



Treasury and SBA Release New PPP Loan Forgiveness Guidance

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Riker Danzig Corporate Client ALERT re Treasury and SBA Release New PPP Loan Forgiveness Guidance

We previously explained the significant changes to the Paycheck Protection Program (PPP) enacted by the Paycheck Protection Program Flexibility Act of 2020 (the “Flex Act”), which was signed into law on June 5, 2020 (see our prior Client Alert on the Flex Act, available [here](#)). Since then, the U.S. Treasury Department and the Small Business Administration (SBA) have issued several interim final rules, largely modifying their prior rules with respect to PPP to conform to the Flex Act. For instance, these new rules recognize the extended 24-week covered period for using PPP loan proceeds (or the option of an 8-week or 24-week period for borrowers prior to June 5), the extension until December 31, 2020, for rehiring furloughed workers or restoring their salary and wages to avoid a loss in loan forgiveness, the increase in loan term (from 2 years to 5 years for new borrowers, with an option to extend to 5 years for pre-June 5 borrowers with lender approval), and the Flex Act’s additional exceptions to loss forgiveness on account of full-time equivalent (FTE) and salary/wage reductions.

But the new rules also provide additional guidance for PPP borrowers and lenders, particularly with respect to salary limits in the use of PPP loan proceeds and the process for applying for and obtaining forgiveness. In addition, the SBA has modified its loan forgiveness application and created a second version of the application – Form 3508EZ – for borrowers meeting certain requirements. This Alert explains the two new forgiveness applications and other key changes in the recent regulatory guidance regarding PPP.

Forgiveness applications

The loan forgiveness application has been modified to reflect the availability of the new 24-week covered period and the reduction of the proportion of loan proceeds that must be spent on payroll costs from 75% to 60%.

The SBA has also released a simplified version of the loan application entitled “PPP Loan Forgiveness Application Form 3508EZ.” This form can be used only by borrowers who meet at least one of the following criteria:

- The borrower is a self-employed individual, independent contractor or sole proprietor with no employees;
- The borrower did not reduce salary or wages by more than 25% during the applicable covered period compared to the period between January 1, 2020 and March 31, 2020, and the borrower did not reduce the number of employees or average paid hours of employees between January 1, 2020 and the end of the applicable covered period; or
- The borrower did not reduce salary or wages of any employee by more than 25% during the applicable covered period compared to the period between January 1, 2020 and March 31, 2020, and the borrower was unable to operate during the applicable covered period at the same level of business at which it operated prior to February 15, 2020.

While the long form application contains Schedule A, which is used for calculating full-time equivalent and salary reductions, Form 3508EZ does not contain such a schedule, as these calculations do not apply to borrowers eligible to use Form 3508EZ.

Compensation limits and calculations

Previously, no more than \$15,385 of cash compensation per person – 8 weeks' worth of \$100,000 per year – was includable in payroll costs for which a PPP loan could be used and forgiven. Under the new post-Flex Act rules, borrowers with a 24-week covered period may now use a PPP loan to pay for up to \$46,154 per employee – 24 weeks' worth of \$100,000 per year. For self-employed individuals and business owners of businesses with a 24-week covered period, payroll costs eligible for forgiveness are also increased, but not by as much – the new cap is the lesser of 2.5 months of 2019 compensation or \$20,833 per individual (2.5 months' worth of \$100,000 per year). A borrower using an 8-week covered period continues to be capped at \$15,385 per employee (or eight weeks of 2019 compensation in the case of an owner, if such amount is less).

The new rules also specify how to calculate whether a business owner has reached the cap on includable compensation, depending on the tax status of the business:

- Owner-employees of C corporations are capped by the amount of their 2019 employee cash compensation and employer retirement and health insurance contributions made on their behalf.
- Owner-employees of S corporations are similarly capped by the amount of their 2019 employee cash compensation and employer retirement contributions made on their behalf, but employer health insurance contributions made on their behalf cannot be separately added because such amounts are already included in

their cash compensation.

- Schedule C filers (*i.e.*, sole proprietors or members of single member limited liability companies that are disregarded for tax purposes) cannot separately include retirement and health insurance contributions in their payroll calculation because such amounts are already in their “owner compensation replacement,” which is determined based on 2019 net profits.
- General partners in a partnership are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed Section 179 expense deductions, unreimbursed partnership expenses and depletion from oil and gas properties) multiplied by 0.9235.

Loan forgiveness process and SBA review

The new rules clarify that a borrower can apply for forgiveness at any time between when the loan is made (even if the covered period is not over yet) and the maturity date of the loan. Note, however, that deferral of repayment expires if a borrower has not applied for forgiveness within ten months of the end of the covered period. The SBA can review a loan before or during a lender’s review of a forgiveness application, and may direct the lender to deny the application without prejudice if its review is not then completed. This suggests that the SBA’s audit of loans in excess of \$2 million may begin sooner rather than later. Additionally, if a lender denies an application, the borrower has 30 days to inform the lender of its request to have the SBA review the denial, in which case the lender must inform the SBA of this within five days thereafter. This would seem to be the appeal mechanism that prior regulations suggested would be forthcoming. However, the new rules state that the SBA has the right to decline to review a denied forgiveness application, in addition to being able to confirm or overturn the lender’s decision.

If you have any questions about how the provisions of the Flex Act and these new rules apply to you or your business, please contact [Jason Navarino](#), [Rich Lomuscio](#), [Hannah Greendyk](#) or any member of Riker Danzig’s [Tax](#) and [Corporate](#) Departments.

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