



COVID-19

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**Coronavirus / COVID-19
Response Team**

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**PPP: Major Takeaways from
Updated SBA
Forgiveness Guidance**

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Today's Topics

- Summary Overview of PPP Flexibility Act
- Summary Overview of Updated Loan Forgiveness Applications
- Major Takeaways from Updated Loan Forgiveness Guidance
- Conclusions
- MJ Audit and Compliance Preparedness Program Overview

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Summary Overview of PPP Flexibility Act

Key Changes Under the PPP Flexibility Act

- Extends 8-week loan forgiveness period to earlier of:
(i) **24 weeks** or (ii) December 31, 2020.
 - Existing PPP borrowers may elect to keep 8-week period.
- Reduces minimum “payroll cost” spending requirement from 75% to 60%.
- Extends June 30 “safe harbor” rehiring / **compensation restoration** date to December 31.
- Prolongs deferral and repayment periods for loans.
 - All new PPP loans have minimum five year maturity.
- Allows PPP participants to utilize payroll tax deferral provisions under the CARES Act.

Key Changes Under The PPP Flexibility Act (cont.)

- Adds the following new exceptions for decreases in FTE employees (i.e., these do not count against PPP borrowers for loan forgiveness calculations):
 - An inability to rehire any employee who was employed by the borrower as of February 15, 2020 (or a similarly qualified employee for the unfilled position).
 - **An inability to rehire back up to prior levels resulting from HHS, CDC or OSHA compliance requirements created between March 1- December 31, 2020 (e.g., social distancing, sanitation requirements, etc.).**

Summary Overview of Updated PPP Loan Forgiveness Applications

Summary Overview of Updated Loan Forgiveness Applications

- On June 16, 2020, SBA and Treasury introduced a less extensive loan forgiveness application (Form 3508EZ) and related instructions for PPP borrowers that will not have their forgiveness reduced based on FTE and/or compensation reductions.
- The original loan forgiveness application (Form 3508) has also been updated, but is not dramatically different compared to the original version.
- Both loan forgiveness applications reflect the changes implemented by the PPP Flexibility Act.

Potential Benefits of “EZ” Loan Forgiveness Application

- Because a threshold qualification criterion for the “EZ” loan forgiveness application is that there not have been FTE and/or compensation reductions that would reduce the borrower’s loan forgiveness, far less information is required on these topics.
- However, borrowers must still certify as to their eligibility to utilize the “EZ” loan forgiveness application and must still retain extensive records and files relating to their PPP loan generally.
 - Borrowers must still retain their complete PPP loan file for six years following forgiveness and/or repayment in full.
 - SBA has the right to request/audit any relevant information.

Standard Loan Forgiveness Application

- If a PPP borrower does not qualify to use the “EZ” application, then it must use the lengthier, standard loan forgiveness application.
- The updated form of this application is not dramatically different compared to the original form of loan forgiveness application published in May.
- However, the application has been updated to include changes necessary to implement the PPP Flexibility Act, including the new FTE-related safe harbors.

Major Takeaways from Updated PPP Loan Forgiveness Guidance

Updated PPP Loan Forgiveness Guidance

- Late on June 22, 2020, SBA published updated rulemaking regarding PPP loan forgiveness.
 - The latest rulemaking amends previous interim final rules (IFRs) published by SBA on May 22, 2020.
 - As with the updated loan forgiveness applications, SBA's latest IFR largely conforms prior rulemaking to implement amendments to the PPP pursuant to the PPP Flexibility Act.
 - Prior forgiveness concepts largely remain in effect, with some important modifications/clarifications...

PPP Loan Forgiveness Applications May Be Submitted Early

- Borrowers do **not** need to wait to file their loan forgiveness application until the expiration of their “covered period” if they have already utilized all of their PPP loan proceeds.
 - However, when calculating their overall loan forgiveness amount, if a borrower applies for forgiveness before the end of its covered period and has reduced any employee's salary or wages by more than 25%, then the borrower must account for this excess salary reduction as if the reduction continued and remained in effect throughout the full 8-week or 24-week covered period.

Example Scenario

- A borrower is using a 24-week covered period. This borrower reduced an FTE's weekly salary from \$1,000/week during the reference period to \$700/week during the covered period. The employee continued to work on a full-time basis during the covered period.
- The first \$250 (25% of \$1,000) is exempted from the loan forgiveness reduction.
- The borrower seeking forgiveness would list \$1,200 as the salary/hourly wage reduction for that employee (the extra \$50 weekly reduction multiplied by 24 weeks).
- If the borrower applies for loan forgiveness before the end of the covered period, **it must account for the salary reduction for the full 24-week covered period (totaling \$1,200).**

FTE Reduction Safe Harbor Based on Health and Safety Rules

- Consistent with the PPP Flexibility Act, borrowers are generally exempted from PPP loan forgiveness reductions arising from a decrease in FTEs during their covered period if the borrower is able to document 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 - December 31, 2020,
 - by the Secretary of Health and Human Services (HHS), the Director of the Centers for Disease Control and Prevention (CDC) or the Occupational Safety and Health Administration (OSHA) related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19 (COVID Requirements or Guidance).

