

Long-Awaited PPP Loan Forgiveness Guidance Finally Released

As has become a theme, late Friday night, the Small Business Administration (SBA) and the Treasury Department issued two sets of guidance relative to forgiveness of the Paycheck Protection Program (PPP) loan proceeds. In the [first interim final rule](#), the agencies provide detailed answers on some of the forgiveness questions that have been plaguing borrowers, while the [second interim final rule](#) details the forgiveness application and review procedures for borrowers, lenders, and SBA.

These guidance documents are critical for borrowers who are on the cusp of completing their eight-week PPP loan covered period and therefore preparing to seek forgiveness, and also critical for PPP lenders that will be making initial forgiveness determinations. We therefore are reviewing the guidance documents in detail but wanted to provide initial impressions and key points of emphasis. Notably, neither document discusses or explains the uncertainty around loan eligibility created by the [Treasury's FAQs and comments concerning additional sources of liquidity](#) despite many borrowers anxiously seeking additional information on this particular point.

On the whole, the forgiveness guidance largely tracks and confirms the information provided in the instructions on the [SBA Forgiveness Application](#). But a few clarifications are key:

- For payroll costs only, borrowers can use the covered period (56 days following loan disbursement). Borrowers with biweekly or more frequent pay periods may instead use an alternative covered payroll period, which is the 56-day period beginning on the first day of the first pay period occurring after the loan disbursement date. In this alert, these periods are collectively referred to as the “Payroll Covered Period.”
- Forgiveness is available for payroll costs that are paid **OR** incurred during the Payroll Covered Period. This guidance means that payroll earned by employees before the Payroll Covered Period but paid during the Payroll Covered Period may be forgiven. It also means that the portion of payroll earned at the end of the Payroll Covered Period (even if the pay period extends after the Payroll Covered Period) may be forgiven if paid on or before the next pay date. This could result in a proration of payroll costs for pay periods that are partially within the Payroll Covered Period but that end after the Payroll Covered Period.
- Salary and wages paid to furloughed employees during the Payroll Covered Period are included in payroll costs eligible for forgiveness.
- Bonuses and hazard pay paid to employees during the Payroll Covered Period also constitute payroll costs eligible for forgiveness for employees whose compensation does not exceed \$100,000 on an annual basis.
- Compensation to “owner-employees” that is eligible for forgiveness is capped at the lesser of 8/52 of 2019 compensation or \$15,385 (\$100,000 annually, prorated for the eight-week period). Notably, the guidance uses the term “owner-employee,” which is an undefined term and first appeared in the forgiveness application issued last week. Based on internal referencing to earlier guidance, the Department appears to be using this terminology to collectively refer to self-employed individuals, general partners, and members of LLCs who file as partnerships. However, the late introduction of a new, undefined term has raised questions for owners of corporations and whether they are swept up by the new terminology. If shareholder-employees are intended to be covered by this new terminology, it will potentially limit the forgiveness of their payroll costs. We are expecting this term to be clarified in future guidance.
- Non-payroll costs are eligible for forgiveness (subject to the 25% cap) if paid during the 56 days following loan disbursement, or incurred during that 56-day period and paid on the next regular billing date.
- Advance payments of mortgage obligations are not eligible for loan forgiveness. This leaves open the question of whether advance payments of rent or lease obligations, or utility payments, are eligible for forgiveness (subject to the 25% cap). The fact that this lingering issue was not specifically addressed suggests that such prepayments could be included in forgiveness amounts, but this remains an area of risk and uncertainty.
- The loan forgiveness application confirmed an exception to forgiveness reduction in situations where an employee was given an offer to return to work but refused to do so. The interim final rule confirms this exception, but in

addition to documentation concerning the offer and refusal (which the borrower must maintain), it requires the borrower to have informed the state unemployment insurance office of the rejected offer within 30 days of the rejection.

- The guidance confirms that a full-time equivalent (FTE) employee is based on a 40-hour-per-week standard. Employees who are paid for an average of 40 hours per week or more are a 1.0 FTE employee.
- For employees who were paid for less than 40 hours per week, borrowers may choose to calculate the full-time equivalency in one of two ways. First, the borrower may calculate the average number of hours a part-time employee was paid per week and divide the number by 40. Second, borrowers may elect to use a full-time equivalency of 0.5 for each part-time employee.
- The CARES Act includes a provision requiring a dollar-for-dollar reduction of loan forgiveness in the event of salary reductions greater than 25% for employees who did not receive in a single pay period in 2019 wages or salary at an annualized rate of \$100,000. This guidance clarifies that the reduction is only for the amount in excess of 25%.
 - For example, if an employee typically made \$1,000 per week, but the borrower reduced the employee's salary by 30% to \$700 per week, a reduction of \$250 (25%) would be permissible. So, the forgiveness amount is reduced by the excess amount, which in this case is \$50 per week.
- Borrowers will not be double penalized for reducing an FTE employee, which necessarily results in a reduction of that employee's salary (who will not be paid because of the termination or furlough). The salary/wage reduction provision applies only to a decline in employee salary or wages that is not attributable to an FTE employee reduction. Also, note that the salary/wage comparison is based on the employee's average salary or wages.
- Consistent with the CARES Act, FTE employee or salary/wage reductions that occurred between February 15, 2020, and April 26, 2020, do not adversely impact forgiveness if they are remedied by June 30, 2020. The guidance provides no further details, suggesting that the borrower will not be adversely impacted if it "remedies" the reduction at any time before June 30, which quite literally could mean on June 29.

As far as the forgiveness application and review procedures are concerned, the guidance confirms that lenders must make forgiveness decisions within 60 days after the borrower makes a forgiveness application. The general expectation would be for SBA to complete its review process within the 90-day period thereafter. But critically important, the guidance provides some additional clarity regarding SBA's review authority:

- SBA may review **any loan** (not just those above the \$2 million threshold) at **any time**. The guidance specifically notes the six-year retention period for PPP loan documents, suggesting that review could come at any time during that six-year period.
- SBA may review multiple components of the PPP loan, including eligibility, maximum loan calculation, and applications for forgiveness.
- Although not explicitly clear in the guidance, it appears that the SBA is unbounded in the time it may take to render a decision on loan eligibility or a forgiveness application. This delay could have significant consequences for borrowers, particularly as interest continues to accrue on the loan balance and considering that the decision may span fiscal or tax years.
- Borrowers may appeal an adverse determination by SBA on loan eligibility or forgiveness—SBA intends to issue additional guidance on the appeal process.
- Once a lender issues its decision on loan forgiveness, SBA will issue payment to the lender within 90 days, subject to its review of the loan/forgiveness application.
- If a lender denies a borrower's forgiveness application, the borrower may, within 30 days, ask SBA to review the lender's decision.

As noted, the impact of these new rules is of critical importance to borrowers. Chambliss will be reviewing and providing a more thorough analysis of key issues in the days to come.

Our Chambliss team continues to monitor legal developments in connection with the COVID-19 pandemic. Please contact [Jim Catanzaro](#), [Mark Cunningham](#), [Justin Furrow](#), or your relationship attorney if you have questions or need additional information.

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