

Breakout Session

The SBA's Paycheck Protection Program

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AGENDA

1. Background
2. Eligibility
3. Spending the PPP Loan
4. Timing Issues
5. Loan Forgiveness Reduction “Penalties”
6. Strategic Considerations

1. Background

BIG PICTURE

- Loan for 2.5 times average monthly “payroll costs” (special definition) based upon 2019 payroll costs.
- Loan principal and interest fully forgivable in certain circumstances.
- Generally, eligible entities are “small business concerns,” plus other entities (including nonprofits) with less than 500 employees (taking certain “affiliation” rules into account).
- The application requires an economic need certification that gained some notoriety in April.
- Loan proceeds may only be used for certain permissible expenses. To obtain/support forgiveness, the band of eligible uses is slightly narrower.
- There are penalties against forgiveness eligibility if the borrower reduces FTEs, reduces certain salaries/wages beyond certain thresholds, or fails to use at least 60 percent of its PPP loan proceeds on eligible payroll costs. There are, however, also countervailing “safe harbors” and “exceptions” for the FTE and salary/wage reductions in certain circumstances.

PROGRAM EVOLUTION

- On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act authorized the Paycheck Protection Program (“PPP”) Pub. L. 116-136 (March 27, 2020).
- On June 5, 2020, the Paycheck Protection Program Flexibility Act, was signed into law, Pub. L. 116-142 (June 5, 2020).
 - Extending certain deadlines through December 31, 2020.
 - Extending potential loan “covered periods” from 8 to 24 weeks.
 - Adding safe harbors for FTE reductions.
- Throughout, the SBA has issued considerable regulatory and sub-regulatory guidance.
- Applications have to be submitted NLT August 8, 2020. (*This presentation focuses on loan eligibility, use/administration, and forgiveness.*)
 - On July 4, 2020, the President signed into law P.L. 116-147 extending the date in which eligible borrowers can apply for PPP loans through August 8, 2020.

KEY GUIDANCE

- Dept. of Treasury’s PPP website is actually the best:
 - <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses>
- Key Documents:
 - Loan Forgiveness Application
 - “How to Calculate Maximum Loan Amounts” (helps to define “payroll costs”)
 - FAQs (though these are more helpful in the application process than in the administration or forgiveness process)
 - SBA Interim Final Rules (as amended):
 - 85 Fed. Reg. 20811 (Apr. 15, 2020) (Original)
 - 85 Fed. Reg. 33004 (Jun. 1, 2020) (Original)
 - 85 Fed. Reg. 36308 (Jun. 16, 2020) (PPP Flex Act revisions)
 - 85 Fed. Reg. 36997 (Jun. 19, 2020) (PPP Flex Act revisions)
 - **85 Fed. Reg. 38304 (Jun. 26, 2020) (PPP Flex Act revisions)**

2. Eligibility

ELIGIBILITY

Eligibility:

- Application deadline was extended until August 8, 2020.
- Nonprofit entities such as health centers and other community-based organizations, for-profit businesses, veterans' organizations, and Tribal concerns, that have **no more than 500 employees**.
- Small businesses that are eligible for a 7(a) SBA loan based on applicable SBA size standards and alternative size standards also are eligible.
- Individuals who operate as a sole proprietorship or as an independent contractor and certain qualified self-employed individuals are eligible.
- The 500-employee threshold includes, for most entities, its affiliates. However, please note that the affiliation rules have been waived for certain industries.

3. Spending the PPP Loan

SPENDING THE PPP – TWO KEY DISTINCTIONS

Distinction 1:

- Eligible Uses vs. Expenses Eligible for Forgiveness

Distinction 2:

- Payroll Costs vs. Non-Payroll Costs

PAYROLL COSTS

Basic Definition:

- Salary/wage (gross wage, *i.e.*, do not include federal payroll taxes withheld, per SBA FAQ 16)
- Employer contributions for health insurance
 - Key limitation: Really must be “health insurance.” Appears to exclude HSA costs and long-term disability coverage costs.
- Employer contributions to employee retirement plans
- Employer state and local taxes (but not employer share of federal taxes)

Cash Compensation Cap:

- Cash compensation (salary/wage, tips, *etc.*) of pay capped at *annual rate* of \$100,000.

PAYROLL COSTS

Permissible Uses	Expenses Eligible for Forgiveness
<p>Payroll costs, as defined above, during the period February 15, 2020 to December 31, 2020.</p> <p>(Though not explicit, reasonable to read as “incurred or paid” in this period.)</p>	<p>Payroll costs incurred <i>or</i> paid* during borrower’s “covered period” or “alternative payroll covered period.”</p>

*Timing rule for “incurred *or* paid” to be addressed momentarily.

NON-PAYROLL COSTS

Permissible Uses (February 15, 2020 to December 31, 2020*)	Expenses Eligible for Forgiveness ("Incurred <u>or</u> Paid" in "Covered Period")
Mortgage interest (No payment of principal)	Mortgage interest on business mortgage Commencing Prior to February 15, 2020
Rent (real property or personal property)	Rent on lease commencing prior to February 15, 2020
Utilities	Certain utilities commencing prior to February 15, 2020: electricity, gas, water, telephone, internet, and "transportation"
Interest on Debt Obligations Incurred prior to February 15, 2020	N/A

*This period was extended from June 30, 2020 to December 31, 2020 under the PPP Flexibility Act.

