

PPP Forgiveness Regulations Issued

Late Friday evening, the SBA released the eagerly-anticipated forgiveness regulations, as well as a document on loan review procedures:

1. “Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities”
2. “Interim Final Rule on Loan Forgiveness”

Loan Review Procedures document:

- The guidance indicates that the SBA may review any loan, and can look at:
 - Borrower eligibility – whether a borrower is eligible (no additional insights were provided on “eligibility”)
 - Loan amounts and use of proceeds – whether the borrower calculated the loan correctly and used loan proceeds for allowable uses
 - Loan forgiveness amounts – whether the borrower is entitled to loan forgiveness in the amount claimed on the application
- Timing of loan review – “For a PPP loan of any size, SBA may undertake a review at any time in SBA’s discretion. For example, SBA may review a loan if the loan documentation submitted to SBA by the lender or any other information indicates that the borrower may be ineligible for a PPP loan, or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower.”
- The guidance also confirms the document retention period listed in the forgiveness application (six years after the loan is forgiven or paid in full), which indicates that a review is possible at any point through the end of that period.
- Includes a section on lender review of the forgiveness application – uses some of the same language we saw on the front-end for the borrowing base, e.g. “good-faith review, in a reasonable time”... “minimal review of calculations based on a payroll report by a recognized third-party processor would be reasonable. By contrast, if payroll costs are not documented with such recognized sources, more extensive review of calculations and data would be appropriate.”

Loan Forgiveness document:

- Timing of payroll costs, expanded example: The guidance indicates that payroll costs paid during the alternative payroll covered period are eligible for forgiveness and “in addition, payroll costs incurred during this alternative payroll covered period.” There is no specific comment that more than 56 days of payroll are eligible for forgiveness; however, that is the result when allowing both costs paid and costs incurred during the period. The guidance also clarifies in the example that costs incurred during the period but not paid until after must be paid on or before the next regular payroll date occurring after the end of the period. So in other words, it appears that the front end of the covered period is on the cash basis and the back end is on the accrual basis (so

long as paid by the next regular pay date.)

- “Example: A borrower has a bi-weekly payroll schedule (every other week). The borrower’s eight-week covered period begins on June 1 and ends on July 26. The first day of the borrower’s first payroll cycle that starts in the covered period is June 7. The borrower may elect an alternative payroll covered period for payroll cost purposes that starts on June 7 and ends 55 days later (for a total of 56 days) on August 1. Payroll costs paid during this alternative payroll covered period are eligible for forgiveness. In addition, payroll costs incurred during this alternative payroll covered period are eligible for forgiveness as long as they are paid on or before the first regular payroll date occurring after August 1. Payroll costs that were both paid and incurred during the covered period (or alternative payroll covered period) may only be counted once.”
- Hazard pay, bonuses, and payments to furloughed employees: eligible for forgiveness, subject to \$100k annualized wage maximum
- Cap on owner-employee and SE individual compensation: Owner-employees’ and SE individuals’ forgiveness can’t be more than the lesser of 8/52 of 2019 compensation or \$15,385 per individual in total across all businesses
- Are benefits for owners eligible for forgiveness too?
 - Owner-employees – YES - “owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health care contributions made on their behalf.” This confirms that the retirement and health benefits for owner-employees CAN be included in forgiveness. There is still confusion, however, on whether or not these benefits are in addition to the \$100k annualized cap for owner-employees.
 - Schedule C owners – NO - Schedule C forgiveness is limited to owner income replacement, calculated as 8/52 of 2019 Schedule C net income (limited to \$100k annualized).
 - General partners – NO ADDITIONAL (these costs are already in the partner’s SE income, so we don’t get to add it on again or go over \$100k annualized with benefits). General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235. “No additional forgiveness is provided for retirement or health insurance contributions for self-employed individuals, including Schedule C filers and general partners, as such expenses are paid out of their net self-employment income.”
- Clarification of cutoff on nonpayroll costs: The guidance clears up confusion on how to handle nonpayroll costs incurred before the end of the covered period but paid on or before the next regular billing date after the covered period. These costs must be prorated to include only the portion incurred before the end of the covered period. The example also confirms that this is treated similar to payroll as far as cash vs. accrual, i.e. cash basis on the front end and accrual basis on the back end. The example includes utilities for the month of May as costs eligible for forgiveness (presumably incurred entirely before the covered period starting June 1 but paid during the covered period).
 - Example: A borrower’s covered period begins on June 1 and ends on July 26. The borrower pays its May and June electricity bill during the covered period and pays its July electricity bill on August 10, which is the next regular billing

