

## SBA Issues New Guidance on PPP Loan Forgiveness

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On May 22, 2020, the Small Business Administration (“**SBA**”) provided additional guidance on the Paycheck Protection Program (“**PPP**”) through the issuance of two new Interim Final Rules on (i) [loan forgiveness](#) and (ii) [SBA loan review procedures](#) and related borrower and lender responsibilities (collectively, the “**Loan Forgiveness Rules**”), each of which supplements the first PPP Interim Final Rule, published on April 2, 2020, the subsequent interim final rules issued since that date (and linked below), and the [PPP loan forgiveness application](#).

The PPP is a small business loan program established pursuant to Title I of the Coronavirus Aid, Relief, and Economic Security (“**CARES**”) Act signed by President Trump on March 27, 2020, and supplemented by the Paycheck Protection Program and Health Care Enhancement Act (the “**PPP/HCE Act**”), which provided additional funding for the program.

Below is a high-level summary of guidance set forth in the Loan Forgiveness Rules. The U.S. Department of Treasury and the SBA may provide further guidance and regulations in the coming days. Such guidance and regulations could provide further detail with respect to PPP loan forgiveness applications and may materially change the summary below. Businesses are encouraged to seek advice from qualified legal counsel before applying for PPP loan forgiveness.

### Loan Forgiveness Rules Summary

<p><b>Loan Forgiveness Review and General Procedure</b></p>	<p><b>SBA Review:</b></p> <p>For a PPP loan of any size, the SBA may undertake a review at any time in the SBA’s discretion.<sup>1</sup> Specifically, the SBA is authorized to review each of the following:</p> <ol style="list-style-type: none"> <li>1. <b>Borrower Eligibility.</b> Whether a borrower is eligible for the PPP loan based on the provisions of the CARES Act, the rules and guidance available at the time of the borrower’s PPP loan application, and the terms of the borrower’s loan application;</li> <li>2. <b>Loan Amounts and Use of Proceeds.</b> Whether a borrower calculated the loan amount correctly and used loan proceeds for the allowable uses specified in the CARES Act; and</li> <li>3. <b>Loan Forgiveness Amounts.</b> Whether a borrower is entitled to loan forgiveness in the amount claimed on the borrower’s Loan Forgiveness Application (SBA Form 3508 or lender’s equivalent).</li> </ol> <p>If the SBA determines that a borrower is ineligible for the PPP loan, loan amount, or loan forgiveness amount claimed by the borrower, SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate. SBA may also seek repayment of the outstanding PPP loan balance or pursue other available remedies.</p>
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<sup>1</sup> If SBA undertakes such a review, SBA will notify the lender in writing and the lender must notify the borrower in writing within five business days of receipt.

	<p>A borrower is expected to be able to appeal the SBA's determination that the borrower is ineligible for a PPP loan, the loan amount or loan forgiveness amount claimed by the borrower. The SBA intends to issue a separate interim final rule addressing this process in the coming weeks.</p> <p><b><u>Lender Review:</u></b></p> <p>The lender is required to review the borrower's Loan Forgiveness Application and make a decision on the requested loan forgiveness. Loan Forgiveness Applications that are <u>not</u> reviewed by the SBA prior to the lender's decision will generally undergo the following procedure:</p> <ol style="list-style-type: none"> <li>1. Borrower must complete and submit a Loan Forgiveness Application (SBA Form 3508 or lender equivalent) to its lender (or the lender servicing its loan);</li> <li>2. The lender has 60 days to review the application and issue a decision regarding loan forgiveness to the SBA.<sup>2</sup> If the lender determines borrower is entitled to forgiveness of a portion of its PPP loan, such lender must request payment from the SBA at the time the lender issues its decision to the SBA.</li> <li>3. The SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to the SBA.</li> <li>4. If only a portion of the loan is forgiven, or if the forgiveness request is denied, any remaining balance due on the loan must be repaid by the borrower on or before the 2-year maturity of the loan.</li> <li>5. If the amount remitted by SBA to the lender exceeds the remaining principal balance of the PPP loan (because the borrower made scheduled payments on the loan after the initial deferment period), the lender must remit the excess amount, including accrued interest, to the borrower.</li> </ol>
<p><b>Eligible Forgiveness Amounts</b></p>	<p>Section 1106(b) of the CARES Act provides that, subject to several important limitations, borrowers shall be eligible for forgiveness of their PPP loan in an amount equal to the sum of the following costs incurred and payments made during the Covered Period:</p> <ol style="list-style-type: none"> <li>1. Payroll costs;<sup>3</sup></li> </ol>

