

Client Alert

August 2020

Paycheck Protection Program Loan Forgiveness FAQs and New Guidance on Lender Obligations

Last week, the Small Business Administration (“SBA”), in consultation with the US Treasury Department, issued new guidance through Frequently Asked Questions (“FAQs”) aimed at helping Paycheck Protection Program (“PPP”) borrowers and lenders with the loan forgiveness process.¹

The FAQs come at a tumultuous time. The PPP ended this past Sunday, and there are multiple congressional bills that aim to make significant changes to the PPP. The proposed bills do appear to have the common goal of simplifying the PPP loan forgiveness process and extending the term until the end of the year. Please be advised that many of these FAQs could be outdated or require revisions based on legislation that may be signed into law shortly.

We are continuing to encourage lenders and borrowers to hold off on the forgiveness process for loans under \$150,000, as the new legislation is expected to include significant relief for such loans. While there may be some additional relief for borrowers with loans greater than \$150,000, borrowers that have exhausted their PPP funds should continue moving forward with the current forgiveness process. The amount of documentation that must be submitted along with the forgiveness application is significant. The amount of supporting documentation that borrowers are expected to maintain, but are not immediately required to submit, is even more substantial.

The FAQs do little to lessen the burden placed on lenders with respect to the forgiveness process. Most notably, the SBA has been silent on the necessity for loan modification documents. Changes to the payment period, deferral period, and term of the PPP resulting from the Paycheck Protection Program Flexibility Act have sweeping consequences for executed loan documents. Lenders may have to modify thousands of loan documents to amend these terms, as the outdated terms may be seen as contrary to the current PPP requirements for lender protections.

The FAQs address loan-forgiveness applications, payroll and nonpayroll costs, owner-employee compensation, reductions in the forgiveness amount, and more, including new guidance on issues such as covered utility payments and eligible electricity supply charges. The FAQs clarify that scanned copies and electronic signatures will be acceptable for loan forgiveness applications. Illustrative examples are also given on how to calculate the forgiveness reduction amounts for salary/wage reductions above 25%. The FAQs also clarify that rent paid under renewal leases and interest paid under refinanced/extended mortgages qualify for loan forgiveness. While most of these FAQs are not new, the SBA and Treasury have made an attempt to create a resource for borrowers to navigate the complex forgiveness process.

We highlight additional notable information contained in the FAQs below.

¹ [Frequently Asked Questions on Loan Forgiveness](#), August 4, 2020.

LENDER FORGIVENESS OBLIGATIONS

General Forgiveness Process

In addition to the FAQs, the SBA has also released an account management guide (the “Account Management Guide”) providing lenders with information on their responsibilities for the forgiveness process and how to use the forgiveness platform.² The lender’s “Authorizing Official,” as registered in the SBA’s Capital Access Financial System (CAFS), will be the designated individual that is approved by the SBA and responsible for administering access to other users at the financial institution that need access to the PPP forgiveness platform. Authorizing Officials should have received a “Welcome to Forgiveness” email by August 3 that contained instructions on how to access the platform. Each Authorizing Official is permitted to create up to 10 additional users in the platform for purposes of submitting and monitoring forgiveness requests. Institutions should reach out to the SBA if they have not yet received the welcome email.

Lenders have two options for submitting forgiveness decisions to the SBA: (1) by manually entering and submitting individual decisions or, (2) by leveraging service providers that can submit decisions in batches using application programming interface (“API”) connections—it seems reasonable to assume that lenders can also submit decisions in bulk directly if they have the requisite technical expertise required for building the APIs.³

The following must be submitted at the time of issuing the decision to the SBA:

- For applications submitted using the SBA Form 3508 or lender equivalent:
 - PPP loan Forgiveness Calculation Form, including the signed certification document;
 - PPP Schedule A; and
 - PPP Borrower Demographic Information Form (if submitted to the lender).
- For applications submitted using the SBA Form 3508EZ:
 - The SBA Form 3508EZ or lender’s equivalent form, including the signed certification document; and
 - Borrower Demographic Information Form (if submitted to the lender).

Lenders are responsible for continuing to monitor the SBA forgiveness portal and the status of the SBA’s review of the forgiveness decision as well as for responding to SBA’s requests for information in a timely manner. If the SBA reviewer determines additional information is needed, the portal will send a detailed request for information to the lender’s portal inbox. Forgiveness decisions may be withdrawn prior to the SBA’s accepting the lender decision—the SBA has not yet indicated how long this window will remain open. The SBA’s Account Management Guide also states that lenders “should continue to communicate with their borrowers as a measure of good customer service.”