date. The borrower may seek loan forgiveness for its May and June electricity bills, because they were paid during the covered period. In addition, the borrower may seek loan forgiveness for the portion of its July electricity bill through July 26 (the end of the covered period), because it was incurred during the covered period and paid on the next regular billing date.

- Related party rentals: The guidance did not mention related-party rentals, so presumably these costs are eligible for forgiveness the same as unrelated party rent.
- Advance payments of interest: Advance payments of interest are NOT eligible for forgiveness because the CARES Act specifically excludes “prepayments.” However, no mention is made of interest accrued prior to the start of the covered period but paid during the covered period, so presumably these costs would still be eligible for forgiveness.
- Loan forgiveness won’t be reduced via FTE reductions when employee declines rehire offer, if requirements are met. The guidance clarified and expanded the requirements:
 1. The borrower made a good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the covered period or the alternative payroll covered period;
 2. the offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;
 3. the offer was rejected by such employee;
 4. the borrower has maintained records documenting the offer and its rejection; and
 5. the borrower informed the applicable state unemployment insurance office of such employee’s rejected offer of reemployment within 30 days of the employee’s rejection of the offer. (A footnote indicates that further information regarding how borrowers will report information concerning rejected rehire offers to state unemployment insurance offices will be provided on SBA’s website.)

Note: We anticipate that payroll providers will be developing reports to calculate the FTEs for PPP forgiveness purposes for the various periods required, so long as employee hours are reported with each payroll. The guidance includes provisions which impact FTE count, such as this provision above – so borrowers will either need to communicate this information to the payroll provider for inclusion in the FTE calculations, or to manually add these FTEs back in.

- Loan forgiveness won’t be reduced via FTE reductions due to an employee’s actions: When an employee of the borrower is fired for cause, voluntarily resigns, or voluntarily requests a reduced schedule during the covered period or the alternative payroll covered period (FTE reduction event), the borrower may count such employee at the same full-time equivalency level before the FTE reduction event when calculating the FTE employee reduction penalty.
- 25% wage reduction clarifications:
 - As listed on the forgiveness application table, this must be done for each new employee in 2020 and each existing employee who was not paid > \$100k annualized in any pay period in 2019. Note the term “any pay period” – this means that an employee who was paid a bonus in a pay period in 2019 will

presumably not be subject to the 25% wage reduction test if it pushes the employee above the limit (e.g. a \$2,000 bonus paid on a weekly pay cycle in 2019 would by itself push the employee above \$100k annualized.)

- Added the word “base” next to salary or wages, so it now reads as “base salary or wages”. This is significant for employers who are now paying less overtime wages and for those who paid bonuses during Q1 2020 (the reference period).
- Clarified that the salary/ wage reduction applies only to the portion of the decline in employee salary and wages that is NOT attributable to the FTE reduction in hours – so no double penalty
- 6/30 safe harbors – clarifies that the borrower can eliminate those reductions by June 30, 2020 or earlier – so presumably borrowers intending to use this rule do not need to wait until June 30 to fix this/ make their forgiveness application

As we suspected, the guidance does not include any provision to change or extend the 8 week period beyond the alternative payroll period we already saw in the application, and does not include any change to the 75% rule for payroll costs. These are changes that the SBA believes require legislative changes. The Wall Street Journal reported on Thursday <https://www.wsj.com/articles/lawmakers-seek-to-double-duration-of-small-business-loans-11590058811> that the House plans to vote this week on a bill that would extend the loan period and eliminate the requirement to use 75% of the funds on payroll expenses. The Senate worked on Thursday on a plan to double the time period to 16 weeks, but did not get unanimous consent before leaving for Memorial Day recess. There is also discussion of changing the repayment period and changing the covered period to 24 weeks.

We are planning to present another loan forgiveness webinar the first week in June, to coincide with the action (or inaction) of Congress as related to PPP.

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