

insights

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Highlights from the SBA's further guidance on PPP loan forgiveness

The Small Business Administration ("SBA") recently published revised Paycheck Protection Program ("PPP") loan forgiveness applications, including an "EZ" version of the standard form. The SBA also published revised regulations incorporating and clarifying the provisions of (i) the Paycheck Protection Program Flexibility Act (the "PPPFA") and (ii) the Interim Final Rule ("IFR") issued on June 22, 2020, related to loan forgiveness, the loan review process and related responsibilities of both lenders and borrowers (the PPP loan forgiveness applications and the regulations incorporating the IFR are collectively the "Recent SBA Guidance"). Our previous coverage of the PPP [can be read here](#).

The Recent SBA Guidance provides further details on the exemptions added in the PPPFA and on the calculations required in the PPP loan forgiveness applications. Many borrowers that received loans prior to June 5, 2020, must decide whether to use an eight-week or a 24-week covered period. Other borrowers that have chosen the eight-week covered period have reached or will soon reach the end of the covered period.

The following highlights the clarifications and modifications to PPP loan forgiveness based on this Recent SBA Guidance which may be helpful to borrowers in completing their loan forgiveness applications. The final section summarizes the lender's role in the forgiveness process.

Clarification on FTE reduction exemptions and exceptions

The PPPFA added two provisions that exempt borrowers from forgiveness amount reductions based on full time equivalent ("FTE") decreases related to (i) lack of employee availability and (ii) reduced business activity, each of which are further clarified in the Recent SBA Guidance.

The employee availability provision in the PPPFA allows an exemption if the borrower can document (i) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020, and (ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020. The Recent SBA Guidance further requires that borrowers maintain documentation that includes, but is not limited to, the written offers to rehire individual employees and the related rejections of such offers and a written record of efforts to hire similarly qualified individuals.

The provision related to reduced business activity allows an exemption if a borrower is unable to operate at the same level of business activity during the covered period compared to the period before February 15, 2020, due to compliance with guidance on sanitation, social distancing and other safety requirements related to COVID-19 issued by certain federal government agencies. The Recent SBA Guidance clarifies that the reduction of business activity qualifying for this exemption may result directly from compliance with guidance from the applicable federal agencies or indirectly from such guidance, including from compliance with state and local shutdown orders that are based, in part, on the federal guidance. As many businesses were forced to shut-down or substantially alter their operations to comply with local and state orders, these businesses are eligible for the exemption from the FTE reductions to their forgiveness amount related to such orders. For each business location, borrowers must retain documentation of the requirements related to federal guidance and/or state or local orders that impacted their business and any related financial records.

The EZ Loan Forgiveness Application Form (the "EZ Form")

Borrowers that qualify to submit the EZ Form do not need to provide individual employee-by-employee wage and salary details and FTE calculations that borrowers must provide when using the standard loan forgiveness application.

A borrower may use the EZ Form if such borrower can give one of following three certifications:

Certification 1

A borrower that is a self-employed individual, an independent contractor or a sole proprietor may use the EZ Form as long as the borrower had no employees at the time of the initial loan application and had no employee salaries included in its computation of average monthly payroll in the initial loan application.

Certification 2 and 3

The next two Certifications have two parts. First, the borrower must certify that it has not reduced the annual salary or hourly wages of any single employee during its covered period by more than 25% compared to the period from January 1, 2020, to March 31, 2020 (excluding those employees that made greater than \$100,000 average annualized salary in 2019).

In addition, for Certification 2, the borrower must document that it has not reduced the number of employees or the average paid hours of employees between January 1, 2020, and the end of the covered period. Borrowers applying based on this criteria must include a “snapshot” calculation of the average FTEs on January 1, 2020, and at the end of the covered period. Presumably, these calculations will be the average FTE employees in the pay period containing January 1, 2020, and the pay period containing the date that is the end of the covered period. Although the SBA only requires these two “snapshot” calculations of the FTE employees, the borrower must attest that it did not reduce its FTEs since January 1, 2020.

For purposes of Certification 2, borrowers can ignore certain employee reductions, including those related to employees that refused written offers of rehire or written offers to restore the employee’s hours. In addition, borrowers do not need to include reductions for unfilled positions if the borrowers are unable to hire similarly qualified employees for such positions on or before December 31, 2020.

For Certification 3, the borrower must also show that it was unable to operate during the covered period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020, and December 31, 2020, by specific federal government agencies related to maintenance of standards of sanitation, social distancing or any other work or customer safety requirement related to Covid-19. As discussed above, compliance with local and state orders are included in this provision as they are indirectly related to such federal guidance.

