

SBA Paycheck Protection Program Loans: Forgiveness Guidance, Part

II

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Holland & Knight Alert

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Highlights

- The U.S. Small Business Administration (SBA) has released additional Paycheck Protection Program (PPP) guidance in the form of the PPP Loan Forgiveness Application, which includes some key definitions and instructions for loan forgiveness.
- PPP loan borrowers should immediately organize documentation and implement procedures in accordance with the Loan Forgiveness Application. In addition, loan recipients should continue to become familiar with the new interim final rules (IFRs) and frequently asked questions, especially concerning forgiveness, as released.
- This Holland & Knight alert outlines the SBA Loan Forgiveness Application process and points out further questions that the SBA may consider and potentially address through additional guidance or FAQs.

Employers rushed to apply for the first \$349 billion in Paycheck Protection Program (PPP) loans made available under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which Congress has increased to \$670 billion for qualifying businesses, because loan proceeds used for payroll, benefits, mortgage interest, rent and utilities could convert into grants and become "forgiven" under the program.

On May 15, 2020, the U.S. Small Business Administration (SBA) announced its long-awaited forgiveness rules through the release of the [PPP Loan Forgiveness Application](#). Through a series of instructions and worksheets, employers today have a much better understanding of how forgiveness will work, although the SBA application still leaves important questions unanswered.

The CARES Act and original guidance had noted that to be forgiven, payroll costs and non-payroll costs had to be incurred and paid during the Covered Period. That has changed in the PPP Loan Forgiveness Application, which states that payroll costs may be incurred or paid during the Covered Period or the Alternative Payroll Covered Period (definitions provided below), and that non-payroll costs may be incurred or paid during the Covered Period. In either case, the payroll costs and non-payroll costs may be paid outside of their applicable periods as long as they are paid on or before the first applicable due date immediately following the end of the applicable period for such costs. (For additional information, see Holland & Knight's previous alert, "[SBA Paycheck Protection Program Loans: Forgiveness Guidance, Part I](#)," May 4, 2020).

This Holland & Knight alert outlines what the SBA has addressed, describes briefly the application process, and points out further questions that the SBA may consider and potentially address through additional guidance or FAQs.

The Process

- A borrower may request forgiveness by completing the PPP Loan Forgiveness Application and submitting it to its PPP lender along with 1) the PPP Loan Forgiveness Calculation Form, 2) the PPP Schedule A, 3) documentation verifying cash compensation and non-cash compensation benefit payments for each employee during the Covered

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Period or the Alternative Payroll Covered Period, 4) documentation showing the full-time equivalent (FTE) employees for the Covered Period or the Alternative Payroll Covered Period, and 5) documentation verifying both the existence of the non-payroll cost arrangements in place prior to Feb. 15, 2020, and the eligible amounts paid or incurred during the Covered Period.

- When submitting the Loan Forgiveness Application, a borrower must certify that it 1) has verified the payroll and non-payroll costs for which they seek forgiveness, 2) understands that the government may pursue civil and criminal remedies for knowing misuse of borrowed funds and for false statements and bank fraud, 3) has submitted the required documentation for forgiveness, 4) has submitted or will submit tax documents to the IRS consistent with those submitted to SBA, and 5) acknowledges the SBA can request additional information to evaluate loan forgiveness.
- Before beginning the Loan Forgiveness Application, a borrower should obtain payroll records for:
 - the eight-week period (56 consecutive days) that begins on the date the borrower received PPP loan funds (Covered Period), or
 - at borrower's option, and for payroll purposes only, the eight-week period (56 consecutive days) that begins on the first day of the borrower's first payroll period after the date the borrower received PPP loan funds (Alternative Payroll Covered Period)
- It is not enough just to know how much a borrower paid its employees during the Covered Period or the Alternative Covered Period. In order to determine whether the borrower will be subject to a reduction in forgiveness based on a reduction in salaries or wages, it should compile records reflecting the salary and hourly wages paid and the number of hours worked per week for each employee during this time and for the period from Jan. 1, 2020 through March 31, 2020. Documentation may also be required if the borrower wishes to seek a safe harbor by restoring the employee's average annual salary or hourly wage as of June 30, 2020.
- A borrower should also gather records dating from February 2020 through the end of the Covered Period of payments on real or personal property mortgages, lender amortization schedules, lease agreements for real or personal property, utility invoices and canceled checks or electronic banking records reflecting payments for these non-payroll costs. A borrower should also have a copy of mortgages and leases as well as copies of utility invoices dated before Feb. 15, 2020, to show that these obligations were in force before that date.
- A borrower must first complete the PPP Schedule A Worksheet (Worksheet) to Schedule A, then PPP Schedule A and finally the PPP Loan Forgiveness Calculation Form as the borrower will need information from the Worksheet to complete Schedule A and will need information from Schedule A to complete the Calculation Form.
- A borrower is requested to submit certain demographic information along with its PPP Loan Forgiveness Application, but is not required to do so.
- A borrower must retain a copy of all forgiveness documents submitted to its PPP lender, as well as the Worksheet, all PPP application and loan documents, and all documentation related to its eligibility and necessity for six years after the date the loan is forgiven or repaid in full.

