



Additional PPP Loan Forgiveness and Review Guidance Issued

Client Advisories

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The US Department of Treasury and the SBA kicked off the Memorial Day weekend by issuing two interim final rules late on Friday, May 22. The first rule, which can be accessed [here](#), outlines certain loan forgiveness requirements and largely mirrors guidance already contained in the PPP loan forgiveness application issued on May 15. The second rule, which can be accessed [here](#), outlines certain procedures to be followed by lenders and the SBA in reviewing PPP loans, including PPP loan forgiveness applications. In case you spent the last few days focused on trying to have a “normal” holiday celebration during these unique times, rather than on looking for additional PPP guidance from the federal government, here is a brief summary of these two new rules:

PPP Requirements for Loan Forgiveness

- Confirms that eligible nonpayroll costs (such as mortgage interest payments, lease payments and utility payments) cannot exceed 25% of total loan forgiveness amount.
- Lenders have 60 days from receipt of complete loan forgiveness application to issue a decision on forgiveness to the SBA. If SBA has not elected to review the related loan or loan application, the SBA will remit the forgiveness amount approved by the lender, plus accrued interest, to the lender within 90 days after the lender issues its decision to the SBA. The interim final rule on PPP loan review procedures described below outlines the procedures applicable to loan forgiveness applications for PPP loans selected for review by the SBA.
- Borrowers with a biweekly or more frequent pay cycle may elect to use an alternative payroll covered period for the purpose of computing payroll costs (but not nonpayroll costs) eligible for forgiveness. The alternative payroll covered period is the 56 day/8-week period commencing on the first day of the first payroll cycle of the borrower following the date of disbursement of the PPP loan.
- Eligible payroll costs paid during the applicable 8-week covered period (or incurred and paid on the first regularly scheduled payroll date following such 8-week period) are eligible for forgiveness.

- Bonuses, hazard pay and salary, wages, and commission payments to furloughed employees are eligible for loan forgiveness, subject to a per employee cap on all wage/salary payments of \$15,385 (which equates to an annual salary of a \$100,000 prorated for 8 weeks).
- Loan forgiveness available for compensation paid to owner-employees and self-employed individuals is capped at the lesser of (a) 8/52 of 2019 compensation (i.e., approximately 15.38% of 2019 compensation) or (b) \$15,385 per individual, in total across all businesses. For self-employed individuals, including Schedule C filers and general partners, no additional forgiveness is provided for retirement or health insurance contributions since such expenses are paid out of their net self-employment income.
- To be eligible for forgiveness nonpayroll costs must be paid during the eight-week period starting on the date that the PPP loan was disbursed or incurred during the period and paid on or before the next regular billing date.
- The guidance makes clear that advance payments on mortgage interest are not eligible for loan forgiveness.
- In calculating any reduction in FTEs (defined as an employee who works 40 hours or more per week), employers can exclude any employees who are fired for cause, resign, voluntarily request a reduction in hours, or decline a good faith offer to return to work at the same pay and hours as before they were laid off or furloughed. *Note that PPP borrowers are required by the guidance to notify the state unemployment office of an employee's rejected offer within 30 days of that rejection.*
- In calculating the eligible amount of PPP loan forgiveness totals, a borrower is not doubly penalized for both an hours and wage reduction for the same employee. The salary/wage reduction factor is to be applied only to the portion of an employee's reduced salary/wages that is not attributable to the reduction in such employee's hours worked during the covered period.

PPP Loan Review Procedures

- Establishes that the SBA may review any PPP loan, *regardless of size*, with respect to the following factors: (a) borrower eligibility at the time of application for a PPP loan under the CARES Act (it is important to note that, for PPP loans of less than \$2 Million, the SBA has issued an FAQ, which states that the borrower will be presumed to have met the economic necessity prong (but not the other prongs) of the PPP loan eligibility requirements), (b) proper calculation by the borrower of the PPP loan amount in its application, (c) PPP loan proceeds were used by the borrower only for eligible costs, and (d) the borrower is eligible for the amount of loan forgiveness it has requested.
- Such review may be undertaken at any time by the SBA and borrowers must retain all PPP documentation in their files for at least 6 years after the date on which the PPP loan is forgiven or paid in full and permit representatives of the SBA or the Office of the Inspector General full access to such files upon request.
- Lenders are required to make a determination on loan forgiveness within 60 days of receipt of the *complete* loan forgiveness application from the borrower. Lenders can request additional information from a borrower to make such determination.



- If the SBA notifies a lender that it is reviewing a loan for which forgiveness is sought, within the stipulated 60-day loan forgiveness application review period, the lender can issue to the applicable borrower a denial without prejudice of the application for forgiveness. If the SBA subsequently rules that the borrower is eligible for a PPP loan, the borrower may request that the lender reconsider its application for loan forgiveness.
- If a lender approves an application for loan forgiveness, in whole or in part, the SBA (so long as it has not elected to review the related loan or loan application), will remit the loan forgiveness amount so approved to the lender within 90 days after the lender issues its decision to the SBA.
- If a lender rejects an application for loan forgiveness, it must notify the borrower in writing that it has notified the SBA of such denial. The borrower has **30 days from receipt of such notice** to file an appeal of the lender's decision with the SBA.
- If the SBA notifies a lender that it is reviewing a PPP loan, the lender must notify the applicable borrower of such review within 5 business days of the lender's receipt of such review notice from the SBA.
- If the SBA notifies a lender that it has commenced a review of a PPP loan, such lender is prohibited from approving any application for loan forgiveness for such loan until the SBA notifies the lender in writing that the SBA has completed its review.
- The SBA will establish, in a future interim final rule, the process for a borrower to appeal the SBA's determination that (a) such borrower is ineligible for a PPP loan, (b) the PPP loan amount received by such borrower was incorrect or (c) a denial of the loan forgiveness amount claimed by the borrower (in whole or in part).

It is important to note that certain legislation currently under consideration by Congress may change the PPP loan forgiveness instructions and guidance released by the SBA and Treasury to date, particularly with respect to the length of the period during which PPP funds must be spent to qualify for forgiveness (currently 8 weeks) and the rule requiring PPP borrowers to spend at least 75% of the PPP loan funds on payroll costs to be eligible to qualify for full loan forgiveness. Accordingly PPP borrowers are strongly urged to monitor such legislation carefully before submitting an application for PPP loan forgiveness to their respective lenders.

PPP borrowers who intend to apply for loan forgiveness, or who are notified that their loan is being reviewed by the SBA, should carefully review the information in the two new interim final rules and reach out to their Archer attorney - or any member of the firm's COVID-19 Task Force - with any questions or for further assistance.

For questions or for more information, please reach out to your Archer contact or any member of **Archer's COVID-19 Task Force**.

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