<sup>2</sup> That decision may take the form of an approval (in whole or in part); denial; or (if directed by SBA) a denial without prejudice due to a pending SBA review of the loan for which forgiveness is sought. In the case of a denial without prejudice, the borrower may subsequently request that the lender reconsider its application for loan forgiveness, unless SBA has determined that the borrower is ineligible for a PPP loan.

<sup>3</sup> Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation. See 15 U.S.C. 636(a)(36)(A)(viii); 85 FR 20811, 20813. If a borrower pays furloughed employees their salary, wages, or commissions during the Covered Period, those

	<ol style="list-style-type: none"> <li>2. Interest payments on any business mortgage obligations on real or personal property that was incurred before February 15, 2020 (but not any prepayment or payment of principal);</li> <li>3. Payments on business rent obligations on real or personal property under a lease agreement in force before February 15, 2020; and</li> <li>4. Business utility payments for distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.</li> </ol> <p>Payments described in Nos. 2-4 above are “<b>nonpayroll costs</b>” and cannot exceed 25% of the loan forgiveness amount. A nonpayroll cost is eligible for forgiveness if it was (i) paid during the Covered Period or (ii) 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.</p> <p>To be eligible for forgiveness, payroll costs must be paid or incurred during the eight consecutive weeks beginning on either (i) the date of disbursement of the borrower’s PPP loan proceeds (the “<b>Covered Period</b>”) or (ii) the first day of the first payroll cycle in the Covered Period (the “<b>Alternative Payroll Covered Period</b>”).<sup>4</sup></p>
<p><b>Calculating Reduction in Loan Forgiveness Based on Reduction in Full-Time Equivalent (“FTE”) Employees<sup>5</sup></b></p>	<p>As a first step, the borrower must first select a reference period:</p> <ol style="list-style-type: none"> <li>1. February 15, 2019 through June 30, 2019;</li> <li>2. January 1, 2020 through February 29, 2020; or</li> <li>3. In the case of a seasonal employer, either of the two preceding methods or a consecutive 12-week period between May 1, 2019 and September 15, 2019.</li> </ol> <p>If the average number of FTE employees during the Covered Period or the Alternative Payroll Covered Period is less than during the reference period, the total eligible expenses available for forgiveness is reduced proportionally by the percentage reduction in FTE employees.</p> <p><u>Example:</u> If a borrower had 10.0 FTE employees during the reference period and this declined to 8.0 FTE employees during the Covered Period, the</p>

payments are eligible for forgiveness as long as they do not exceed an annual salary of \$100,000, as prorated for the Covered Period. Finally, if an employee’s total compensation does not exceed \$100,000 on an annualized basis, the employee’s hazard pay and bonuses are eligible for loan forgiveness because they constitute a supplement to salary or wages, and are thus a similar form of compensation.

<sup>4</sup> Payroll costs are considered paid on the day that paychecks are distributed or the borrower originates an ACH credit transaction. Payroll costs incurred during the borrower’s last pay period of the Covered Period or the Alternative Payroll Covered Period are eligible for forgiveness if paid on or before the next regular payroll date; otherwise, payroll costs must be paid during the Covered Period (or Alternative Payroll Covered Period) to be eligible for forgiveness. Payroll costs are generally incurred on the day the employee’s pay is earned (i.e., on the day the employee worked). For employees who are not performing work but are still on the borrower’s payroll, payroll costs are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work).

