

Paycheck Protection Program: Guidelines For Loan Forgiveness

On May 15, 2020, the Treasury Department and the Small Business Administration (the “SBA”) released the form of application for loan forgiveness under the Paycheck Protection Program (the “Loan Forgiveness Application”).¹ Since implementation of the program, which began on March 29, 2020 with the passage of the Coronavirus Aid, Relief, and Economic Security Act (H.R. 748) (the “CARES Act”), eligible businesses that have received loans under the Paycheck Protection Program, as well as the lenders who make the loans, have eagerly awaited guidance on forgiveness of up to 100% of the principal amount of these loans.² The Loan Forgiveness Application, along with the accompanying detailed instructions and worksheets, provide step-by-step assistance.

I. Costs Eligible For Forgiveness

Borrowers may be eligible for loan forgiveness for expenditures made during an eight-week period following the loan’s origination for payroll costs and certain eligible non-payroll costs, provided that at least 75% of the loan proceeds are used for payroll costs. In the Loan Forgiveness Application instructions, the SBA clarified the costs eligible for forgiveness and the covered period.

Recognizing the variety in payroll periods, the SBA clarified that the covered period may constitute the 56 days from and including the date the Paycheck Protection Program loan was received (the “Covered Period”) or, if the borrower has a biweekly or more frequent payroll schedule, the 56 days commencing with the first day of the pay period immediately following receipt of the Paycheck Protection Program loan (the “Alternative Covered Period”). Importantly, the Covered Period (and not the Alternative Covered Period) applies when determining forgiveness for non-payroll costs.

In calculating their payroll costs,³ borrowers may include both payroll costs actually paid and payroll costs otherwise incurred during either the Covered Period or Alternative Covered Period. Payroll costs paid are considered paid on the day that the paychecks are distributed or the borrower originates an ACH credit transaction. Payroll costs are considered incurred on the day the pay is earned. If employees’ pay is earned but not paid during the applicable eight-week period, the payroll costs incurred are eligible for forgiveness if they are paid on or before the next regular payroll date. Payroll costs paid and incurred should only be counted once in calculating the forgiveness amount. Amounts paid to an employee in excess of \$100,000 annually (prorated to \$15,385 for the eight-week period) are excluded.

Eligible non-payroll costs include interest on mortgage obligations on real and personal property and business rent or lease payments for real and personal property pursuant to agreements entered into before February 15, 2020. The SBA explicitly notes that payments of mortgage principal and any prepayments are excluded. Eligible non-payroll costs also include payments for electricity, gas, water, transportation, telephone, or internet

¹ The Loan Forgiveness Application form and related instructions and worksheets can be found [here](#).

² For information on the low-interest rate loan programs available to small businesses and not-for-profit organizations with fewer than 500 employees, *see* our memorandum “The CARES Act: What Small Business Owners and Not-for-Profit Organizations Need to Know,” found [here](#).

³ Payroll costs include total compensation paid to employees whose principal place of residence is in the United States and who earn less than \$100,000 in total compensation. Total compensation includes wages and salary; payments for vacation, parental, family, medical or sick leave; allowance for separation or dismissal; payments for employee benefits; and payment of state and local compensation taxes. Payroll costs exclude federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, payments to independent contractors and 1099 workers, and qualified sick and family leave under Sections 7001 and 7003 of the Families First Coronavirus Response Act (H.R. 6201).

access for which service began before February 15, 2020. Eligible non-payroll costs include those paid during the Covered Period or incurred during the Covered Period and paid on or before the next regular payment date.

The SBA states that a borrower may exclude any non-payroll costs it is not seeking to include in the forgiveness amount. This could be helpful to borrowers who might otherwise not meet the requirement that at least 75% of the forgiveness amount must be spent on payroll costs.

II. Reduction In Loan Forgiveness

Loan forgiveness will be reduced in proportion to the decrease, if any, in the number of full-time equivalent employees during the Covered Period or the Alternative Covered Period, as applicable, compared to a reference period chosen by the borrower of either February 15, 2019 to June 30, 2019 or January 1, 2020 to February 29, 2020.⁴ Full-time equivalency is based on a 40-hour work week and calculated per individual based on their average hours worked during the relevant period. Borrowers are exempt from this reduction under the “FTE Reduction Safe Harbor” if the number of full-time equivalent employees on June 30, 2020 is at least equal to the number of full-time equivalent employees on payroll for the pay period that includes February 15, 2020. Furthermore, exceptions to the full-time equivalency reduction apply if the borrower made a good faith, written offer to rehire an employee during the Covered Period or Alternative Covered Period or the employee was fired for cause, voluntarily resigned, or voluntarily requested and received a reduction of hours.

Forgiveness also may be reduced for decreases during the Covered Period or the Alternative Covered Period of the wages of any employee who earns less than \$100,000 annually by more than 25% when compared to the period January 1, 2020 to March 31, 2020. Borrowers may be exempt from this reduction if they meet the “Salary/Hourly Wage Reduction Safe Harbor” by restoring the wage level at June 30, 2020 to the level that existed for the pay period that includes February 15, 2020.

III. Documents To Be Submitted To Request Loan Forgiveness

The following documents must be submitted:

1. The Loan Forgiveness Application, which consists of:
 - a. PPP Loan Forgiveness Calculation Form (attached to the Loan Forgiveness Application); and
 - b. PPP Schedule A.

The SBA issued instructions for each of these forms and a worksheet with further instructions to help borrowers determine full-time equivalency for purposes of loan forgiveness.

2. Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Covered Period, including:
 - a. Bank account statements or third-party payroll service provider reports;
 - b. Tax forms (or equivalent third-party payroll service provider reports), including:

⁴ Seasonal employers may also use any consecutive 12-week period between May 1, 2019 and September 15, 2019.

- i. Payroll tax filings reported, or that will be reported; and
 - ii. State quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported; and
- c. Payment receipts, cancelled checks, or account statements documenting contributions to employee health insurance and retirement plans that the borrower included in the forgiveness amount.
3. Documentation showing the number of employees and payroll information used to calculate the FTEs. This may include payroll tax filings (Form 941) and state tax filings.
4. Documentation verifying the existence of business mortgage obligations, rent and lease obligations and business utility services prior to February 15, 2020 and payments for such obligations and services made during the Covered Period.

IV. Conclusion

The Loan Forgiveness Application and instructions provide businesses that received loans under the Paycheck Protection Program, and their lenders, much-needed clarification on the process and requirements for forgiveness of their loans. The SBA has indicated that it will soon issue regulations and guidance to further assist borrowers as they complete their forgiveness applications.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Helene R. Banks at 212.701.3439 or hbanks@cahill.com or Robyn Sablove at 212.701.3753 or rsablove@cahill.com; or email publications@cahill.com.