Questions Addressed by the SBA Application and Instructions

What Costs Are Eligible for Loan Forgiveness?

- PPP loan proceeds may be forgivable so long as the loan proceeds are used on the following expenses incurred or paid during the Covered Period (or solely for payroll costs incurred or paid during the Alternative Payroll Covered Period): 1) payroll costs, 2) mortgage interest payments, 3) rent or lease payments and 4) utility payments. Payroll

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costs must account for at least 75 percent of the loan forgiveness amount.

- Eligible payroll costs include gross salary, gross wages, gross tips and gross commissions, and paid leave not including leave covered by the Families First Coronavirus Response Act (FFCRA), up to \$100,000 of annualized cash compensation per employee capped at \$15,385 maximum per individual, plus benefits for employees as set forth in the [Interim Final Rule on PPP](#), III.2.f.
 - For ease of calculations, borrower may elect to use the Alternative Payroll Covered Period.
 - The Alternative Payroll Covered Period applies only to payroll costs, calculation of FTE employees and salary/hourly wage reductions; it does not apply to non-payroll costs.
 - Payroll costs are considered incurred on the day that the employee's pay is earned. Payroll costs incurred, but not paid, during the last pay period during the Covered Period or Alternative Payroll Covered Period are eligible for forgiveness if paid on or before the next regular payroll date.
- Eligible non-payroll costs include mortgage interest payments, rent or lease payments, and utility payments. (See the [Interim Final Rule on Additional Eligibility Criteria](#), III.1.d.iii, for examples.)
 - These costs must be for a mortgage obligation incurred before Feb. 15, 2020, a rent or lease agreement in force before Feb. 15, 2020, or a utility service in place before Feb. 15, 2020.
 - Non-payroll costs must be paid during the Covered Period or incurred during the Covered Period and paid on or before the next regular billing date, even if that date is after the Covered Period.
 - Non-payroll costs may not exceed 25 percent of the loan forgiveness amount.

Will a Borrower Need to Repay All or a Portion of the PPP Loan Amount Borrowed Even if It Applies for Loan Forgiveness?

Yes, unless the borrower meets one or both of the safe harbors for loan forgiveness reduction, it is possible that all or a portion of the loan amount will not be forgiven if the borrower has 1) reduced the salary/hourly wages (by more than 25 percent) of any employee who made \$100,000 or less in any pay period in 2019 or was not employed by borrower in 2019, or 2) reduced its average weekly number of FTE employees.

What Are the Safe Harbors from Loan Forgiveness Reduction?

- The salary/hourly wage reduction safe harbor is determined on an individual employee level for each employee 1) who received compensation at an annualized rate of less than or equal to \$100,000 for all pay periods of 2019 or were not employed by borrower in 2019, and 2) whose salary/hourly wage was reduced by more than 25 percent during the Covered Period or the Alternative Payroll Covered Period as compared to the period of Jan. 1, 2020, through March 31, 2020.
 - The salary/hourly wage reduction safe harbor exempts the borrower from forgiveness reduction if, for each employee whose average annual salary or hourly wage was reduced by more than 25 percent, such employee's average annual salary as of June 30, 2020, is equal to or greater than such employee's average annual salary or hourly wage as of Feb. 15, 2020.
 - If any employee does not meet this test, then the borrower does not qualify for the salary/hourly wage reduction safe harbor.
- The FTE reduction safe harbor is determined based upon the borrower meeting both of the following conditions:

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1. Borrower reduced its FTE employee levels during the period beginning Feb. 15, 2020, and ending April 26, 2020.
2. Borrower restored its FTE employee levels by not later than June 30, 2020, to the FTE employee levels it had during the pay period that included Feb. 15, 2020.

How Does a Borrower Calculate a Full-Time Equivalent?

The Schedule A worksheet requires that a borrower calculate average FTE for all employees. The instructions to the Schedule A worksheet inform that a borrower must, for each employee, enter the average number of hours paid per week, divide by 40 and round the total to the nearest tenth. No one may be counted as more than 1 FTE. A borrower may, if it elects to do so, use a simplified method and simply ascribe a 1.0 for each employee who works 40 hours or more per week and a 0.5 for each employee who works less than 40 hours per week.

Should a Borrower Apply for Loan Forgiveness at the Expiration of Its Chosen Forgiveness Covered Period?

