

Insights

New Interim Final Rules Provide Further Guidance on PPP Forgiveness

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Late in the evening on May 22, 2020, the SBA and Treasury released two new interim final rules ("New IFRs") for the Paycheck Protection Program ("PPP") that provide clarity on loan forgiveness and the loan review process and responsibilities. In many places, the New IFRs confirmed guidance that had previously been issued in the FAQs issued by the SBA. The new guidance did not provide any further guidance on extending the loan forgiveness period or eliminating the requirement to spend at least 75% of funds on payroll costs to qualify for full loan forgiveness. Those issues are among others that are the focus of a number of bills currently being considered by Congress.

The New IFR that addresses loan forgiveness requirements primarily mirrors prior guidance and the loan forgiveness application that was released earlier in May (**SBA Form 3508** or the lender's equivalent form). Some of the highlights of this New IFR include:

- Provision of the general process for a borrower to receive loan forgiveness:
 - Lenders have 60 days to process a complete application for loan forgiveness, issue its decision to the SBA and request payment from the SBA.
 - The SBA must process a loan forgiveness application within 90 days from submission of the loan application for the SBA review.
- Clarification that bonuses and hazard pay are eligible for loan forgiveness, as well as salary, wages, and commission to furloughed employees, subject to the pro-rated \$100,000 salary cap.
- Creation of an alternative eight-week period for businesses with pay cycles that are biweekly or more frequent. This alternative period would start the first day of the pay period after the borrower has received funds.
- Creation of a maximum amount for loan forgiveness for self-employed individuals. The amount requested for forgiveness must be the lesser of 8/52 of 2019 compensation (approximately 15.38% of 2019 compensation) or \$15,385 per individual across all businesses.

- Clarification that payroll costs and nonpayroll will be eligible for forgiveness if they are paid during the eight-week period or incurred during the period and paid before the next regular payroll date or billing date, even if it extends past the eight week period.
- Confirmation that the forgiveness amount will not be reduced for laid off or reduced hour employees if those employees are offered to be rehired or have their hours restored but decline and the processes that need to be followed to avoid reduction, including documentation of the offer and the rejection and notice to the state unemployment insurance office of the rejected offer.
- Creation of a definition of full-time equivalent as 40 hours, and two separate methods for calculating FTEs for non-full-time employees.
- Provision of examples of the calculations relating to reduction in loan forgiveness based on reductions in the number of employees or hours or wages reduction.
- Clarification that borrowers will not be doubly penalized for salary/wage reduction that is not attributable to FTE reduction.
- Confirmation that restoration of FTE employees and hours/wages by June 30, 2020 or earlier will allow a borrower to avoid reductions in loan forgiveness.
- Clarification that employees who are fired for cause, voluntarily resign or voluntarily request a schedule reduction will be included in the FTE equivalency level when calculating the reduction in the loan forgiveness amount due to FTE reductions.

The New IFR that addresses PPP review procedures and responsibilities of the borrower and lender primarily covers procedural details and issues. Some of the highlights of this rule include:

- Confirmation that the SBA still can review any PPP loan, regardless of size, to determine the borrower correctly applied or was even eligible for forgiveness.
- Provision of information on the loan forgiveness process and the timing of actions that are part of the review process:
 - The borrower must submit its application for forgiveness. The application has many information requirements to establish the right of forgiveness, the amount eligible to be forgiven and the amount or absence of any reduction in the amount that can be forgiven. The borrower can submit the application as soon as it believes it has all of the required information. No outside date is identified by which the application must be submitted.

- The lender's decision must be made within 60 days of the receipt of a complete application for forgiveness from the borrower. The lender can (i) approve in whole or in part, (ii) deny in whole based on the lender's evaluation of the borrower's entitlement to forgiveness by meeting requirements regarding permitted uses and avoiding reduction in forgiveness, or (iii) deny without prejudice if so directed by the SBA due to a pending review by the SBA of the loan in question.
 - If the loan forgiveness application is denied by the lender, the borrower can request a review of the lender's decision by the SBA within 30 days of the lender's notice to the borrower that the lender issued its denial decision to the SBA.
 - SBA will notify the lender that it is reviewing a loan, and the lender must then within 5 business days notify the borrower and provide the SBA with the borrower's loan documentation and forgiveness application, a signed and certified transcript of account, a copy of the borrower's executed note and such other information requested by the SBA.
 - The lender must also ask the borrower for its loan forgiveness worksheet within 5 business days and forward it to the SBA within 5 business days of receipt from the borrower.
 - The lender may not approve any application for loan forgiveness for a loan being reviewed until the SBA notifies the lender in writing that the SBA's review is complete.
- Confirmation that interest accrued on the loan will be eligible for forgiveness, based on the commitment of the SBA to pay such interest to the lender if the SBA review is favorable.
 - Confirmation that an appeal process will be provided for borrowers who disagree with the SBA's determination of the borrower's loan forgiveness. Further information about the appeal process will be coming in a separate interim final rule.
 - Clarification that lenders will not be paid fees for any PPP funds that the SBA deems were ineligible, including a one year claw back for these funds.
 - Confirmation that amounts not forgiven must be repaid within the two-year maturity of the loan.

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If you have any further questions, comments or concerns, please feel free to contact **Robert A. Greising, Corben A. Lee** or a member of our **Business, Acquisitions & Securities team**.