60 PERCENT PAYROLL RULE FOR FORGIVENESS

- For 100% eligibility for forgiveness, the borrower must expend at least 60%* of its PPP funds on “forgiveness eligible” payroll costs.
- As applied by SBA, the amount spent on payroll is used as the starting point to determine what maximum forgiveness amount is possible.
- For example, use of \$600,000 of PPP funds on eligible payroll expenses support a potential forgiveness amount of up to \$1 million.

*By SBA Rule, this was originally 75%. The PPP Flexibility Act lowered it to 60%.

4. Timing Issues

THE LOAN “COVERED PERIOD”

- **Original Covered Period:** The 8-week (56-day) period beginning on the day the loan was disbursed.
- **PPP Flexibility Act Covered Period:** The 24-week period beginning on the day the loan was disbursed and ending *no later than* December 31, 2020.
- **For Loans Made Before June 5, 2020:** A borrower may still elect to use the 8-week (56-day) period beginning on the day the loan was disbursed.
- **Alternative Payroll Covered Period:** Borrowers with a biweekly or more frequent payroll schedule may elect to use the period that begins on the first day of borrower’s first pay period following the loan disbursement.

**Note:* The most recent final rule appears to have a typo, counting from the day after the loan is disbursed. Start counting on the day it is disbursed.

COSTS ELIGIBLE FOR FORGIVENESS ARE THOSE INCURRED OR PAID IN THE COVERED PERIOD

- Rule 1: Costs “paid” at the beginning of the covered period are eligible for forgiveness even if not entirely incurred in the covered period (so long as routinely so paid).
- Rule 2: Cost “incurred” toward the end of the covered period, but paid after the end of the covered period, are eligible for forgiveness to the extent incurred during the covered period.
- Same concept applies to payroll and non-payroll costs.
- Let’s see some examples.

PAYROLL COST EXAMPLE (ASSUME 8-WEEK)

Pay Period 0 Apr 20 – May 3	Pay Period 1 May 4 – May 17 (Mon-Sun)	Pay Period 2 May 18 – May 31	Pay Period 3 Jun 1 – Jun 14	Pay Period 4 Jun 15 – Jun 28	Pay Period 5 Jun 29 – Jul 12	Pay Period 6 Jul 13 – Jul 26
Pay Date: Thursday May 7	Pay Date: Thursday, May 21	Pay Date: Thursday, Jun 4	Pay Date: Thursday, Jun 18	Pay Date: Thursday, Jul 2	Pay Date: Thursday, Jul 16	Pay Date: Thursday, Jul 30

Assume that [Loan funded May 5](#). Two Possible Payroll “Covered Periods”:

- Standard: May 5 – June 29
- Alternative: May 18 – July 12 (only possible because bi-weekly, or more frequent, payroll)

Alternative Covered Period	Pay Period 1 All eligible All eligible b/c <i>paid</i> May 21	Pay Period 2 All eligible	Pay Period 3 All eligible	Pay Period 4 All eligible	Pay Period 5 All eligible, and note that pay period ends same day as covered period	
Standard Covered Period	Pay Period 0 All eligible b/c <i>paid</i> May 7	Pay Period 1 All eligible	Pay Period 2 All eligible	Pay Period 3 All eligible	Pay Period 4 All eligible	Pay Period 5 June 29 costs (1 day) eligible b/c <i>incurred</i> in period

NON-PAYROLL COST EXAMPLE (ASSUME 8-WEEK)

April Rent Due and Paid April 1 Covers all April	May Rent Due and Paid May 1 Covers all May	June Rent Due and Paid June 1 Covers all June	July Rent Due and Paid July 1 Covers all July
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Again, assume that [Loan funded May 5](#):

- May 5 – June 29

Standard: Incurred or Paid in Covered Period

Questions:

1. Can we count the portion of May rent attributable to May 6 through May 31?
 - Probably yes. Arguably “incurred” after May 6. However, SBA has not explicitly clarified.
2. Can we count the part of our rent applicable to June 30?
 - Would seem like yes, but if counting May from May 6 forward, it might be prudent to count only a total of 56 days’ rent (for an 8-week covered period).

Note: The new 24-week covered period resolves some of this risk.

COSTS INCLUDED IN “COVERED PERIOD”

- Some open questions on timing of payments:
 - Infrequent but regularly made, e.g., bonuses
 - Prepayments
 - Substantially overdue payments
- Proceed with caution pending further guidance:
 - Give priority to clearly allowable costs
 - Give priority to clearly allowable costs
 - Consider using most advantageous covered period
- The 24-week covered period creates a lot of flexibility to avoid “gray areas”

5. Loan Forgiveness Reduction “Penalties”

LOAN FORGIVENESS REDUCTIONS

- **FTE Reduction:** The amount of the loan forgiven will be reduced if a borrower reduces its workforce (average weekly FTEs) during the Covered Period or Alternative Payroll Covered Period from the average weekly FTEs employed during a selected reference period:
 - Third level February 15, 2019 to June 30, 2019; *or*
 - January 1, 2020 to February 29, 2020.
- **Salary/Wage Reduction:** The amount of the loan forgiven will be reduced if the borrower reduced the salary or wages of any employee (earning less than \$100,000 annualized) by more than 25% during the Covered or Alternative Payroll Covered Period as compared to the period of January 1, 2020 through March 31, 2020.

