

SBA Paycheck Protection Program Loans: Forgiveness Guidance, Part I

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Holland & Knight Alert

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Highlights

- A key feature of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) Paycheck Protection Program (PPP), which now authorizes \$670 billion for qualifying businesses to obtain loans for payroll, benefits, rent and other costs, is the "forgiveness" aspect of the Program.
- However, the U.S. Small Business Administration (SBA) has yet to release its overdue Interim Final Rule (IFR) focusing on forgiveness, which will include the key definitions and instructions for loan forgiveness.
- PPP loan recipients should immediately organize documentation and procedures in accordance with the current rules and expectations. In addition, loan recipients should continue to follow the new IFRs, frequently asked questions and developments, especially concerning forgiveness, as released.

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Accordingly, PPP loan recipients should immediately organize documentation and procedures in accordance with the current rules and expectations. Then, PPP recipients must continue to follow the new IFRs and FAQs and developments, especially concerning forgiveness, as released. (See Holland & Knight's previous alert, "[Key Factors for Companies to Consider When Certifying Their PPP Need](#)," April 25, 2020).

In preparation for the upcoming rules and guidance, this Holland & Knight alert provides an overview of the underlying forgiveness calculations as well as the other forgiveness-related guidance available now.

What Are the Basic Rules of Calculating and Processing Loan Forgiveness?

- PPP loan proceeds (plus accrued interest on the loan itself) are forgivable so long as they are expended on the following expenses incurred and paid during the eight-week period: 1) payroll costs, 2) utilities, 3) rent and 4) mortgage interest. However, amounts spent on these items outside of the eight-week window are not forgivable, and payroll expenditures must account for 75 percent of the loan forgiveness amount.
 - Eligible payroll costs include salary, wages and tips, up to \$100,000 of annualized per employee (or \$15,385 maximum per individual), plus benefits for employees. Employee benefits include healthcare expenses, retirement contributions and state taxes imposed on employee payroll paid by the employer.
 - All utilities, rent and mortgage interest must be in effect as of Feb. 15, 2020.

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- All eligible expenses must be "incurred and paid" during the eight-week period.
- The eight-week period for qualifying expenses begins on the date that the lender makes its first disbursement of PPP loan proceeds. More notably, according to the new IFR on Disbursements, the lender must make a one-time, full disbursement of the loan no later than 10 calendar days from the date of loan approval.
- PPP forgiveness can be reduced based upon a head-count reduction formula and a salary-reduction formula, which are complicated and still in need of further clarification.
 - Maintain employment levels 1) for the eight-week period from the loan origination date or 2) by June 30, 2020, for the average number of full-time equivalent employees per month to, at recipient's election, either a) the average number of full-time equivalent employees per month from Feb. 15, 2019, and ending on June 30, 2019 or b) the average number of full-time equivalent employees per month from Jan. 1, 2020, and ending on Feb. 29, 2020; and
 - Maintain wages/salaries on each individual employee 1) for the eight-week period from the loan origination date or 2) by June 30, 2020, with a salary that at no time during any pay period in 2019 was greater than \$100,000 on an annualized period, and at least 75 percent of what that individual employee's wage/salary was in the most recent full quarter prior to the origination date of the loan.
- An employee who rejects an offer of rehire will be excluded from the recipient's calculations for employment level and wages/salaries for forgiveness reduction as long as the recipient made a good faith, written offer of rehire and the employee's rejection of such offer is documented.
 - An employee who rejects an offer of reemployment may forfeit eligibility for continued unemployment compensation.
- A recipient must request forgiveness and will work with its lender on its loan forgiveness application and the documentation required under the CARES Act and the upcoming Forgiveness IFR, which will be necessary to obtain forgiveness. An example loan forgiveness application has not been made available to date.
- Lenders may require supplemental information and documentation, in addition to what is in the forthcoming SBA guidance and the expected example loan forgiveness application.
- In addition to its PPP application certifications, a recipient will need to certify its forgiveness application.

What Should a Recipient Do to Begin to Document and Calculate Loan Forgiveness?

- Creating a separate bank account to deposit and disperse the PPP loan proceeds is not required. Still, it is advisable to account for all eligible expenditures made over the eight-week period. However, such an account should not be subject to any account control agreement.
- Recipients should also consider setting up a separate charge code for costs incurred during the forgiveness period and monitor spending throughout the forgiveness period to determine whether it meets the 25 percent limit at the end of the forgiveness period.
- Since forgivable funds have to be for expenses incurred during the eight-week period and paid during that period, maintain records of all forgivable payments.
 - For payroll costs, this will also include all federal and state taxes paid with payroll.
 - For mortgage interest, rent and utilities, this would consist of the invoice and the ACH/check/credit card payment receipts.

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- In operating the segregated account, only move the funds out of it directly to the payment account and in the exact amount being paid (i.e., if payroll is \$10,000, you would see a transfer from the segregated account to the payroll account for \$10,000 and then the payment out of the payroll account of \$10,000).
- Be prepared to have to run an off-cycle payroll because of the "incurred and paid" requirement. In other words, recipients may need to run an off-cycle payroll on the last business day of the eight-week period to capture all eligible payroll expenditures.
- Keep separate and contemporaneous records of employees hired back, as well as their position and pay. If an employee decides not to return to work, analyze whether hiring a replacement is feasible, and compare the relative impacts on loan forgiveness if the position goes unfilled and the expense of hiring a new person.
- Begin to speak with your lender about their anticipated forgiveness process and inquire about exactly when they expect to have their process and documentation requirements available. Recipients should begin to work with their lenders on forgiveness applications during the eight-week forgiveness period.

What Else Should a Recipient Know?

- Given the fluidity of the PPP program and ongoing changes, it is expected that the Program will continue to operate in the manner it has to date. Accordingly, it is imperative for recipients to stay on top of programmatic [changes and developments](#) and continue to consult counsel.
- The CARES Act requires lenders to make decisions on forgiveness within 60 days of the applicant's request.
- It is unknown and a point of debate whether the upcoming Forgiveness IFR will provide additional guidance and direction, or simply provide a more transparent outline of the process and information available to date.
- All PPP loans of \$2 million and greater, in addition to other loans as appropriate, will be reviewed following lender's submission of the recipient's loan forgiveness application.
- SBA's report regarding loan approvals through May 1, 2020, currently shows that less than 1 percent of the loans are for more than \$1 million; 2.66 percent of the loans are between \$350,000 and \$1 million, and the average loan size is \$79,000. Accordingly, in addition to the audits set forth above, recipients receiving loans of more than \$350,000 should expect ongoing scrutiny.

Conclusion

In sum, while foundational information is available with regard to calculating and documenting PPP loan forgiveness, it is expected that additional guidance will follow through the overdue Forgiveness IFR, supplemental FAQs, and ongoing programmatic clarifications. For more information or any additional questions you may have on PPP loan forgiveness, contact the authors.

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