Lenders are permitted to submit supporting documentation via the platform to provide further justification for forgiveness decisions. While the additional supporting documentation is “optional” at the time of the submission of the forgiveness decision, lenders are *required* to submit the supporting documentation if the SBA notifies the lender that a manual review will be performed. Accordingly, lenders must obtain such information in the event of a request.

² It is important to note that a footnote in the Account Management Guide cautions that the SBA is still updating the forgiveness platform.

³ The SBA has established a website for developers to create APIs: <https://ussbaforgiveness.github.io/>.

Manual Reviews

As the SBA has previously announced, it may review any PPP loan of any size at any time at its discretion. The SBA will notify lenders of such reviews via the forgiveness platform. If a lender receives notice that a loan is under review, it has five business days to complete the following steps:

- Notify the borrower in writing of the SBA's decision to manually review the forgiveness application.
- Submit the following documents through the forgiveness portal:
 - The Borrower Application Form (SBA Form 2483 or lender's equivalent form) *and all supporting documentation* provided by the borrower, including Payroll documents supporting the loan amount and, if applicable, Addendums A and B;
 - The Loan Forgiveness Application (SBA Form 3508, 3508EZ, or the lender's equivalent forms), *and all supporting documentation* provided by the borrower;
 - A copy of the executed note evidencing the PPP loan;
 - Payroll documentation verifying the eligible cash compensation and non-cash benefit payments for the relevant forgiveness period; and
 - Nonpayroll documentation verifying the existence of the obligations and services prior to February 15, 2020 and all eligible payments for the relevant forgiveness period.

The following are examples of documentation that is considered optional at the time of decision submission, but is required if the SBA decides to conduct a manual review:

- **Payroll** – documentation verifying the eligible cash compensation and non-cash benefit payments for the forgiveness period consisting of the following:
 - Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees;
 - Tax forms (or third-party service provider reports) for the period that overlaps with the forgiveness period. These tax forms include payroll tax filings that are reported, or will be reported, to the IRS (typically, Form 941); and state quarterly business and individual employee wage reporting, and unemployment insurance tax filings, that are reported, or that will be reported, to the relevant state; and
 - Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the borrower included in the forgiveness amount.
- **Nonpayroll**⁴ – documentation verifying the existence of the obligations/services prior to February 15, 2020, and eligible expenses during the forgiveness period can consist of the following:
 - Business mortgage interest payments: copy of the lender amortization schedule and receipts or cancelled checks verifying eligible payments from the forgiveness period; or lender account statements from February 2020 and the months of the forgiveness period through one month after the end of the forgiveness period verifying interest amounts and eligible payments.

⁴ Nonpayroll documentation is only required if the borrower included nonpayroll expenses in the amount for which it is seeking forgiveness.

- Business rent or lease payments: copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the forgiveness period; or lessor account statements from February 2020 and the forgiveness period through one month after the end of the forgiveness period verifying eligible payments.
- Business utility payments: copy of invoices from February 2020 and those paid during the forgiveness period and receipts, cancelled checks, or account statements verifying eligible payments.

It remains clear that the documentation burden placed on lenders is severe. While the above does not all have to be submitted to the SBA upon issuing the forgiveness decision, it must all be received by the lender along with the forgiveness application and must be stored in a way that it can be submitted through the portal within five days of receiving the notice of review from the SBA.

THE FORGIVENESS FAQs

Unlike the longstanding general FAQs document that the SBA has updated over the course of the PPP, the SBA published the forgiveness FAQs as a stand-alone document. The SBA did this previously with its FAQs addressing faith-based organizations. Consequently, lenders and borrowers parse forgiveness information from the multitude of rules that have been issued over the past few months.

E-signature Confirmation

The FAQs clarify the requirements for signatures for PPP forgiveness application documents, and more importantly, for the supporting evidence and documents for the application. All PPP lenders may accept scanned copies of signed loan forgiveness applications and documents containing the information and certifications required by SBA Forms 3508, 3508EZ, or lender equivalent. Lenders may accept any form of E-consent or E-signature that complies with the requirements of the E-SIGN Act.⁵ If electronic signatures are not feasible, the lender will need to use its own process in order to gain assurance that the signature is from a properly authorized individual. This guidance does not supersede signature requirements imposed by other applicable laws.

Payment of Payroll and Nonpayroll Expenses

The FAQs state that payroll costs that were incurred during the Covered Period or Alternative Covered Period, but paid after the Covered Period or Alternative Covered Period qualify for forgiveness as long as they are paid on or before the next regular payroll date.⁶ Additionally, payroll costs that were incurred before the Covered Period but paid during the Covered Period are eligible for loan forgiveness. These grace periods extend to nonpayroll costs as well.

