



## COVID-19 Update

May 19, 2020

### SBA Releases PPP Loan Forgiveness Application and Related Instructions

#### Key Notes:

- Borrowers may elect their eight-week loan covered period to begin on the date of receipt of the PPP loan or on the first day of their first pay period following loan disbursement.
- Borrowers must confirm that at least 75% of the forgiveness amount sought is for payroll costs.
- Certain headcount reductions of borrower will not reduce the borrower's forgiveness amount.
- Borrowers will have the flexibility to include expenses "paid" or "incurred" during the applicable period.

The long-awaited [Paycheck Protection Program Loan Forgiveness Application and Instructions for Borrowers](#) was released by the Small Business Administration (SBA) and the Department of the Treasury late Friday, May 15, 2020. The Application includes instructions, a Calculation Form, a Schedule A and a Schedule A Worksheet, each of which provides detailed formulas for the various calculations required to determine the amount eligible for forgiveness. We advise borrowers to carefully review each of these forms and provide accurate and complete information, all of which is subject to certification that the borrower has accurately verified the payments for which forgiveness is being requested and that the information provided is true and correct in all material respects.

Treasury also indicated that additional regulations and guidance to further aid PPP borrowers and lenders with the forgiveness process and their respective responsibilities will be forthcoming, but the Application itself provides several key takeaways for borrowers to plan and prepare for the

forgiveness process. First, to calculate expenditures made, "for administrative convenience" a borrower may select its covered period to be the first eight weeks following the loan disbursement or the eight weeks beginning on the first pay period immediately following receipt of PPP loan funds. The Application indicates that this alternative calculation period can be used only for the payroll costs included in the forgiveness amount (and not forgivable "nonpayroll" costs). Still, this slight change from prior PPP terms relieves the burden of borrowers having to run special payroll cycles or other one-off means to maximize a greater amount of loan forgiveness and instead allows them to align their covered period with their standard payroll practices.

Second, despite much talk and speculation that the required 75%/25% split of payroll to nonpayroll expenses, such as rent, mortgage interest and utilities, may be relaxed, the Application provides that the borrower must confirm that at least 75% of the requested forgiveness amount was used for payroll costs (as defined in the CARES Act and related FAQs). While the Application and instructions confirm that at least 75% of any amount *forgiven* must have been used for payroll costs, it does not ask for confirmation that at least 75% of the PPP loan proceeds received were actually *used* for payroll costs. Under current guidance, there is a requirement that at least 75% of PPP loan proceeds must be used for payroll costs, which is a real concern for some borrowers, particularly those whose businesses remain closed. The Application does not directly address the issue of whether borrowers who are unable to expend 75% of the PPP loan on payroll costs during the covered period are in plain violation of the

PPP rules. The Application contains no line item calling for the overall use percentage breakdown of the PPP loan proceeds, **only** lines for the amounts for which forgiveness is being requested. In fact, in the Application's section for nonpayroll costs, the form expressly states that "you are not required to report payments that you do not want to include in the forgiveness amount." Borrowers do have to certify their understanding that "if the funds were knowingly used for unauthorized purposes" they may be subject to civil and criminal charges. Hopefully, the Application foreshadows that future guidance will resolve once and for all whether using PPP loan proceeds for nonpayroll costs as authorized by the statute, but not within the 75%/25% ratio required under interim Treasury and SBA rules, constitutes a "use" of PPP funds "for unauthorized purposes."

Borrowers also received some reassurance that certain reductions in employee headcount will not reduce the loan forgiveness amount sought by the borrower. As stated in FAQ #40, if a borrower previously made a good faith written offer to rehire an employee and that offer is rejected, that employee will be excluded from any calculation of reduction of the borrower's headcount for the applicable loan forgiveness formulas. Additionally, employees who were terminated for cause, voluntarily resigned or voluntarily requested a reduction in their hours may also be excluded from any calculation of reduction in headcount.

The Application also provides some guidance on how to calculate full-time equivalent employees, including how to treat part-time employees. While FTEs have previously been undefined in the CARES Act and PPP secondary guidance, the instructions in the Application permit fractional FTE figures to be used to capture employees working on a less than 40-hour workweek basis. The Application provides borrowers with options on how to count part-time employees, so long as the method used is consistent for both the covered period and the prior payroll lookback period used to determine whether there has been a relevant reduction in headcount. Some ambiguities still remain regarding the precise rules for determining the proper FTE count, but it is expected that the promised further guidance from the SBA will provide more insight

into the interplay between the headcount reduction formula and the wage reduction formula for calculating maximum loan forgiveness amounts under the PPP.

Finally, the Application resolved one key issue regarding the timing of expenses: borrowers now have flexibility to include both expenses "paid" or "incurred" during their applicable eight-week covered period. This allows the borrower to include payroll costs and nonpayroll costs incurred but not paid during the covered period, so long as such costs are paid on the next regular payment date. Accordingly, wages earned during the covered period but not yet paid in the case where the pay date falls after the last payday in the applicable covered period can be included in payroll costs.

The instructions also specify that borrowers must keep all documentation relating to their use of the PPP loan proceeds for six years from the date of forgiveness or repayment and must permit authorized representatives of the SBA or the SBA Inspector General to access such files upon request.

## FOR MORE INFORMATION

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## Keep Abreast of What's Next

Thompson Hine is staying abreast of continuing developments related to the CARES Act and the PPP. Please visit our [COVID-19 Task Force page](#) for details on this and other information and resources.