

SBA Releases Paycheck Protection Program Forgiveness Application and Instructions

By Alexander B. Ginsberg, Jenny Y. Liu, David B. Dixon and Matthew Oresman

TAKEAWAYS

On May 15, 2020, the Small Business Administration (SBA) published the application form that Paycheck Protection Program (PPP) borrowers will submit to their banks when they apply for forgiveness of their PPP loans. The application form and its accompanying instructions provide significant insight into the mechanics of applying for forgiveness under the program.

- *SBA has released the application it expects PPP borrowers seeking loan forgiveness to submit to their banks at the end of the eight-week “Covered Period” of the loan.*
- *The application, which includes detailed formulae and worksheets to help borrowers determine the amount of loan forgiveness to which they are entitled, is consistent with SBA regulations and guidance implementing the PPP program.*
- *Meanwhile, also on May 15, 2020, the House of Representatives passed the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act) which, if ultimately passed by the Senate and enacted, could introduce some important changes to the PPP that would necessitate changes to SBA’s forgiveness formula.*

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The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), enacted March 27, 2020, established the PPP and set aside \$349 billion for small business loans. We summarized the Act’s small business loan provisions [here](#). On April 24, 2020, the Paycheck Protection Program and Health Care Enhancement Act increased appropriations for the PPP by \$310 billion. Perhaps the most notable facet of the PPP—and the reason that many thousands of companies applied for loans under it—was Congress’ promise to *forgive* loan amounts expended for up to eight weeks of permissible uses enumerated by the CARES Act.

In the weeks since Congress established the PPP, SBA has issued a steady stream of guidance, in the form [Frequently Asked Questions](#), and several interim regulations that have made significant changes to the PPP framework set forth in the CARES Act. For example, SBA regulations imposed the requirement that at least 75 percent of a borrower’s PPP loan must be used for payroll expenses, as defined by the Act, while a maximum of 25 percent of the loan may be used for permissible non-payroll expenses, such as rent and utilities. While SBA has yet to issue its much-anticipated regulations pertaining specifically to loan forgiveness, on May 15, 2020, SBA published a copy of the [loan forgiveness application form](#) and accompanying instructions that PPP borrowers will submit to their lenders when the borrowers seek loan forgiveness.

The 11-page document tracks the requirements of the CARES Act, as modified by SBA guidance and regulations, and includes step-by-step formulae and worksheets designed to assist borrowers with the forgiveness calculation. We summarize the key aspects of the forgiveness application below:

- The application reiterates that the Covered Period over which applicants may seek loan forgiveness is the eight-week (or 56-day) period beginning on the day that the loan is disbursed.
 - The application provides an *alternative* calculation for payroll expenses under which borrowers using a biweekly (or more frequent) payroll may elect to start their eight-week period on the first day their payroll begins following loan disbursement.
- The application specifies that at least 75 percent of the loan proceeds must have been expended for allowable payroll costs and requires applicants to certify compliance with this rule. **SBA regulations** implementing the CARES Act define “payroll costs” as follows:

[C]ompensation 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.

The Act and regulations also exclude from the definition of “payroll costs” the following:

- i. Any compensation of an employee whose principal place of residence is outside of the United States;
 - ii. The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;
 - iii. Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee’s and employer’s share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and
 - iv. Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Pub. L. 116-127).
- The application reminds applicants of the eligible non-payroll expenses that may comprise up to 25 percent of their total loan expenses, specifically:
 - covered mortgage obligations: payments of interest (not including any prepayment or payment of principal) on any business mortgage obligation on real or personal property incurred before February 15, 2020;
 - covered rent obligations: business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020; and
 - covered utility payments: business payments for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.

Importantly, the eligible non-payroll expenses must be paid during the Covered Period, or incurred during the Covered Period and paid on or before the next regular billing date for these expenses.

