

PPP Loans: SBA Releases New Interim Final Rules on Forgiveness and Reviews

May 26, 2020

Late Friday, May 22, the Small Business Administration, which administers the Paycheck Protection Program, released two separate interim final rules: one regarding forgiveness and one regarding SBA review of PPP loans. This alert provides summary updates on certain key elements of each.

Interim final rule regarding forgiveness

As laid out in the PPP forgiveness application (see our [May 16 alert](#) and the [forgiveness application](#) and its instructions), the SBA set forth the specific information a borrower is required to provide to seek forgiveness of its PPP loan. Certain key provisions of [the new IFR regarding forgiveness](#) are:

- A borrower can seek loan forgiveness as early as eight weeks following the date of loan disbursement (see the comments and immediate effective date portion of the IFR)
- Lenders have 60 days from receipt of a complete forgiveness application to issue decisions to the SBA
- For loan forgiveness applications that are not reviewed by the SBA prior to a lender's decision regarding forgiveness:
 - The SBA must remit the applicable forgiveness amount (if any) to the lender within 90 days after the lender issues its decision regarding forgiveness
 - The IFR confirms that remittance of the forgiveness amount is subject to any review of eligibility (for the loan or forgiveness) undertaken by the SBA, implying the 90-day window may be extended as a result of ongoing review
 - The SBA has discretion to approve any or all (or none) of the forgiveness amount or to determine that the borrower was not eligible for a PPP loan in the first instance
- The eight-week period for calculating the amount of payroll costs forgivable can commence on the date of disbursement of the loan (the beginning of the covered period) or the first day of the first payroll cycle in the covered period for borrowers with a bi-weekly (or more frequent) payroll cycle, at the borrower's election
 - Note that the earlier FAQ suggested that, for administrative convenience, *any* borrower could choose this alternative period, but this IFR indicates borrowers with payroll periods that are less frequent than bi-weekly cannot avail themselves of this alternative period
- Non-payroll costs incurred during the covered period and paid on or before the next regular billing date (even if after the covered period) are expressly forgivable, subject to the limitation that at least 75% of the forgiveness amount must be for payroll costs
- "FTE" employee, for purposes of the reduction of a borrower's forgiveness amount for FTE reductions during the covered period, is further defined as (i) for employees paid for an average of 40 or more hours per week, 1.0; and (ii) for employees paid for fewer than an average of 40 hours per week, at the borrower's option *either* (a) the ratio of the average number of hours per week to 40 (e.g., for 30 hours, 0.75), or (b) 0.5; provided that for *all* part-time employees the same method is used
- Reductions in salaries/wages that are solely a result of FTE reductions will *not* affect the eligible forgiveness amount, but otherwise, reductions in salaries/wages in excess of 25% will reduce the loan forgiveness amount

- Terminations for cause and voluntary resignations or reductions in hours are exempted from the calculation of the FTE and salaries/wages reduction penalty

Interim final rule regarding SBA review

The IFR regarding SBA review partially clarifies review considerations for PPP loans. Certain key provisions of [the IFR regarding SBA review are](#):

- The SBA expressly reserves the right to review any PPP loan of any size and at any time in its discretion and as it deems appropriate. Notably:
 - Nothing in the new IFR refers back to the safe harbor set forth FAQ 46 (see our [May 13 alert](#))
 - The IFR specifically indicates that the SBA can review, without limitation, eligibility (including vis-à-vis eligible businesses and affiliation/size standards); information, certifications and representations made in the loan application and/or the forgiveness application; loan amounts; use(s) of proceeds; and loan forgiveness amounts
- Borrowers must maintain records for six years, as discussed in the forgiveness application (though the IFR implies that all borrowers, regardless of whether forgiveness is sought, are subject to this requirement)
- Lenders must comply with applicable document retention rules and regulations
- The SBA may "pursue other available remedies" beyond seeking repayment of outstanding PPP loan balances, if the SBA determines the borrower was ineligible for the loan amount or ineligible for the forgiveness amount sought
- The SBA will notify the lender if it undertakes a review of a PPP loan, and the lender must then notify the borrower in writing within five days
- The SBA may require additional information from the borrower (which it may request directly or via the lender)
- Borrowers may appeal an SBA determination that the borrower is ineligible for the loan amount or loan forgiveness amount sought, and the SBA intends to issue a separate IFR addressing the appeals process
- While lenders continue to be able to rely on information and certifications provided by borrowers, lenders are required to reasonably verify calculations (using the information as provided) and confirm receipt of applicable documentation
- Lenders are required to notify the SBA even of *denials* of forgiveness and will be required to provide, among other things, the reason for the denial (thus alerting the SBA to potential issues)

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal notices](#).

Key Contacts

Andrew D. Goldstein Washington, DC	agoldstein@cooley.com +1 202 842 7805
Daniel Grooms Washington, DC	dgrooms@cooley.com +1 202 776 2042
Danielle Naftulin Palo Alto	dnaftulin@cooley.com +1 650 849 7118
Ryan Naftulin London	rnaftulin@cooley.com +44 (0) 20 7556 4540
Peter H. Werner San Francisco	pwerner@cooley.com +1 415 693 2172

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.