

Paycheck Protection Program Forgiveness Update

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PPP Forgiveness Updates

The SBA began accepting loan forgiveness applications on August 10

- Forgiveness deadline is December 31, 2020, or within 10 months of exhausting funds.

Since that time, the SBA has issued additional guidelines and another interim final rule.

PPP Forgiveness Updates

- As of August 19, only 7% of PPP recipients had submitted forgiveness applications based on a survey conducted by National Federation for Independent Business.
- Since Lenders have begun accepting forgiveness applications, the SBA has issued additional guidelines and another interim final rule.
- It is unclear if there will be more changes.

PPP Forgiveness Update: When Should you Apply for Forgiveness?

- Many lenders have been encouraging applicants to apply for forgiveness
- Most CPAs and Attorneys advise businesses to wait a bit to see if more changes are forthcoming.
- Under proposed bipartisan bills borrowers would only have to assert that they had complied with the program and were eligible for the loans, less than \$150,000, to be forgiven.
- Factors to consider: timing of forgiveness impacts tax returns, likelihood of law changes, mergers or acquisitions, etc.

PPP Forgiveness Update: Which Application Form Should I Use?

Form 3508 EZ is shorter and requires less documentation and can be used by borrowers who:

- Are self-employed and have no employees;
- Did not reduce the salaries or wages of their employees by more than 25% and did not reduce the number or hours of their employees; or
- Experienced reductions in business activity as a result of health directives related to Covid-19 and did not reduce the salaries or wages more than 25%.

If you cannot satisfy these tests, use form 3508.

Forgiveness Changes- Owner Compensation

- An owner-employee in a C or S corporation holding less than a 5% ownership stake are eligible for up to \$46,154 in payroll forgiveness for 24 weeks.
- Previously, any owner was eligible for forgiveness for the less of \$15,385 or 15.385% of their 2019 compensation (if the borrower is using an 8 week covered period)
- Covered benefits including health care, retirement, and state taxes are also eligible expenses.

Forgiveness Changes- Home Office or Tenant Expenses

- If a business rents out a portion of its office, the business will not receive forgiveness for the portion that is paid by the tenant.
- If you sublease your office, you only receive forgiveness for your portion of the rent and utilities.
- Home office expenses are only forgivable based on the amount you claimed as a deduction on the 2019 or 2020 filings.

Forgiveness Changes- Mortgage Interest Payments

- If a business holds any ownership interest in a business from which it rents property, the businesses are deemed related.
- The business renting property from a related business is eligible for the portion of rent payments that are equal to or less than the amount of mortgage interest the entity owning the business pays on the property.
- The lease or mortgage must be entered into prior to February 15, 2020
- If the business leasing the property owns the building outright, the lessee will not be entitled to forgiveness

Forgiveness Changes- Benefits

- Payments toward vision and dental are considered group health care benefits eligible for forgiveness.

Forgiveness Changes- Interest

- Borrowers are not required to make payments while awaiting a forgiveness determination.
- If the loan is fully forgiven, and the application is submitted on a timely basis, interest will not accrue while the forgiveness application is pending.
- If the loan is not forgiven, interest will accrue from the time of disbursement.

How Long with a Forgiveness Determination Take?

- After you submit your application, the lender has 60 days to submit a decision to the SBA, using the SBA's Payroll Protection Forgiveness Platform.
- The SBA has 90 days to make a decision and remit the forgiveness funds to the lender
- 150 days total

Forgiveness Changes- Denials and Appeals Procedure

If the SBA finds that a borrower was:

- Ineligible for a PPP loan
- Was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses
- Is ineligible for PPP forgiveness in the amount determined by the lender in its full or partial approval decision issued to the SBA (except for the deduction of any EIDL advance); and/or
- Is ineligible for PPP forgiveness in any amount when the lender has issued a full denial decision to SBA

The decision is eligible for appeal to the SBA Office of Hearings and Appeals

Forgiveness Changes- Denials and Appeals Procedure

An appeal to the SBA Office of Hearings and Appeals (OHA) must include:

- The basis for OHA's jurisdiction
- A copy of the SBA's decision being appealed
- A statement explaining why the SBA decision is erroneous, including supporting facts and legal arguments
- Relief being sought; and
- Signed copies of payroll tax filings filed with the IRS, and various state and federal tax returns and schedules

In order to have standing to appeal, a borrower must have a final SBA loan review decision.

