

Small Business Administration Issues PPP Loan Forgiveness Application

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On May 15, 2020, the Small Business Administration (the “SBA”) issued the form of application (the “[Application](#)”), a copy of which can be found by [clicking here](#), that borrowers will be required to submit when seeking loan forgiveness under the Paycheck Protection Program (“PPP”). Although the Application does not answer all of the relevant questions regarding loan forgiveness, it clarifies a number of critical points. A summary of these provisions is provided below. Please note, however, that (a) the SBA intends to issue additional guidance on loan forgiveness in the form of an Interim Final Rule, and (b) Congress is considering additional changes to the PPP affecting loan forgiveness. As a result, the details of potential loan forgiveness are likely to change.

Question

Clarification

When does the 8 week period begin for determining “payroll costs”?

The 8 week period for determining eligible payroll costs begins, at a qualifying borrower’s election, either on (i) the date the PPP loan is disbursed (“[Covered Period](#)”) **or** (ii) the first day of the borrower’s first payroll period following the day of the PPP loan disbursement (the “[Alternative Period](#)”).

The SBA has provided certain borrowers with administrative flexibility to ensure covered payroll costs are eligible for loan forgiveness. Specifically, the Application provides that “[b]orrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the eight-week (56 day) period that begins on the first day of their first pay period following their PPP loan disbursement.” As an example, the SBA indicated that if the borrower received its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP loan disbursement was Sunday, April 26, the first day of the Alternative Period was April 26 and the last day of the Alternative Period would be Saturday, June 20. This Alternative Period option, according to the Application, is not available for borrowers with a semi-monthly or monthly payroll schedule.

When are payroll costs deemed to have been “incurred” and “paid”?

Pursuant to the CARES Act, a borrower is eligible for an amount of forgiveness equal to amounts “incurred and payments made” on covered costs (payroll costs, rent, utilities, etc.) during the 8 week period after the PPP loan disbursement. This statutory provision, however, does not explain when a payment or obligation is deemed to be “incurred” under the PPP.

The SBA has clarified that payroll costs are deemed to be “incurred” on the date that the employee’s pay is earned. Payroll costs are deemed to be “paid” on the day that paychecks are distributed or the borrower originates an Automated Clearing House (ACH) credit transaction.

To ensure that a borrower is able to potentially obtain maximum forgiveness, payroll costs incurred but not paid during the borrower’s last payroll of the Covered Period or Alternative Period, as applicable, are eligible for forgiveness if paid on or before the next regular payroll date.

Question

Clarification

How is the limit on employee cash compensation in excess of \$100,000 calculated?

Under the CARES Act, payroll costs *exclude* the amount of an employee's compensation in excess of an annual salary of \$100,000, as prorated for the applicable period. The SBA previously determined that this \$100,000 limitation "applies only to cash compensation, not to non-cash benefits" includible as payroll costs, such as health and retirement plan contributions made on behalf of employees. As set forth in the instructions to the Application, the SBA has clarified that borrowers are to cap cash compensation eligible for forgiveness at \$15,385 (the 8 week equivalent of \$100,000 per year) for each employee.

However, the compensation for owner-employees, self-employed individuals and general partners of businesses is limited to the lesser of \$15,385 *or* the 8 week equivalent of their applicable compensation in 2019. The prior guidance excluding from payroll costs health and retirement plan contributions made on behalf of such individuals remains unchanged.

Has the SBA provided additional information on what cash compensation is included in payroll costs?

Yes. The Instructions to Schedule A to the Application define "cash compensation" to include "the sum of gross salary, gross wages, gross tips, gross commissions, paid leave (vacation, family, medical or sick leave, not including leave covered by the Families First Coronavirus Response Act), and allowances for dismissal or separation paid or incurred during the Covered Period or the [Alternative Period]."

Although the Application does not specifically address bonuses or premium pay, in general, "gross wages" refers to all taxable wages, including bonuses and premium pay. As a result, absent further guidance to the contrary, premium pay and bonuses appear to be a permissible use of PPP loan proceeds and, thus, eligible for loan forgiveness, subject to the limitation on cash compensation in excess of \$100,000 on an annualized basis as discussed above.

Has the SBA provided additional information on the non-cash components of payroll costs?

Yes. The Instructions to Schedule A to the Application confirm that the following costs are considered eligible payroll costs:

- Employer contributions for employee health insurance, including employer contributions to a self-insured, employer-sponsored group health plan, but *excluding* any pre-tax or after-tax contributions by employees.
- Employer contributions to employee retirement plans on behalf of employees, but *excluding* any pre-tax or after-tax contributions by employees.
- Employer state and local taxes assessed on employee compensation, but *excluding* any taxes withheld from employee earnings.

Has the SBA provided clarity on whether covered mortgage obligations and covered rent obligations include mortgages and leases relating to personal property?

Yes. Pursuant to the CARES Act and the existing guidance issued by the SBA, the following costs are "permissible" uses of PPP loan proceeds: (i) payroll costs; (ii) covered mortgage obligations interest only) incurred before February 15, 2020; (iii) covered rent obligations under leases dated before February 15, 2020; (iv) utility payments under service agreements dated before February 15, 2020; and (v) interest on any other debt obligations that were incurred before February 15, 2020. Only the costs set forth in items (i)–(iv) are subject to loan forgiveness. The costs set forth in items (ii)–(iv) are referred to as the "eligible non-payroll costs".

The Application clarifies that, in addition to real property obligations, borrowers may use PPP loan proceeds to pay interest on mortgage obligations, as well as rent and lease obligations relating to personal property, and such costs are subject to loan forgiveness. We note that borrowers are still required to use at least 75% of the PPP loan proceeds on eligible payroll costs and up to 25% on eligible non-payroll costs, including covered mortgage and rent obligations, to be eligible for maximum loan full forgiveness.