<sup>5</sup> “**Full-time equivalent employee**” means an employee who works 40 hours or more, on average, each week. The hours of employees who work less than 40 hours are calculated as proportions of a single full-time equivalent employee and aggregated.

	<p>percentage of FTE employees declined by 20 percent and thus only 80 percent of otherwise eligible expenses are available for forgiveness.</p> <p><b>To calculate their average number of FTE employees, borrowers must divide the average number of hours paid for each employee per week by 40, capping this quotient at 1.0. For example, an employee who was paid 48 hours per week during the Covered Period would be considered to be an FTE employee of 1.0.</b></p> <p>Finally, a borrower's loan forgiveness amount will <u>not</u> be reduced if an employee is fired for cause, voluntarily resigns, or voluntarily requests a schedule reduction during the Covered Period or the Alternative Payroll Covered Period ("<b>FTE reduction event</b>"). Rather, when calculating the FTE employee reduction, a borrower may count such employee at the same full-time equivalency level before the FTE reduction event.</p>
<p><b>Calculating Reduction in Loan Forgiveness based on Reduction in Employees' Salary or Wages</b></p>	<p>For each new employee in 2020 and each existing employee who was not paid more than the annualized equivalent of \$100,000 in any pay period in 2019, the borrower must reduce the total forgiveness amount by the total dollar amount of the salary or wage reductions that are in excess of 25 percent of base salary or wages between January 1, 2020 and March 31, 2020 (the reference period), subject to exceptions for borrowers who restore reduced wages or salaries (discussed below). This reduction calculation is performed on a per employee basis, not in the aggregate.</p> <p><u>Example:</u> A borrower reduced a full-time employee's weekly salary from \$1,000 per week during the reference period to \$700 per week during the Covered Period. The employee continued to work on a full-time basis during the Covered Period with an FTE of 1.0. In this case, the first \$250 (25 percent of \$1,000) is exempted from the reduction. Borrowers seeking forgiveness would list \$400 as the salary/hourly wage reduction for that employee (the extra \$50 weekly reduction multiplied by eight weeks).</p> <p><b>To ensure that borrowers are not doubly penalized, 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.</b> For example, an hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE employee of 1.0) and the borrower reduced the employee's hours to 20 hours per week during the Covered Period (FTE employee of 0.5). There was no change to the employee's hourly wage during the Covered Period. Because the hourly wage did not change, the reduction in the employee's total wages is entirely attributable to the FTE employee reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee.</p>

<p><b>Exceptions to Reductions in Loan Forgiveness Amounts</b></p>	<p><b>Statutory Exemptions under the CARES Act.</b> Exemptions are available to borrowers who have rehired employees and restored salary and wage levels by June 30, 2020 (with limitations), as follows:</p> <ul style="list-style-type: none"> <li>• Section 1106(d)(5) of the CARES Act provides that if certain employee salaries and wages were reduced between February 15, 2020 and April 26, 2020 (the safe harbor period) but the borrower eliminates those reductions by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in salaries and wages under section 1106(d)(3) of the CARES Act.</li> <li>• Similarly, if a borrower eliminates any reductions in FTE employees occurring during the safe harbor period by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in FTE employees.</li> </ul> <p><b>Regulatory Exemptions per the Interim Final Rules:</b> Exemptions are available to borrowers who have offered to rehire employees or restore employee hours, even if the employees have not accepted. Specifically, in calculating the loan forgiveness amount, a borrower may exclude any reduction in FTE employee headcount that is attributable to an individual employee if:</p> <ol style="list-style-type: none"> <li>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;</li> <li>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;</li> <li>3. the offer was rejected by such employee;</li> <li>4. the borrower has maintained records documenting the offer and its rejection; and</li> <li>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.<sup>6</sup></li> </ol>
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For more information, please see the following resources:

1. PPP Resources from the SBA and Treasury Department:
  - a. [Top-Line Overview of the Program](#)
  - b. [Information Sheet for Lenders](#)
  - c. [Information Sheet for Borrowers](#) (updated April 2, 2020)

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<sup>6</sup> Further information regarding how borrowers will report information concerning rejected rehire offers to state unemployment insurance officers will be provided on SBA's website.