Standard PPP loan forgiveness application: Wage reductions over 25% and FTE reduction safe harbors

The standard PPP loan forgiveness form requires the borrower to perform detailed calculations on an employee by employee basis to determine if the borrower must reduce the potential forgiveness amount due to either (i) reductions in salary or hourly wages greater than 25% or (ii) reductions in its FTE employees.

Salary/hourly wage reductions and related safe harbor

The standard PPP loan forgiveness application form requires that borrowers first calculate the salary or hourly wage reduction for any employee whose salary or wage was reduced by greater than 25% during the covered period as compared to the period from January 1, 2020, to March 31, 2020. The borrower then must determine if the salary/hourly wage reduction safe harbor applies, in which case their forgiveness amount would not be reduced for the applicable employee(s) salary/hourly wage reduction.

The salary/hourly wage reduction safe harbor only applies if the related reduction occurred between February 15, 2020, and April 26, 2020, and was restored before the earlier of December 31, 2020, and the date of the loan forgiveness application. Any reductions made after April 26, 2020, are not eligible for the safe harbor.

The reduction above 25% for each employee (excluding those eligible for the safe harbor) is calculated as a weekly dollar amount that is then multiplied by the number of weeks in the covered period. This per-employee reduction amount is then aggregated for all employees and subtracted from the loan forgiveness amount. This reduced loan forgiveness amount is then subject to further adjustment due to FTE reductions, unless an FTE reduction safe harbor applies.

Borrowers that obtained their loans prior to June 5, 2020, have the option to select either an eight-week covered period or a 24-week covered period. These borrowers should be aware of a potential downside to 24-week period if the borrowers reduced employee salaries or hourly wages more than 25% (and do not qualify for the safe harbor related to such reduction) as the resulting reduction to the forgiveness amount is greater for the 24-week covered period. For example, assume an employee earned \$1,000 per week prior to the covered period and \$700 per week during the covered period. The reduction above the permitted 25% is \$50 per week ($\$300 - \$1,000 * .25$). For an eight-week covered period, the reduction to the forgiveness amount would be \$400 ($8 * \50). For a 24-week covered period, the reduction to the forgiveness amount would be \$1,200 ($24 * \50). Borrowers should weigh the additional reduction to their loan forgiveness amount against the payroll costs eligible to be forgiven over the eight-week versus the 24-week period.

FTE reduction safe harbors

The Recent SBA Guidance provides for two FTE reduction safe harbors. If a borrower meets the requirements for either safe harbor, the borrower’s loan forgiveness will be exempt from reductions based on reductions in the borrower’s FTE employee levels.

The first safe harbor applies if the borrower's reduction in FTE employees occurred between February 15, 2020, and April 26, 2020, and the borrower restores this FTE employee level by not later than December 31, 2020, to the FTE employee levels in the borrower's pay period that includes February 15, 2020.

The FTE reduction safe harbor merely states the FTE restoration must occur by December 31, 2020, although the SBA may essentially use the same comparison as the guidance uses for the salary/hourly wage reduction safe harbor (i.e. the FTE employee levels on the earlier of (i) date of the loan forgiveness application or (ii) December 31, 2020). The guidance leaves some question as to whether a borrower would qualify for the safe harbor if the borrower is able to restore its FTE employee levels during the covered period but is unable to sustain the FTE employee levels and subsequently reduces such levels prior to the date of the borrower's loan forgiveness application. In the event that a borrower's covered period ends prior to December 31, 2020, and the borrower has been unable to restore employees, the borrower could wait to file its forgiveness application until on or after December 31, 2020, and avail itself of the time from the end of the covered period through December 31, 2020, to restore its FTE employee level.

The second safe harbor applies if the borrower can document that it was unable to operate between February 15, 2020, and the end of its covered period at its pre-February 15, 2020, level due to compliance with guidance issued by certain federal agencies related to maintenance of sanitation standards, social distancing or similar safety requirements due to COVID-19. As discussed above, state and local shutdown orders are considered indirect guidance related to such federal guidance.

Maximum payroll compensation

The loan forgiveness applications place a cap on an individual employee's cash compensation that is eligible for forgiveness. For borrowers with an eight-week covered period, an individual employee's cash compensation cannot exceed \$15,385 ($8/52 * \$100,000$) and for borrowers with a 24-week covered period, an individual employee's cash compensation cannot exceed \$46,154 ($24/52 * \$100,000$).