Question

Clarification

What happens if a borrower's eligible non-payroll costs are incurred during the Covered Period, but are required to be paid after the Covered Period ends?

Similar to the SBA's treatment of payroll costs, eligible non-payroll costs that are either 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 is after the Covered Period, are eligible for loan forgiveness. Please note, however, that the relevant period for determining eligible non-payroll costs is the Covered Period, as the Alternative Period only applies to determining payroll costs. Meaning, qualifying non-payroll costs must be paid or incurred within 8 weeks of loan disbursement to be eligible for forgiveness.

How are FTEs calculated for purposes of the FTE headcount reduction calculation?

The Application clarifies that average full-time equivalent ("FTE") employee headcount during the Covered Period or the Alternative Period, is calculated as follows:

- for each employee, the borrower is required to divide the average number of hours paid per week by 40, and round the total to the nearest tenth (the maximum for each employee is capped at 1.0); or
- a simplified method that assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours may be used at the election of the borrower.

What if a borrower's employees refused to return to work, resigned or were terminated? Are they still to be counted in the FTE employee headcount reduction calculation?

No. The Application makes clear that a borrower may exclude the following employees for purposes of the FTE reduction calculation:

- employees to whom the borrower made a good-faith, written offer to rehire during the Covered Period or the Alternative Period which was rejected by the employee; and
- employees who, during the Covered Period or the Alternative Period, (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours.

Any FTE reductions in these cases do not reduce the borrower's loan forgiveness.

Has the SBA provided information on the salary/wage reduction calculation?

- The Application contains a detailed worksheet for borrowers to use in determining if an applicable employee's average salary/wages during the Covered Period or Alternative Period, as applicable, was reduced by more than 25% compared to the employee's average salary/wages for the period of January 1, 2020 through March 31, 2020.
- This calculation is to be performed for each employee that received compensation at an annualized rate of less than or equal to \$100,000 for all pay periods in 2019, or who were not employed during 2019.

What type of payroll and eligible non-payroll documentation is a borrower required to submit with its Application?

The types of payroll documentation that a borrower is required to submit with its Application are listed below.

- Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
 - Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Period, such as: (i) payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941); and (ii) state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state.
 - Payment receipts, cancelled checks or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the borrower included in the forgiveness amount.
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In addition, a borrower will be required to submit with its Application the following documentation for all eligible non-payroll costs.

- *Eligible Non-Payroll Costs.* Documentation verifying the existence of the obligations/services prior to February 15, 2020 (e.g., loan agreements, rent/lease agreements and service agreements).
- *Covered Mortgage Obligations.* A copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
- *Covered Rent Obligations.* A copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
- *Covered Utility Payments.* A copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks or account statements verifying those eligible payments.

What types of FTE documentation is a borrower required to submit with its Application?

Borrowers' Applications must include documentation evidencing the average number of FTE employees on payroll per month employed by the borrower for one of the following periods, as determined by the borrower: (i) February 15, 2019 to June 30, 2019 or (ii) January 1, 2020 to February 29, 2020.

In the case of a seasonal employer, the borrower must submit documentation evidencing the average number of FTE employees on payroll per month employed by the borrower for one of the following periods, as determined by the borrower: (i) February 15, 2019 to June 30, 2019; (ii) January 1, 2020 to February 29, 2020; or (iii) any consecutive 12 week period between May 1, 2019 and September 15, 2019.

The Application provides that such documentation may include payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state.

What type of documentation is the borrower required to retain, but which is not required to be submitted with its Application?

For six years after the date the PPP loan is forgiven or repaid in full, borrowers are required to retain the below documentation.

- Schedule A Worksheet or its equivalent.
- Documentation supporting the listing of each individual employee in Schedule A – Table 1 to the Application, including the “Salary/Hourly Wage Reduction” calculation, if necessary.
- Documentation supporting the listing of each individual employee in Schedule A – Table 2 of the Application; specifically, that each listed employee received during any single pay period in 2019 compensation at an annualized rate of more than \$100,000.
- Documentation regarding any employee job offers and refusals, firings for cause, voluntary resignations and written requests by any employee for reductions in work schedule.
- Documentation supporting the Schedule A section “FTE Reduction Safe Harbor,” if applicable.

Question

Clarification

- All records relating to the borrower's PPP loan including, but not limited to, the following: (a) documentation submitted with its PPP loan application; (b) documentation supporting the borrower's certifications as to the necessity of the loan request and its eligibility for a PPP loan; (c) documentation necessary to support the borrower's loan forgiveness application; and (d) documentation demonstrating the borrower's material compliance with PPP requirements.

Borrowers are expected to "permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request."

Is there any clarification regarding audits of borrowers who obtained a PPP loan in an amount in excess of \$2 million?

No. If a borrower, along with all of its affiliates, received a PPP loan in excess of \$2 million, the borrower is required to acknowledge the fact in a check-the-box manner. At this time, the SBA has issued no guidance that outlines how it will "audit" relevant borrowers.

Is the borrower required to make any new or additional certifications in submitting the Application?

Yes. The borrower is required to make a variety of certifications in submitting the Application, including but not limited to the following:

- Certification that the dollar amount for which forgiveness is requested was used to pay costs that are eligible for forgiveness and that, if the funds were knowingly used for unauthorized purposes or the borrower knowingly makes a false statement to obtain forgiveness, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges.
- Certification to its understanding and agreement that the SBA may request additional information for the purposes of evaluating the borrower's eligibility for both (i) the PPP loan and (ii) loan forgiveness.

Acknowledgement that if it fails to provide information requested by the SBA, it may result in a determination that the borrower was ineligible for the PPP loan or a denial of the borrower's loan forgiveness application.

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