

## SBA Releases Important New Rules Regarding PPP Loan Forgiveness

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The Small Business Administration (SBA) just released important new rules regarding forgiveness of Paycheck Protection Program (PPP) loans. The June 22 Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures Interim Final Rule offer additional clarification on the rules governing forgiveness of PPP loans, while providing borrowers with additional flexibility. What do employers need to know about these developments?

### **If we have used all the PPP loan proceeds before the end of the Covered Period, can we apply for forgiveness prior to the end of the covered period?**

Yes. The new rules clarify that a borrower may submit a loan forgiveness application before the end of the Covered Period if the borrower has used all the loan proceeds for which the borrower is requesting forgiveness.

Many borrowers who were nearing the end of their eight-week covered period when the PPP Flexibility Act was passed had not expended all their PPP funds, but also did not have sufficient funds remaining to cover payroll costs for the expanded 24-week period. This left many borrowers questioning whether to stay with the eight-week period and return unused funds, or use the new 24-week covered period and potentially have numerous weeks not covered by PPP loan funds.

The new rules allow borrowers to elect the 24-week Covered Period without forcing the borrower to wait until the end of the 24-week Covered Period to apply for loan forgiveness. As a result, employers

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have more flexibility with their staffing needs. They can elect to use the 24-week covered period without the need to consider how head count reductions occurring after PPP funds were exhausted would impact forgiveness – provided, of course, that they submit their forgiveness application immediately upon exhausting PPP loan funds.

Borrowers should note that the rules specify that if the borrower applies for forgiveness before the end of the covered period and “has reduced any employee’s salaries or wages in excess of 25%, the borrower must account for the excess salary reduction for the full eight-week or 24-week covered period.” However, if the borrower has restored salaries and wages at the time that it submits the forgiveness application, the borrower does not need to account for the salary/wage reduction.

### **If my business is unable to return to the same level of business activity as it was operating at before February 15, 2020 because of compliance with a state order related to COVID-19, does that meet the exemption from loan forgiveness reduction?**

The new rules clarify that a reduction in business activity as a result of a state or local shutdown order is sufficient to take advantage of the loan forgiveness exemption.

The PPP Flexibility Act created a new exemption from the loan forgiveness reduction based on FTE headcount reduction during the covered period. To meet this exemption, a borrower must be able to document in good faith “an inability to return to the same level of business activity as the borrower was operating at before February 15, 2020, 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 (CDC), or the Occupational Safety and Health Administration related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.”

Many borrowers have closed their business or seen their operational capacity limited because of state or local health orders, not directly because of guidance issued by federal agencies. The new rules clarify that the statutory exemption includes “both direct and indirect compliance” with COVID-19 requirements or guidance issued by federal agencies. The rules recognize that “a significant amount of the reduction in business activity stemming from COVID Requirements or Guidance is the result of state and local government shutdown orders that are based in part on guidance from the three federal agencies.”

The new rules also specify that borrowers seeking to take advantage of the new exemption must maintain copies of applicable COVID-19 guidance or shutdown orders that caused the reduction in business activity and relevant borrower financial records evidencing the reduction. This documentation must be maintained for six years.



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### **Are there caps on the amount of loan forgiveness available for owner-employees payroll compensation?**

Yes. The new rules specify that, for borrowers electing for an eight-week covered period, the amount of loan forgiveness requested for an owner-employer's payroll compensation is capped at eight weeks' worth (8/52) of their 2019 compensation or \$15,385 per owner-employee, whichever is less. For borrowers with a 24-week covered period, the cap is 2.5 months' worth (2.5/12) of the owner-employee's 2019 compensation or \$20,833 per owner-employee, whichever is less. This restriction is entirely a creature of the rules, as nothing in the Act itself would suggest such a limitation.

### **Conclusion**

The new rules provide borrowers with flexibility in the decision of whether to adopt the new 24-week covered period or maintain the original eight-week covered period. This is welcome news to borrowers who may exhaust their PPP loan funds shortly after the expiration of the eight-week covered period, as they will now be able to adopt the 24-week covered period and not wait until the end of the entire 24-week period to apply for loan forgiveness. The new rules also expand the new safe harbor provision for businesses unable to return to the same level of business activity as previously operating where state and local orders are the cause of the business reduction.

Fisher Phillips' SBA Loan Team will continue to monitor the ever-changing COVID-19 situation and provide updates. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information.

For further information, contact your Fisher Phillips attorney, or any member of our SBA Loan Task Force. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*