Interaction with State and Local Orders

- The latest IFR suggests that SBA is interpreting and implementing this exemption/safe harbor broadly:
 - First, SBA is interpreting the exemption to include both **direct and indirect** compliance with COVID Requirements or Guidance, since 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 HHS, CDC and/or OSHA.

Interaction with State and Local Orders (cont.)

- Second, an example in the IFR appears to provide significant relief for businesses that were required to close or significantly reduce operations for a period of time due to **state or local orders** that are/were based in part on COVID Requirements or Guidance.
 - SBA's example states that, "Because the borrower's business activity during the covered period was reduced compared to its activity before February 15, 2020 due to compliance with COVID Requirements or Guidance, the borrower satisfies the Flexibility Act's exemption and **will not have its forgiveness amount reduced because of a reduction in FTEs during the covered period**" as long as the borrower **retains records** of the applicable government shutdown order and the resulting reduction in business activity.

Deadline for Submitting PPP Loan Forgiveness Application

- There does not appear to be any near term deadline for submitting a PPP loan forgiveness application, as the updated forgiveness IFR states that borrowers may submit their forgiveness application at **any time before the loan's maturity date**.
- However, consistent with the PPP Flexibility Act, borrowers that delay submission of their loan forgiveness application for more than ten months after the end of their covered period will be required to start making payments on their loan (i.e., the loan deferment period will end) at that time.

“Owner Compensation” Guidance

- For borrowers using an **eight-week covered period**, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at eight weeks' worth (8/52) of 2019 compensation (i.e., approximately 15.38% of 2019 compensation) or \$15,385 per individual (whichever is less) **in total across all businesses**.
- **For all other borrowers**, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at 2.5 months' worth (2.5/12) of 2019 compensation (i.e., approximately 20.83% of 2019 compensation) or \$20,833 per individual (whichever is less) **in total across all businesses**.

“Owner Compensation” for Particular Circumstances

- C-corporation owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health insurance contributions made on their behalf.
- S-corporation owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement contributions made on their behalf, but employer health insurance contributions made on their behalf cannot be separately added because those payments are already included in their employee cash compensation.

“Owner Compensation” for Particular Circumstances (cont.)

- Schedule C or F filers are capped by the amount of their owner compensation replacement, based on 2019 net profit.
- General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties), multiplied by 0.9235.
- For self-employed individuals (including Schedule C or F filers and general partners) retirement and health insurance contributions are included in their net self-employment income and therefore cannot be separately added to their payroll calculation.

Conclusions

- Ability to apply for loan forgiveness prior to conclusion of 24-week covered period, combined with FTE/compensation safe harbors and exemptions, should give many eligible PPP borrowers a pathway to full (or near full) forgiveness.
 - Should also allow more borrowers to use the “EZ” loan forgiveness application.
- Additional clarity on “owner compensation” considerations will help owner-employees and self-employed individuals plan compensation, health and retirement payments/contributions.
- Given the timing flexibility and number of safe harbors now built into the PPP and its implementing rules, the focus of many loan forgiveness challenges is likely to be on threshold eligibility and “need” certification issues (in my opinion).



**COVID-19
RESPONSE TEAM**

PPP Compliance Readiness Program

Miller Johnson's interdisciplinary team of corporate and litigation attorneys will work with you to identify and gather relevant documents and performance data to ensure your business is best positioned to comply with the ever-changing rules governing the Paycheck Protection Program (PPP) and any resulting inquiry or investigation related to your business's application for, and receipt of, PPP funds.

Services

- Assist with identifying and compiling records and performance data to support the good faith “need certification” made at the time the PPP loan application was made.
- Review use and accounting of funds to support your application for loan forgiveness.
- Compliance assessment based on review of information received.
- Advise on best practices and evolving rules and guidance related to the PPP.
- Development of audit preparedness plan.
- Advise on enforcement defenses and evidentiary support for the same.

Pricing

Flat Fee* based on amount of PPP loan.

\$5,000	Loan amount of \$2MM+
\$5,500	Loan amount between \$1MM - \$1,999MM
\$3,000	Loan amount between \$500K - \$999K
\$2,000	Loan amount between \$250K - \$499K
\$1,500	Loan amount less than \$250K.

*Legal services related to responding to, or otherwise participating in, an informal or formal inquiry, investigation, audit or any other enforcement action (collectively, “PPP Enforcement Action”) are excluded from the scope of legal services offered in this Compliance Readiness Program. However, in the event your business is required to respond to, or otherwise participate in, a PPP Enforcement Action, Miller Johnson will credit 50% of the Flat Fee paid for the Compliance Readiness Program against the cost of advising and representing your business with respect to any PPP Enforcement Action.

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