- d. [Borrower Application Form](#) (updated April 3, 2020)
- e. [Lender Application Form for Federally Insured Depository Institutions, Federally Insured Credit Unions, and Farm Credit System Institutions \(4/3/2020\)](#) (released April 3, 2020)
- f. [Lender Application Form for Non-Bank and Non-Insured Depository Institution Lenders \(4/8/2020\)](#) (released April 8, 2020)
- g. [Lender Agreement to participate in PPP](#) (released April 3, 2020)
- h. [PPP Program Loan Report](#) (updated April 16, 2020)
- i. [Loan Forgiveness Application](#) (released May 15, 2020)
- j. [How to Calculate Loan Amounts](#)
- k. [Search Tools: Find an Eligible Lender](#)

2. Prior SBA Guidance on the Paycheck Protection Program:

- a. [PPP Frequently Asked Questions](#) (updated May 13, 2020)
- b. [Interim Final Rule 1](#) (originally posted April 2, 2020)
- c. [Interim Final Rule on Applicable Affiliation Rules](#) (originally posted April 3, 2020)
- d. [Interim Final Rule on Additional Eligibility Criteria and Requirements for Certain Pledges of Loans](#) (originally posted April 14, 2020)
- e. [Interim Final Rule on Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility](#) (originally posted April 24, 2020)
- f. [Interim Final Rule Additional Criterion for Seasonal Employers](#) (originally posted April 27, 2020)
- g. [Interim Final Rule on Disbursements](#) (originally posted April 28, 2020)
- h. [Interim Final Rule on Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders](#) (originally posted April 30, 2020)
- i. [Interim Final Rule on Nondiscrimination and Additional Eligibility Criteria](#) (originally posted May 5, 2020)
- j. [Interim Final Rule on Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request](#) (originally posted on May 8, 2020)
- k. [Interim Final Rule on Loan Increases](#) (originally posted May 13, 2020)
- l. [Interim Final Rule on Eligibility of Certain Electric Cooperatives](#) (originally posted May 14, 2020)
- m. [Interim Final Rule on Treatment of Entities with Foreign Affiliates](#) (originally posted May 18, 2020)
- n. [Interim Final Rule on Loan Forgiveness](#) (originally published May 22, 2020)
- o. [Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities](#) (originally published May 22, 2020)

3. Prior Haynes and Boone Guidance on the Paycheck Protection Program:

- a. [Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program](#) (updated May 7, 2020)
- b. [SBA Issues New Guidance on Certification of Necessity Safe Harbor](#) (May 13, 2020)
- c. [SBA Extends Loan Repayment Safe Harbor Date, Provides Additional Guidance on Employees of Foreign Affiliates](#) (May 7, 2020)
- d. [Could Retention of PPP Loan Funds Create False Claims Act Liability?](#) (updated May 6, 2020)
- e. [President Signs Additional Appropriation for Small Business Relief into Law, SBA Clarifies Eligibility of Large Companies for PPP Loans](#) (April 24, 2020)
- f. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
- g. [What Franchise and Hospitality Companies Should Know! A Guide to CARES and Other Relief Programs](#) (April 2, 2020)
- h. [Relief for Employers and Workers under the CARES Act](#) (updated March 29, 2020)

***Additional Questions? Contact a member of the Haynes and Boone [Finance](#) or [Corporate](#) Practice Groups at Haynes and Boone, including the following individuals:***

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