Forgiveness Changes- Denials

- Lenders will not receive a processing fee for loans determined by the SBA to be ineligible for PPP.
- SBA will seek refund of processing fees if within a year after loan disbursement, SBA determines the borrower was ineligible.
- SBA will seek reimbursement of fees and may find loan ineligible for guaranty if the lender does not collect and retain the correct borrowers documents.

Forgiveness Changes- Audit and Investigation

The CARES Act created a Special Inspector General for Pandemic Recovery (“SIGPR”) in the Department of Treasury with authority to audit and investigate PPP loans:

- The SIGPR partnered with the US Attorney to pursue civil and criminal investigations of misconduct and fraud
- DOJ has filed criminal charges for fraudulent PPP loans
- Although borrowers receiving less than \$2 million are presumed to have made the required certifications in good faith, loans as small as \$33,000 have been the subject of investigation

Forgiveness Changes- Records Retention

In order to prepare for an audit, a borrower should maintain:

- Records to document the use of proceeds including dates of expenditure, employee payroll and benefits and other covered expenses
- An accounting of the use of loan proceeds
- Changes in the number of employees and/or hours worked or payroll
- Any situations where an employee terminated their employment with the borrower

Forgiveness Changes- Forgiveness and Taxation

- No income is realized upon receipt of the loan because of the obligation to repay the amount
- When all or a part of the loan is forgiven, this would generally give rise to cancellation of indebtedness income; However, the CARES Act excludes the amount of loan forgiveness from gross income;
- Revenue Notice 2020-32 clarifies that expenses are not deductible if they result in loan forgiveness under a PPP loan.

Forgiveness Changes- Forgiveness and Taxation

How Should Borrowers Prepare?

- Borrowers may need to increase their estimated tax payments to account for the increased income;
- Borrowers need to determine whether they will include the deductions in their 2020 returns (since they will be excluded to the amount of forgiveness) or whether they will amend the return when they learn what their amount of forgiveness is.

Forgiveness Changes- PPP and EIDL

- Lender can confirm amount of EIDL advance that will be automatically deducted from the PPP borrower's forgiveness amount
- The Lender must notify the borrower of the amount remitted by the SBA and when the first payment will be due.

Forgiveness Updates: What is Next?

A large number of lobbying groups are requesting two things:

- Allowing automatic forgiveness or self-certification for borrowers of \$150,000 or less
- Allowing lenders to receive a second PPP loan if they can show losses in revenue at a to-be determined threshold level

Non-PPP Issues: Payroll Tax Deferral

President Trump issued a presidential memorandum directing the Treasury to defer the withholding, deposit and payment of certain payroll tax obligations. In response the IRS issued Notice 2020-65, providing as follows:

- Specifically employees can defer their share of Social Security Tax on wages paid between September 1, 2020 and December 31, 2020
- The Social Security tax deferred for this period would result in an additional withholding amount from January 1, 2021 through April 30, 2021

Non-PPP Issues: Payroll Tax Deferral

- Employees whose gross earnings are \$4,000 or less on a bi-weekly basis or \$4,333 or less on a semi-monthly basis are eligible to defer
- This results in an increase in tax home pay, but if pay is stable the employee pays twice as much Social Security tax from January 1, 2021 through April 30, 2021

Payroll Tax Deferral- Employer Considerations

- It is not mandatory for employers to participate.
- The employer will have an increased administrative burden (including payroll processing fees)
- Employer must withhold and deposit the additional make up withholding
- If an employee leaves or is terminated and their final paycheck does not cover the amount, the employer may have to make up the difference
- Due to these risks, many employers are choosing not to participate

Non-PPP Issues: Next Stimulus Package

The Democrats (who proposed the HEROES Act) and Republicans (who proposed the HEALS Act) have not reached agreement on the next stimulus package

- Most representatives agree that more PPP assistance is needed
- It is unclear what terms would be included in a future package

Non-PPP Issues: GOP Proposed Stimulus Package

The Republicans have proposed a “Skinny” bill

- It is smaller than the HEALS bill
- Targets aid to select groups
- Includes another round of PPP funds for small businesses that had a minimum revenue loss of 35% from the same period last year
- Loans would be equal to 2.5 times payroll with a maximum of \$2,000,000
- May also provide priority loans for travel and restaurants
- This would be funded by the remaining PPP balance
- Coronavirus liability shield

Questions?

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