NOTE: NO OVERLAP ISSUE PER SBA

- SBA has clarified that, to the extent a reduction in salary/wage is attributable to a reduction in an individual's FTE status, you count only the FTE reduction in your calculations.
 - For example:
 - Individual works 40 hours per week and is paid \$80k per year.
 - Reduced to 20 hours per week at \$40k per year.
 - There is only an FTE reduction. No “salary/wage” reduction.
 - Compare:
 - Individual works 40 hours per week and is paid \$80k per year.
 - Reduced to 20 hours per week at \$20k per year.
 - There is both an FTE reduction *and* a “salary/wage” reduction of \$20k/40k, or 50 percent, which must be accounted for in accordance with the “salary/wage” reduction rules.

FTE REDUCTION SAFE HARBOR

- Borrowers will not have the amount of their loan that can be forgiven reduced on account of a reduction in FTE employees if both of the following conditions are met:
 - The borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; **and**
 - The borrower restores its FTE employee levels by **December 31, 2020** to the FTE employee levels in the borrower's pay period that included February 15, 2020.
 - Applies to FTEs, not to individual employees.
 - Prior deadline for restoring FTEs was June 30, 2020.

****Critical Note:** *As seen from the first bullet point, this safe harbor only protects you from reductions that occurred between February 15 and April 26 – the Loan Forgiveness Application explicitly controls for this in its very first safe harbor step.*

SALARY/WAGE REDUCTION SAFE HARBOR

If a borrower restores an employee's average annual salary or hourly wage by **December 31, 2020**, to a level that is equal to or greater than the employee's annual salary or hourly wage as of February 15, 2020, the loan amount forgiven will not be reduced for that particular employee.

SPECIAL NOTE ON TIMING

By interim final rule on June 26, 2020, the SBA confirmed that a borrower that uses the 24-week covered period can submit its Loan Forgiveness Application prior to the end of its covered period (assuming the funds are spent before the 24 weeks has run, which is quite possible).

In such event, the data used for the above-described safe harbors is that which is currently applicable. You must return the FTEs or Salaries/Wages to original levels before submitting the Loan Forgiveness Application.

FTE REDUCTION EXCEPTIONS

- According to the SBA, FTE reductions resulting from any of the following circumstances **will not impact** loan forgiveness:
 - Employees who during the Covered Period or Alternative Payroll Covered Period:
 - Rejected a good-faith written offer to return to work for same salary or hours, if:
 - » Offer for same salary/wages or hours prior to separation from employment or reduction in hours;
 - » Documentation of offer and rejection
 - » Reported to the state unemployment insurance agency
 - Were fired for cause, voluntarily resigned; or
 - Voluntarily requested and received a reduction in work hours.
 - Be sure to document

FTE REDUCTION EXCEPTIONS

The PPP Flexibility Act added two additional exceptions where FTE reduction will not impact loan forgiveness:

- The borrower has documented its inability to rehire individuals who were employees on February 15, 2020, and its inability to hire similarly qualified employees for unfilled positions on or before **December 31, 2020**.
- The borrower has documented its inability to return to the same level of its business activity as existed before February 15, 2020, **due to compliance with requirements established or guidance issued by HHS, CDC, or OSHA** between March 1, 2020 and December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

THE “CDC/OSHA COMPLIANCE” EXCEPTION

Key Concept:

- . . . due to compliance with requirements established or guidance issued by HHS, CDC, or OSHA between March 1, 2020 and December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

Resources:

- OSHA: <https://www.osha.gov/SLTC/covid-19/>
- CDC:
 - <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>;
 - <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/workplace-decision-tool.html>

6. Strategic Considerations

STRATEGIC CONSIDERATIONS

8-weeks vs. 24-weeks

(Option for loans predating the PPP):

- With the flexible interpretation of “incurred [or] paid,” if you can reach 60 percent payroll costs in 8 weeks (which can essentially be 10 weeks), it may be more advantageous.
- Note that, as calculated by SBA, the wage reduction penalty is three times larger if you select the 24-week period.

STRATEGIC CONSIDERATIONS

Employee	Amount “Eligible” For PPP Forgiveness (From PPP Schedule A Table)	Amount Actually Charged to PPP Funds	Funding Source(s) to Which Balance Was Charged
Total		<i>Insert Total*</i>	

Deconflicting Funding Streams

(Grantee so-called “Double Dipping”):

- SBA Loan Forgiveness calls for data by employee
- But for grant charging purposes, you may allocate certain pooled salaries/wages/fringes

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