroll costs during the covered period.

Covered payroll costs that are either paid or incurred during the 8-week covered period are eligible for forgiveness. Costs are "paid" when checks are distributed or an ACH transfer initiated and are "incurred" when they are earned by the employees through days of service. So, it is possible that payroll checks distributed at the beginning of the 8-week period but include amounts "earned" before that 8-week period starts, are eligible for forgiveness. At the end of the 8-week covered period, the payroll accrued during the period, but not due to be paid until after the period ends, are also eligible, but only if they are actually paid on the next payroll date.

For eligible non-payroll costs such as mortgage interest, covered rent for leases of real or personal property, and covered utility payments, there is no alternative choice for the 8-week covered period – the covered period begins on the date loan funds are disbursed whether or not the borrower elects the

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Norris McLaughlin has assembled a team of attorneys equipped to readily answer your questions. Contact one of our CARES Act Resource team members (below) or your relationship attorney for additional advice and counsel.

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alternative 8-week period for payroll cost purposes. Such eligible non-payroll costs must be paid during the covered period or incurred during the covered period but only if paid on or before the next regular billing date. Following SBA's previous guidance on the subject, eligible non-payroll costs may not exceed 25% of the total forgiveness amount.

FORGIVENESS REDUCTIONS

FTE Reduction: The Loan Forgiveness Application provides a worksheet to calculate whether a reduction in loan forgiveness is required based on any reduction of employee full time equivalency ("FTE") during the Covered Period, compared to the pre-pandemic reference periods (two alternative periods are provided). For each period, a weekly average of the FTE is determined. There are exceptions which benefit the borrower if: (i) a position for which the borrower made a good faith written offer to rehire an ex-employee was rejected by that ex-employee; (ii) an employee was terminated for cause or voluntarily resigned; or (iii) an employee voluntarily requested a reduction in hours. Further, a borrower is exempt from reduction of forgiveness under this FTE reduction test if a "safe harbor" is satisfied – that is, if the borrower reduced its FTE levels between February 15, 2020 and April 26, 2020, then restored its FTE employee levels on or before June 30, 2020 to the FTE levels in the pay period that included February 15, 2020.

Salary/Wage Reduction: The other potential reduction of loan forgiveness tests whether the borrower reduced by more than 25% the average weekly salary/wage levels of those employees making less than \$100,000 annually in 2019 during the 8-week covered period when compared to their average weekly salary/wage levels during the quarter ended March 31, 2020. The Loan Forgiveness Application provides a worksheet to analyze for each employee whether their salary/wage levels were reduced below the 25% threshold. There is also a "safe-harbor" exemption from forgiveness reduction for this test, measured by each employee, and provided their salary/wage level at June 30, 2020 is at least the same as it was at February 15, 2020.

CERTIFICATIONS

The borrower is required to certify several matters supporting the Loan Forgiveness Application and its underlying information. For example, the borrower has to certify that loan proceeds were not knowingly used for unauthorized purposes (if so the government may pursue recovery of loan amounts, or civil and/or criminal fraud claims). Further, borrower has to certify that knowingly making a false statement to obtain loan forgiveness is subject to severe civil and criminal penalties. SBA may direct a lender to disapprove loan forgiveness if it determines the borrowers was ineligible for the PPP loan.

Borrowers that obtained loans of \$2 million or more (either alone or combined with all their affiliates), have to check a box to so indicate, and SBA has made public that it intends to audit or scrutinize all of such loan forgiveness applications (there are 7,900 loans of \$2 million or more at May 8, 2020), and have reserved the right also to examine whether the borrower had a good faith basis to certify in the original loan applications that the loan was necessary to support its operations because of the economic uncertainty caused by COVID 19.

DOCUMENTS AND RECORDS SUPPORTING THE APPLICATION

The instructions to the Loan Forgiveness Application list the supporting documentation that have to be submitted with the application, and separately, the documents that the borrower is not required to submit, but must be maintained for six years and are subject to inspection by the government and its inspectors general in connection with any audit. The Loan Forgiveness Application and instructions are intricate, and borrowers are urged to review them thoroughly and to start making test applications to measure the estimated loan forgiveness in order to resolve any difficulties as early as possible.