For owner-employees and self-employed individuals, their own payroll compensation is capped at the lesser of approximately 15.38% of 2019 compensation or \$15,385 for an eight-week covered period or the lesser of 2.5 months' worth of 2019 compensation (or about 20.83% of such compensation) or \$20,833 for a 24-week period.

Other clarifications and requirements

Documentation requirements

Each of the PPP loan forgiveness application forms details the documentation that borrowers must submit with the respective loan forgiveness application and additional documentation that borrowers must retain for a period of six years after the date that the loan is forgiven or is paid in full.

Timing of forgiveness application and deferral period

The SBA has clarified that a borrower may submit a loan forgiveness application at any time on or before the maturity of the loan (including before the end of the covered period if the borrower has used all of the PPP loan funds). A borrower may apply for forgiveness before the end of its covered period if the borrower has spent all of the PPP loan funds. However, if the borrower has not applied for forgiveness within 10 months after the last day of the covered period, the borrower must begin paying principal and interest on the loan. This extension of the deferral period is effective as if included in the CARES Act on March 27, 2020, and applies to all loans made under the CARES Act. This provision effectively overrides loan provisions in existing PPP loans made prior to June 5, 2020, that required principal and interest payments to begin after a six-month deferral period.

Employees not performing work

The Recent SBA Guidance states that payroll costs eligible for forgiveness include costs for employees who are not performing work but who are still on the borrower's payroll and that the payroll costs incurred during the covered period for such employees will be based on the schedule created by the borrower to determine the amount paid to such non-working employees.

Lenders' role

Recent SBA Guidance makes clear that lenders will have an active role in reviewing PPP loan forgiveness applications. The guidance states that lenders must perform a good-faith review of the application and related documentation. The guidance requires lenders to (i) confirm receipt of borrower certifications, (ii) confirm receipt of the documentation required to verify payroll and non-payroll costs and (iii) confirm the borrower's calculations of cash compensation to employees and/or owner compensation, as applicable, employer contributions for health benefits and retirement plans, employer state and local taxes assessed on employee compensation and all non-payroll costs included on the borrower's loan forgiveness application. If the lender discovers errors in the loan forgiveness application or a material lack of documentation, the lender should work with the borrower to remedy the issue.

The lender has 60 days after receipt of a complete application to perform its review, and must issue a decision to the SBA on whether the borrower is entitled to all or part of the forgiveness amount and request payment from the SBA for the approved forgiveness amount. In the event that the SBA is conducting a review of the loan, the lender will issue a denial, without prejudice, due to such review, and the borrower may subsequently request the lender to reconsider its loan forgiveness application unless the SBA determines that the borrower was ineligible for the loan.



The SBA has 90 days from the date the lender submits its decision to review the loan forgiveness application (and, if applicable, the loan application and the borrower's eligibility for the loan) to determine if the borrower is eligible to receive any or all of the loan forgiveness. The SBA has sole discretion on whether to conduct a detailed review of the loan forgiveness application and/or the loan application, borrower's use of funds or other matters related to the PPP loan. In the event that the SBA determines the borrower was ineligible for the PPP loan, the loan will not be eligible for forgiveness. After its review, the SBA will notify the lender if any or all of the loan is not eligible for forgiveness and will also remit the amount of the loan forgiven (together with accrued interest) to the lender.

The lender is responsible for communicating to the borrower that the funds have been received or that the SBA has denied some or all of the borrower's loan forgiveness. To the extent all or a portion of the loan remains outstanding, the lender must notify the borrower of the date that the borrower's first payment on the loan is due.

In the event the lender, after its review, denies some or all of the borrower's loan forgiveness amount, the lender must communicate this decision to the borrower (in addition to communicating the decision to the SBA). Within 30 days of receiving the lender's notice of such denial, the borrower may notify the lender that it is requesting the SBA to review the lender's decision. The lender must, within five days of receiving such notice, inform the SBA of the borrower's request for review. The SBA, in its sole discretion, will determine whether or not to perform such review, and if the SBA performs the review, the SBA will inform the borrower and the lender of the results of the review. If the SBA denies any or all of the loan forgiveness, the lender is responsible for informing the borrower of the date that its first payment on the loan is due.

As SBA guidance continues to evolve, feel free to reach out to your regular Thompson Coburn contact with any questions.

If you have any questions on these various programs, please feel free to call or e-mail your regular contact at Thompson Coburn LLP. For more information from Thompson Coburn LLP related to COVID-19, please visit [our resource page](#).

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