- Perhaps the most complex aspect of the application relates to the calculation of the amount by which an applicant's forgiveness must be reduced, based on the applicant's reduction in its number of full-time equivalents (FTEs) or employee salary reductions of greater than 25 percent. The application also gives effect to CARES Act provisions providing a safe harbor for any FTE- or salary-based reductions to applicants' forgiveness amounts under certain circumstances.
 - With respect to any FTE-related forgiveness reductions, the application instructs applicants to calculate a ratio where the numerator is an applicant's average number of FTEs during the Covered Period (or the alternative period described above) and the denominator is the applicant's average number of FTEs over, at the applicant's election, the period from February 15 to June 30, 2019, or January 1 to February 29, 2020 (or May 1, 2019 to September 15, 2019 for seasonal employers). The ratio reflects the percentage by which an applicant's loan forgiveness will be reduced *unless* the safe harbor provision described below applies.
 - In calculating the foregoing ratio, consistent with SBA guidance, an applicant is not subject to an FTE reduction related to any employee who, during the Covered Period, rejected the applicant's good-faith, written offer to rehire that employee; nor is the applicant subject to an FTE reduction related to employees who were fired for cause, resigned or requested and received a reduction of their hours. The applicant essentially will be permitted to credit FTEs in these categories as part of the calculation of its average number of FTEs. If the applicant fills the positions in question, however, it will not be entitled to any additional FTE credit.
 - The application also contains a formula to determine whether an applicant has reduced by more than 25 percent during the Covered Period—as compared to the period from January 1 to March 31, 2020—the salary of any employee who earns an average annual salary \$100,000 or less. Unless the safe harbor provision applies, the applicant must calculate a dollar-for-dollar reduction of loan forgiveness based on any employee whose average salary has decreased by more than 25 percent.

An applicant that has reduced its FTE count or salaries may be subject to a safe harbor, and therefore exempt from a loan forgiveness reduction, if two conditions are met: (1) the applicant reduced its FTE levels or any individual employee's salary in the period beginning February 15, 2020, and ending April 26, 2020; and (2) the applicant then restored its FTE levels or any individual employee's salary by not later than June 30, 2020, to its pre-February 15, 2020 level.

- The application requires significant documentation verifying the use of PPP loan funds, including bank statements, tax forms, payment receipts, cancelled checks or account statements, and documents reflecting FTE levels. PPP borrowers must retain this documentation, as well as all other documents demonstrating compliance with the PPP requirements, for six years after the date the loan is forgiven or repaid in full, and borrowers must provide access to these records upon the request of SBA or the Office of Inspector General.
- The application also requires a number of certifications and representations, to be signed under threat of criminal and civil penalties. One notable representation asks borrowers to specify whether the combined value of PPP loans received by it and its affiliates exceeds \$2 million. This representation gives effect to SBA guidance issued May 13, 2020, which announced SBA's intent to conduct PPP compliance reviews of loans greater than \$2 million per affiliate group.

In sum, SBA's newly available loan forgiveness application sets forth the mechanics of the forgiveness calculation under the existing rules of the PPP. These rules, however, could change, both through further SBA rulemaking or another act of Congress.

In this vein, on May 15, 2020, the House of Representatives passed the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act) which, if ultimately passed by the Senate and enacted, could introduce some important changes into the PPP that would necessitate changes to SBA's forgiveness formula. For example, the HEROES Act would eliminate the 75/25 ratio described above related to the use of loan proceeds. The requirement for a borrower to use at least 75 percent of its loan on payroll expenses was a product of SBA regulations and not of the CARES Act itself. Other changes affecting loan forgiveness remain possible.

Pillsbury attorneys can help clients interpret and assess the PPP requirements as clients assess and strategize regarding the availability of SBA loans and other stimulus funds. We are proactively monitoring any forthcoming regulations and guidance.

*Pillsbury's experienced, multidisciplinary COVID-19 Task Force is closely monitoring the global threat of COVID-19 and providing real-time advice across industry sectors, drawing on the firm's capabilities in crisis management, employment law, insurance recovery, real estate, supply chain management, cybersecurity, corporate and contracts law and other areas to provide critical guidance to clients in an urgent and quickly evolving situation. For more thought leadership on this rapidly developing topic, please visit our [**COVID-19 \(Coronavirus\) Resource Center**](#).*