

PPP Forgiveness Application Released

Late Friday, the SBA released an 11-page PPP loan forgiveness application which includes instructions. Click here for application. <https://home.treasury.gov/news/press-releases/sm1010>; The press release for the instructions indicates that the SBA will also soon issue regulations and guidance to further assist borrowers as they complete their applications.

Many businesses have experienced or are expecting reductions in revenue related to stay-at-home orders and/or mandated closures of non-essential businesses which have gone on longer than originally anticipated. These businesses are hoping for an extension of the 8-week forgiveness period, or the ability to start the 8-week period at a later date. As Senator Rubio indicated earlier in the week after his discussion with Treasury Secretary Mnuchin, the SBA is limited in what they can do administratively in these instructions without legislative changes. So as expected, these instructions provide only limited relief for these businesses and have not extended the 8-week period.

The instructions generally follow the way we believed forgiveness would be calculated. Certain formulas used in the application are slightly different than the calculations and groupings used in our Excel forgiveness template (for example, the application separates cash compensation into three buckets: (1) owner-employees/self-employed individuals/ general partners; (2) those paid at an annualized rate of \leq \$100k for all pay periods in 2019 or who were not employed by the borrower in 2019; and (3) those paid an annualized rate of $>$ \$100k for any pay period in 2019.) We are in the process of updating our template to better line up with the forgiveness application and to match the formulas, and will send to our clients when complete.

While the instructions clarified some points, there are still some areas that we are hoping for additional guidance on when the regulations come out.

General:

- A limitation on overall forgiveness was defined as payroll costs divided by 0.75.
 - For example, assume a total PPP loan of \$100k, with \$70k of payroll costs and \$30k of non-payroll costs during the forgiveness period. Also assume no reduction from FTE % or salary/ wage reductions. The maximum loan forgiveness is \$93,333 (calculated as \$70k of payroll costs divided by 0.75 = \$93,333.)
- We highlighted in a previous alert that the forgiveness formula may include additional reductions to forgiveness based on need. Although future guidance may change this based on definitions, the calculations in the instructions do not include any such reduction and the representations/ certifications with the forgiveness application do not repeat the certification from the original application that “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
- The borrower must retain documentation supporting the forgiveness application for six

years after the date the loan is forgiven or repaid in full.

- Page 10 of the instructions gives a list of specific documentation to be provided with the forgiveness application, and which documents must be maintained but are not required to be submitted.

Payroll costs:

- The instructions state that payroll costs eligible for forgiveness are those “payroll costs paid and payroll costs incurred during the eight-week (56-day) Covered Period (or Alternative Payroll Covered Period.)”
 - *GMS comment:* This can be read two ways, that the costs must be BOTH paid and incurred, or that they can be EITHER paid or incurred. The instructions include a provision for the back end of the period, that payroll costs incurred but not paid during the borrower’s last pay period of the Covered Period (or Alternative Payroll Covered Period) are eligible for forgiveness if paid on or before the next regular payroll date. There is currently no offsetting instruction related to the front end payroll, so (unless the future regulations tell us otherwise) the instructions appear to allow the first pay period PAID during the 8-weeks to be included in the forgiveness calculation, even though it likely includes payroll costs EARNED/incurred prior to the 8-week period. This would result in more than 56-days of payroll being included in the forgiveness calculation. The press release announcing the instructions also highlight “flexibility to include eligible payroll and non-payroll expenses paid or incurred during the eight-week period after receiving their PPP loan.”
- Definition of “paid” and “incurred” as related to payroll costs:
 - “Paid” = payroll costs are considered “paid” on the day that paychecks are distributed or the borrower originates an ACH credit transaction
 - “Incurred” = payroll costs are considered “incurred” on the day that the employee’s pay is earned
- An “Alternative Payroll Covered Period” is allowed for administrative convenience to better line up with the borrower’s regular payroll cycles. This alternative is provided only for those borrowers with bi-weekly or more frequent pay periods, and allows the borrower to shift the 8-week period related to payroll costs only to start on the first day of its first pay period following the PPP loan disbursement date.
 - For example, 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 is Sunday, April 26, the first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is Saturday, June 20.
 - *GMS comment:* This alternative payroll period would likely shift the 8-week period forward by one pay period, which may be beneficial for those businesses with higher payroll costs at the end of the 8-week period over the beginning of the period.
- FTE reduction %:
 - A full-time equivalent (“FTE”) employee is based on 40 hours/week. For each employee, determine the average number of hours paid per week, divide by 40, and round to the nearest tenth. The maximum for each employee is capped at 1.0. The borrower can also elect to use a simplified method, which assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours.

- The FTE reduction exception for employees who reject an employer's rehire offer has been more clearly defined. The borrower can add in to the FTE calculation any positions for which the borrower made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period which was rejected by the employee; and (2) any employees who during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours. In all of these cases, include these FTEs only if the position was not filled by a new employee.
- It appears that the SBA is adding a second safe harbor similar to the June 30 safe harbor, using a January 1, 2020 date. The bottom of page 6 of the instructions indicates that if you have not reduced the number of employees or the average paid hours of your employees between January 1, 2020 and the end of the Covered Period, you can check a box on the form and not have any reduction to forgiveness based on FTEs.
- Owner compensation (including owner-employee, self-employed individual, general partner) is also capped at the 8-week equivalent of 2019 compensation or the regular \$15,385 cap (\$100k/ 52 weeks X 8 weeks), whichever is less.
- *Still unclear:*
 - For employer contributions to retirement plans, the instructions refer to the "total amount paid". Can the borrower make an interim retirement plan contribution for year to date compensation and include the entire amount in payroll costs, even if an interim contribution is not normal practice? What about a 2019 contribution paid in 2020?
 - Will there be any additional limitation on maximum employee earnings to be included in the computation (beyond the owner cap based on 2019 earnings)? For example, if we normally pay a bonus at year-end, can we pay some of it now instead if that's not our normal practice?

Non-payroll costs:

- Interest included in non-payroll costs eligible for forgiveness is defined as "payments of interest (not including any prepayment or payment of principal) on any business mortgage obligation on real or personal property incurred before February 15, 2020." This is consistent with the definition in the law.
- Rent included in non-payroll costs eligible for forgiveness is defined as "business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020." This definition expands the definition in the law by including the term "real or personal property."
- Eligible non-payroll costs include BOTH those paid during the covered period AND those 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.
 - *GMS comment:* It is unclear how far back the borrower can go, for example can the borrower pay three months of back rent during the covered period and include

all of it as eligible forgiveness costs? (subject to the overall cap of 25% of the forgiveness amount.)

- *Still unclear:*
 - Will there be any special rules for related party rentals?
 - Still need clarification on types of debt/ interest eligible for forgiveness, e.g. LOC interest secured by something other than real or personal property.

We plan on scheduling another webinar on forgiveness once the forgiveness regulations come out. In the meantime, please reach out to us if you have any questions.

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