

# The Small Business Administration Has Released Guidance on Several Important Payroll Protection Program Loan-Related Issues

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Over the last several days, the Small Business Administration (the “SBA”) has provided some answers to questions that many borrowers have had, including:

- With the negative publicity that some borrowers have gotten, can my business justify applying for/keeping a Payroll Protection Program[1] (“PPP”) loan?
- The CARES Act stated that PPP loan proceeds can only be spent on certain “costs incurred and payments made,” but what does that mean?
- What circumstances can affect my business’s ability to have some or all of the PPP loan forgiven?
- What documentation or information should I keep regarding my business’s use of the PPP loan?

This new information came in the form of two FAQs (issued on May 13, 2020) and the Paycheck Protection Program Loan Forgiveness Application (“the Application”) (posted on May 15, 2020), which can be found at the U.S. Department of the Treasury’s website (home.treasury.gov) at the following links:

- <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.
- <https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>.

Below is a summary[2] of some key aspects of these FAQs and the Application, particularly as they relate to the above questions.

- **With the negative publicity that some borrowers have gotten, can my business justify applying for/keeping a PPP loan?**

Several weeks ago, Secretary of Treasury Steven Mnuchin said it was “unfortunate” and “inappropriate” that over 200 publicly-traded companies received PPP loans. The Treasury Department and the SBA called upon PPP loan recipients to reassess their need[3] for the loan and threatened those who kept the loan[4] without being able to show need with criminal and other sanctions. Although the SBA gave some guidance regarding the showing of need,[5] many questions persisted.

The two FAQs issued by the SBA last week (Nos. 46 and 47) provided some answers -and some good news for those with PPP loan amounts of under \$2 million. Under FAQ No. 46, borrowers of less than \$2 million are deemed to have made the required need certification in good faith.

The need certification issue remains less clear for borrowers that received more than \$2 million. The SBA has provided no additional guidance to help such borrowers, although FAQ No. 46 indicated that they will be given an opportunity to repay the loan if the SBA later determines that the borrower lacked an adequate basis for the required certification of need. If the borrower repays the loan at that time, SBA will not pursue administrative enforcement or referrals to other

agencies.

The full text of these FAQs read as follows:

*46. Question: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?*

*Answer: When submitting a PPP application, all borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith. SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns. Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.*

*47. Question: An SBA interim final rule posted on May 8, 2020 provided that any borrower who applied for a PPP loan and repays the loan in full by May 14, 2020 will be deemed by SBA to have made the required certification concerning the necessity of the loan request in good faith. Is it possible for a borrower to obtain an extension of the May 14, 2020 repayment date? For purposes of this safe harbor, a borrower must include its affiliates to the extent required under the interim final rule on affiliates, 85 FR 20817 (April 15, 2020).*

*Answer: Yes, SBA is extending the repayment date for this safe harbor to May 18, 2020, to give borrowers an opportunity to review and consider FAQ #46. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor.*

## **2. The CARES Act stated that PPP loan proceeds can only be spent on certain "costs incurred and payments made," but what does that mean?**

The release of the Application provided welcome news – both qualifying costs<sup>[6]</sup> incurred and qualifying costs paid during the eight weeks after the date the borrower received the PPP loan (the so-called "Covered Period") can be paid by the loan proceeds and be eligible for forgiveness.

First, on the important subject of payroll costs, the Application clarifies that:

***Payroll costs are considered paid on the day that paychecks are distributed or the Borrower originates an ACH credit transaction. Payroll costs are considered incurred on the day that the employee's pay is earned. Payroll costs incurred but not paid during the Borrower's last pay period of the Covered Period (or Alternative Payroll Covered Period) are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, payroll***

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*costs must be paid during the Covered Period (or Alternative Payroll Covered Period). For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of \$100,000, as prorated for the covered period. Count payroll costs that were both paid and incurred only once.*

**(Emphasis added.)**

Second, regarding nonpayroll costs, the Application states that:

*An eligible nonpayroll cost must be paid during the Covered Period or incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period.*

This clarification set forth in the Application resolves an outstanding issue in a positive way for most businesses.

**3. What circumstances can affect my business's ability to have some or all of the PPP loan forgiven?**

Although the CARES Act stated that a borrower's forgiveness can be reduced based upon reductions in headcount and wages unless the borrower eliminated those headcount and wage reductions by June 30, 2020, it was unclear exactly how these reductions and the safe harbors would work.