It may, but because both the salary/hourly wage reduction safe harbor and the FTE reduction safe harbor are calculated as of June 30, 2020, a borrower may want to wait to apply until after June 30, 2020, to determine whether it qualifies for either the salary/hourly wage reduction safe harbor or the FTE reduction safe harbor. A borrower should carefully consider this June 30, 2020, date if its chosen covered period extends beyond it and consider ramping up hiring and increasing salary/hourly wages before June 30, 2020, to the extent that its business can justify doing so.

Will the Forgiveness Application Affect SBA's Review of a Borrower's Prior Necessity Certification?

The Loan Forgiveness Application requires borrowers to check a box indicating whether it received (together with its affiliates, as applicable) a PPP loan of greater than \$2 million. Presumably, SBA will track this information for purposes of the certification safe harbor provided by FAQ 46. (See Holland & Knight's previous alert, "[SBA Provides Safe Harbor for PPP Borrowers Receiving Less Than \\$2 Million](#)," May 13, 2020.)

How Does a Borrower Calculate the Loan Forgiveness Amount?

- A borrower must fill out the Worksheet that is attached to the PPP Loan Forgiveness Application to calculate cash compensation for all employees, the total average FTE employees, and any salary/hourly wage reduction during the Covered Period or the Alternative Covered Period. These calculations are also used to determine if the borrower met either of the Salary/Hourly Wage Reduction Safe Harbor or the FTE Reduction Safe Harbor. Each employee employed during the Covered Period or the Alternative Payroll Covered Period must be listed by name on the Worksheet.
- For each employee 1) to whom the borrower made a good-faith written offer to rehire during the Covered Period or Alternative Covered period and such employee rejected that offer, or 2) who, during the Covered Period or Alternative Covered Period, was a) fired for cause, b) voluntarily resigned or c) voluntarily requested and received a reduction in hours, borrower calculates the FTE for all such positions and, unless such position is filled by a new employee, enters the FTE numbers into the FTE Reduction Exceptions line on the Worksheet. Such FTE reductions will not reduce borrower's loan forgiveness.
- Borrower then fills out PPP Schedule A using information from the Worksheet as well as including the non-cash compensation payroll costs of 1) employer contributions for employee health insurance, 2) employer contributions to employee retirement plans, and 3) employer state and local taxes assessed on employee compensation for the Covered Period or the Alternative Payroll Covered Period to calculate the Total Payroll Costs. Borrower also calculates the FTE Reduction Quotient; provided that the FTE Reduction Safe Harbor was met, the FTE Reduction

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Quotient is 1.0.

- Borrower then fills out the PPP Loan Forgiveness Calculation Form to calculate the actual loan forgiveness amount by:
 1. Adding together the Total Payroll Costs from the PPP Schedule A with non-payroll costs
 2. Subtracting the Total Salary/Hourly Wage Reduction amount from PPP Schedule A from No. 1 above
 3. Multiplying the sum of No. 2 above by the FTE Reduction Quotient from PPP Schedule A to obtain the Modified Total
 4. The Forgiveness Amount is then the least of a) the sum of No. 3 above, b) the actual PPP Loan Amount or c) the Total Payroll Cost from PPP Schedule A divided by 0.75
- Borrower must certify the Loan Forgiveness Application providing the certifications described above.
- Note: The CARES Act provides that after forgiveness has been determined, the SBA will, within 90 days of such date, remit to the PPP lender an amount equal to the forgiveness plus any interest accrued on the forgiveness amount through the date of payment.

What Was Not Answered in the New Guidance

The PPP Loan Forgiveness Application did not clarify the following questions:

- Are bonuses able to be counted as cash compensation?
- What is the deadline for submission of the PPP Loan Forgiveness Application?
- What if the borrower's business was subject to local orders that required it to be closed and the borrower was not able to pay its employees during the Covered Period or the Alternative Payroll Covered Period?
- How does one compare employee salary/hourly wages and calculate FTEs if a borrower is acquired during its chosen covered period?
- What type of transportation, telephone or internet access payments qualify as a covered utility for purposes of loan forgiveness?
- Are mortgage obligations only those obligations evidencing indebtedness used specifically to finance the purchase of real (i.e., a warehouse) or personal (i.e., an automobile) property, or do they also include obligations secured by the borrower's real or personal property where the use of the proceeds of such debt was not limited to such purchase (i.e., for a new acquisition or working capital)?
- How do the Salary/Hourly Wage Reduction Safe Harbor and the FTE Reduction Safe Harbor work when the June 30, 2020, safe harbor date is during a borrower's Covered Period or Alternative Payroll Covered Period?

Conclusion

Borrowers now have a better understanding of the documentation needed to apply for PPP loan forgiveness and what the procedure will require, but the long-awaited SBA guidance on forgiveness still leaves unanswered questions that some borrowers will have as they prepare their applications. It is important that borrowers work with their payroll service providers, tax and accounting professionals and legal counsel as they complete the PPP loan forgiveness application. Our team of Holland & Knight attorneys is well versed in the PPP and stands ready to assist you.

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