Cannot Use the Alternative Covered Period for Nonpayroll Expenses

The FAQs splits the method of calculating payroll and nonpayroll costs for borrowers who elected to use the Alternative Covered Period. The Alternative Covered Period only effects payroll costs. All nonpayroll costs for which the borrower is seeking forgiveness must be calculated using the traditional Covered Period which starts the day the lender disburses the loan. This will add complications for borrowers who wish to use the Alternative Covered Period for all expenses, as they will now need to have two separate timelines and workflows.

⁵ For additional information on electronic signatures, please see our previous client alert: [Using Electronic Signatures in the Age of COVID-19](#).

⁶ "Covered Period" is the 24-week or 56-day period beginning on the loan disbursement date. "Alternative Covered Period" is the 24-week or 56-day period that begins on the first day of the pay period following the loan disbursement date.

Salary Clarifications

The FAQs state that the gross amount for salary should be used to calculate cash compensation. This gross amount is salary before deductions for taxes, employee benefits payments and similar payments. Further, payroll costs include all forms of cash compensation paid to employees, including tips, commissions, bonuses and hazard pay. This may provide some comfort for borrowers who are wary of forgiveness reductions because forgiveness reduction kicks in when employee salaries have dropped by 25% or more.

Additional Clarifications on Nonpayroll Expenses

Interest on unsecured credit is not eligible for loan forgiveness because the loan is not secured by real or personal property. Although interest on unsecured credit incurred before February 15, 2020, is a permissible use of PPP loan proceeds, this expense is not eligible for forgiveness.

Payments on a renewed lease or refinanced mortgage continue to be eligible for forgiveness; provided, the extensions or refinancing are for a lease or mortgage that was in existence prior to February 15, 2020. However, the FAQs do not extend to new leases or mortgages that were incurred during the forgiveness period. When we reached out to the SBA, they informally stated that a new lease, even if comparable to the existing lease, would not qualify for forgiveness. This distinction will cause borrowers to weigh the benefits of renewing leases with the potential to lose crucial loan forgiveness.

The FAQs provide some clarity to the “Utility” category of forgivable nonpayroll expenses. Under the CARES Act, a “covered utility payment means payment for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access.”⁷ For electricity, the entire electricity bill payment is eligible for loan forgiveness (even if charges are invoiced separately), including supply charges, distribution charges, and other charges such as gross receipts taxes. The SBA waited until the end of the PPP to let borrowers know what transportation expenses are eligible for forgiveness. The FAQs provide that the only forgivable transportation expenses are transportation utility fees assessed by state and local governments.

Loan Forgiveness Reduction

Determining the required reductions in the forgiveness amount for reductions in employee compensation remains incredibly complex despite the guidance provided in the FAQs. As just one example, the instructions for Table 1 in the PPP Schedule A Worksheet state that borrowers should list only employees who “[r]eceived compensation from the Borrower at an annualized rate of less than or equal to \$100,000 for all pay periods in 2019 or were not employed by the borrower at any point in 2019.” However, the FAQs state that “[t]he FTE Reduction Exceptions apply to all employees ... [and borrowers] should therefore include employees who made more than \$100,000 in the FTE Reduction Exception line in Table 1 of the PPP Schedule A Worksheet.” This FAQ clarifies that the exceptions borrowers can use for employees that they tried in good faith to hire back extends to employees who make more than \$100,000. The SBA is attempting to reconcile the PPP Flexibility Act language with the existing forgiveness application. The forgiveness application includes this “FTE Reduction Exception” only in Table 1 of the PPP Schedule A Worksheet and does not include any information to state that the employees in Table 2 should also be included. The SBA needs to revise the forgiveness application to address the many issues that exist, not leave the form ambiguous and attempt to reconcile inconsistencies through FAQs.

The FAQs do provide much needed examples for how to calculate the forgiveness reduction based on salary decreases. These illustrations should provide clarity for borrowers who are not able to meet the safe harbor requirements and will need to calculate salary reductions.

⁷ [CARES Act, Section 1106\(a\)\(5\)](#).

The FAQs also provide some relief for borrowers in calculating the salary reductions. For purposes of calculating reductions in the loan forgiveness amount, the borrower should only take into account decreases in salaries or wages. Salaries and wages do not include lost tips, lost commissions, bonuses, or other forms of incentive pay. The FAQs allow for those “other” payroll expenses to be classified for forgiveness, but does not punish the borrower for those expenses dipping during the forgiveness period. This may provide relief to borrowers that experience sales declines over the course of the forgiveness period, but still provided the same base salary to employees.

Contacts

Peter G. Weinstock

pweinstock@HuntonAK.com

Patrick J. Boot

pboot@HuntonAK.com

Dean Elazab

delazab@HuntonAK.com

© 2020 Hunton Andrews Kurth LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.