

COVID-19 Alert

CARES ACT PAYCHECK PROTECTION PROGRAM LOANS JUNE 22, 2020 UPDATE

JUNE 2020

This continues our efforts to provide updates on the Paycheck Protection Program (PPP) loan offerings created by the CARES Act and overseen by the Small Business Administration (SBA).

WHAT HAS CHANGED?

As discussed in our [June 4](#) and [June 12](#) updates, the [Paycheck Protection Program Flexibility Act of 2020](#) (the Flexibility Act) has made major changes in the PPP as originally created in the CARES Act and implemented by SBA. These changes particularly loosened the requirements for PPP loan forgiveness, by permitting a 24-week Covered Period and reducing the portion of the forgivable amount that must be justified by Payroll Costs to 60% from the 75% previously established by SBA. Our June 12 update discussed a new Interim Final Rule (IFR) promulgated by SBA on June 11, 2020 (the June 11 IFR), to begin to integrate the effects of the Flexibility Act into SBA's prior PPP rule-making and guidance.

SBA has now continued the process by issuing an IFR (the June 19 IFR), a revised PPP Loan Forgiveness Application, and a new "EZ" version of the PPP Loan Forgiveness Application.

THE JUNE 19 IFR

The June 19 IFR is titled "Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to Third and Sixth Interim Final Rules" and was published in the Federal Register on [June 19, 2020](#). As indicated by the title, it makes revisions to two prior IFRs. The first was issued April 14, 2020 (published in the Federal Register [April 20, 2020](#)), and discussed in our [April 16](#) update. The second was issued April 28, 2020 (published in the Federal Register [May 4, 2020](#)).

The revisions are largely technical, inserting the idea of the 24-week Covered Period (with borrowers having the option to use an eight-week Covered Period if they received loans prior to June 5, 2020), the requirement that a minimum 60% of PPP loan proceeds be used for Payroll Costs, and the back-end date of December 31, 2020 for any Covered Period.

Of more interest is new detail on certain Payroll Costs eligible to serve as a basis for forgiveness. In the case of an employee compensated at an annual rate of more than \$100,000, the amount eligible is capped at the proportionate amount of \$100,000 that applies to the Covered Period. For a borrower with an eight-week

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Covered Period, the capped amount is \$15,385 per employee, as in previous SBA guidance. For a borrower with a 24-week Covered Period, the capped amount is now established to be \$46,154 per employee.

However, parallel treatment is NOT provided for Payroll Costs consisting of “owner compensation replacement” for owner-employees, self-employed individuals, and general partners (a group including members of limited liability companies taxed as partnerships). For these individuals, the capped amount is based on 2019 net profit paid to them (which in any event cannot exceed \$100,000 for these purposes). In the case of an eight-week Covered Period, the capped amount is 8/52 of the 2019 amount (but never more than \$15,385). In the case of a 24-week Covered Period, the capped amount is 2.5/12 of the 2019 amount (but never more than \$20,383, as opposed to the \$46,154 maximum for an employee). The logic is this equates to the amount used to calculate the original amount of the loan and is necessary to prevent windfalls to certain business owners who dismiss other employees but fit into a safe harbor for avoiding FTE-based reduction to the amount forgivable.

THE REVISED LOAN FORGIVENESS APPLICATION

On May 15, 2020, SBA issued its initial Loan Application Form, which we discussed in our [May 18](#) update. It has now issued a [new Loan Application Form](#), with [instructions](#), to account for the Flexibility Act, the June 11 IFR, and the June 19 IFR.

The new Loan Forgiveness Application is a fairly straight-forward revision to account for changes since May 15. To answer a couple of open questions, it does continue the concept of an Alternative Payroll Covered Period for calculating Payroll Costs and reductions to forgiveness for FTE or salary reductions, and it does continue to allow for eligible expenses to be either paid in the Covered Period (or alternative Payroll Covered Period) or incurred at the end of the period and paid on the next due date. This is true whether the borrower sticks with the original eight-week Covered Period or elects to use the 24-week Covered Period created by the Flexibility Act.

As with the prior version, the new Loan Forgiveness Application does include a number of certifications required to be made by the borrower. As a reminder, these include an undertaking to provide SBA with any additional documentation requested to evaluate either original eligibility for the loan or the request for forgiveness. This specifically includes documentation justifying the necessity of the loan in the first instance, regardless of whether the loan is more or less than \$2,000,000, with the borrower obligated to maintain this documentation for six years.

THE NEW EZ LOAN FORGIVENESS APPLICATION

SBA has now issued an [“EZ” version](#) of the Loan Application Form with [instructions](#).

As indicated by its title, this is a simplified version of the general Loan Application Form. For a borrower to be eligible to use it, one of the following three conditions must be satisfied:

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- The borrower is self-employed, an independent contractor, or a sole proprietor who had no employees at the time of loan application and did not include employee salaries in computing the amount of the loan applied for.
- The borrower did not reduce annual salary or hourly wages of any employee compensated at less than \$100,000 per year by more than 25% during the Covered Period or Alternative Payroll Covered Period compared to the January 1 to March 31, 2020 period AND the borrower did not reduce FTEs between January 1, 2020 and the end of the Covered Period (ignoring for these purposes reductions due to an inability to rehire individuals who were employed February 15 if similarly qualified individuals cannot be hired by December 31).
- The borrower did not reduce annual salary or hourly wages of any employee compensated at less than \$100,000 per year by more than 25% during the Covered Period or Alternative Payroll Covered Period compared to the January 1 to March 31, 2020 period AND the borrower was unable to operate during the Covered Period at the same level of business activity as before February 15 “due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards for sanitation, social distancing, or any other worker or safety requirement related to COVID-19.”

WHAT REMAINS UNADDRESSED?

As some phase one borrowers have now exited, or are about to exit, their Covered Periods, it remains unclear whether Congress will make additional tweaks to the PPP, whether SBA will issue additional guidance, or when lenders will begin to accept forgiveness applications. Also, for those borrowers who elect the 24-week Covered Period, it is unclear if they must wait until the end of the Covered Period to apply for forgiveness or may do so once they have paid expenses sufficient to maximize their forgiveness – a potentially difficult timing issue discussed in our [June 12](#) update.

PRIOR UPDATES

For our previous PPP updates, please see [April 1, 2020](#), [April 3, 2020](#), [April 9, 2020](#), [April 16, 2020](#), [April 24, 2020](#), [May 1, 2020](#), [May 6, 2020](#), [May 13, 2020](#), [May 18, 2020](#), [June 1, 2020](#), [June 4, 2020](#), and [June 12, 2020](#).

We are interested to hear your experiences with the PPP.

Please contact the Reid and Riege attorney with whom you regularly work, or a member of our Business Services practice listed to the right, for more up to date information, or questions about your unique circumstances.

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