The Applications provided much needed clarification on these fronts. Page 2 of the Application shows how to calculate the amount eligible for forgiveness. Pages 5-7 describe the forgiveness reduction and safe harbor relating to headcount (FTE) reductions. Pages 7 and 8 set forth the forgiveness reduction and safe harbor relating to wage reductions. As you will note, a very specific method of calculating FTEs is given and key periods of time for which FTE calculations will be needed include:

- February 15, 2019 to June 30, 2019;
  - January 1, 2020 to February 29, 2020;
  - The eight week period starting on the official PPP Loan Disbursement Date ("Covered Period");
  - February 15, 2020 and April 26, 2020; and
  - The payroll period that includes February 15, 2020.

The instructions given should be followed very carefully.

Special attention should be given to the headcount and wage reduction safe harbors. Borrowers who meet the requirements for these safe harbors will not have their PPP loan forgiveness reduced even if they made headcount or wage reductions during the COVID-19 crisis.

**4. What documentation or information should I keep regarding my business's use of the PPP loan?**

Page 10 of the Applications contains two sections. One is titled, "Documents that Each Borrower Must Submit with its PPP Loan Forgiveness Application" and the other one is called, "Documents that Each Borrower Must Maintain but is Not Required to Submit." Borrowers should closely read and follow these sections.

For additional information contact Albert Lee, Barry Nelson or Christopher Voltz.

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[1] For prior articles relating to the PPP, visit our COVID 19: Answers to Business Challenges page, including the following articles:

- Employee Reduction and Forgiveness: <https://www.tuckerlaw.com/2020/05/06/sba-employees-who-decline-offers-of-reemployment-will-not-reduce-amount-of-borrowers-ppp-loan-forgiveness/>

- SBA Guidance on Forgiveness: <https://www.tuckerlaw.com/2020/04/22/sba-provides-guidance-regarding-ppp-loan-forgiveness-but-questions-remain/>
- Round 2 of PPP: <https://www.tuckerlaw.com/2020/04/17/now-is-the-time-to-prepare-for-ppp-round-2/>
- Small Business Size Requirements: <https://www.tuckerlaw.com/2020/04/14/the-small-business-size-requirement-and-the-payroll-protection-program/>
- Early SBA Guidance: <https://www.tuckerlaw.com/2020/04/03/sba-releases-guidance-for-paycheck-protection-program/>
- Forgiveness under the CARES Act: <https://www.tuckerlaw.com/2020/04/02/cares-act-payroll-protection-program-loan-forgiveness/>
- PPP Begins: <https://www.tuckerlaw.com/2020/04/01/april-3-2020-banks-may-begin-processing-applications-for-the-paycheck-protection-programs-forgivable-loans/>
- PPP Overview: <https://www.tuckerlaw.com/2020/03/28/cares-act-becomes-law-how-it-can-help-you-and-your-business/>

[2] **IMPORTANT DISCLAIMER:** *Please note that this article is not intended to, and does not, serve as legal advice to the reader. This is general information that neither constitutes nor substitutes for specific legal advice that takes into account your organization's specific jurisdiction(s) or circumstances. Also, regulations and guidance related to COVID-19-based legislation are being published frequently, which may affect the information provided here. For more general information regarding COVID-19-related issue, visit: <https://www.tuckerlaw.com/category/covid-19-answers-to-business-challenges/>*

[3] PPP borrowers must certify, on their application forms, that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” See, FAQ No. 43.

[4] The SBA initially set a repayment date of May 7, 2020. This “safe harbor” was later extended to May 14, 2020 and then May 18, 2020). See, FAQ Nos. 43 and 45.

[5] This guidance came in the form of FAQ Nos. 31 and 37, which stated:

31. *Question: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?*

*Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.*

37. *Question: Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?*

Answer: See response to FAQ #31.

[6] As explained in the Interim Final Rule on Paycheck Protection Program posted on April 2, 2020 (85 FR 20811), PPP loan proceeds can be used and be eligible for forgiveness if used for “payroll costs” (defined below) and “non-payroll costs” (i.e., payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020) over the eight-week period following the date of the loan, with the important proviso that not more than 25 percent of the loan forgiveness amount may be attributable to “non-payroll costs.”

<https://home.treasury.gov/system/files/136/PPP-IFRN%20FINAL.pdf>

The Interim Final Rule defined “payroll costs,” as follows:

*f. What qualifies as “payroll costs?” Payroll costs consist of compensation 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.*

*g. Is there anything that is expressly excluded from the definition of payroll costs? Yes. The Act expressly excludes 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).*

Id.