

BANKING & FINANCE LAW ALERT

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Updated guidance for lenders on the PPP loan forgiveness program

Although the federal government's Paycheck Protection Program (PPP) is still open to applicants, borrowers who received PPP loans earlier this spring are getting ready to request that their loans be forgiven, in whole or in part. Lenders are preparing for the influx of a new round of "paperwork." However, many questions about the program remain unanswered. On July 23, 2020, the Small Business Administration (SBA) tried to answer some of those questions by releasing new guidance on the forgiveness process for PPP loans from a lender's perspective. This law alert will discuss some of the highlights of that guidance.

Forgiveness process overview

PPP borrowers start the loan forgiveness process by submitting their Loan Forgiveness Applications to their respective lenders. Borrowers may submit before the end of their self-selected "covered period" if they have used all of the loan proceeds for which they are requesting forgiveness. When a Borrower submits a loan forgiveness application, the lender must promptly:

1. Confirm receipt of the borrower's certifications required in such forgiveness application;
2. Confirm receipt of borrower's documentation for verifying payroll and nonpayroll costs;
3. Confirm the borrower's calculations of payroll and nonpayroll costs in the application by reviewing that documentation; and
4. Confirm that the borrower properly calculated whether it used 60% of the loan on "payroll costs."

Lenders may rely on a borrower's representations regarding its calculation of its loan forgiveness amount, but lenders must still conduct a good-faith review of those figures. If a lender detects an error in a borrower's calculations or insufficiency in its documentation, then the lender should work with the borrower to fix the problem. Under the CARES Act, a lender has only 60 days to complete its review of a borrower's forgiveness application and submit its decision on forgiveness to the SBA. **If a Lender does not meet that deadline, it runs the risk that the SBA will not purchase (guaranty) the loan from the lender.** A lender's decision may take the form of a full or partial approval; denial; or (if directed by the SBA) a denial without prejudice due to a pending SBA review of the loan. If the lender approves the application for full or partial forgiveness, it must request payment from the SBA for the forgiveness amount.

Because the statute gives a lender 60 days to review and pass along to the SBA its recommendation on forgiveness, borrowers may expect a written answer from the lender within that same 60 days. Neither the statute nor any SBA guidance to date require that a borrower be given any notice, however. Lenders should be prepared to respond to the pressure that borrowers will bring to bear with respect to forgiveness applications.

Subject to any pending review by the SBA, within 90 days after a lender issues its decision to the SBA, the agency will remit the requested forgiveness amount to lender, plus any accrued interest (but less any EIDL Advance amounts previously paid to the borrower, if applicable). The lender then must notify the borrower of the forgiveness amount paid to the lender by the SBA. If the SBA pays less than the amount in the lender's forgiveness decision, the lender must also specifically notify the borrower of the amount the lender requested to be forgiven. If the loan is partially forgiven, or if the forgiveness request is denied, the lender must notify the borrower of its first loan payment due date, and the borrower must repay any remaining balance due on the loan by the maturity date of the PPP loan. These notices to borrowers are the only ones required by the SBA, so **borrowers may not receive anything in writing from their PPP lenders until as late as 150 days after the initial submission of their Loan Forgiveness Applications.** Lenders should expect their borrowers to request frequent updates on the status of their forgiveness; thus, it may be a good idea to communicate openly with borrowers.

Failure to timely notify the borrower of the disposition of its PPP loan may bear some risk for the lender. The SBA can refuse to honor a lender's guaranty purchase request if the lender "fails to comply materially with a Loan Program Requirement."

After a lender submits its forgiveness decision, it must continue to service the loan as required by [SBA SOP 50 57](#).

If a lender decides at any time that a borrower is not entitled to any forgiveness, it must notify the borrower of its decision (which the SBA may review in its sole discretion). Within 30 days of a denial notice, the borrower may advise the lender that it is requesting that the SBA review the lender's

decision. The lender must then notify the SBA of the borrower's request within five days of the borrower's request. If the SBA declines a request for review, it will notify the lender. If the SBA accepts a request for review, it will notify both the borrower and the lender of the results of its review.

Against the foregoing overview, here is a more detailed description of how a PPP lender should handle the forgiveness process:

Lender submission of loan forgiveness decisions to the SBA

The SBA has created a secure platform through its E-Tran system (the PPP forgiveness platform) to accept from lenders loan forgiveness decisions, supporting documentation, and requests for forgiveness payments. This platform, which is only available to lenders, not borrowers, creates a user interface that allows lenders to upload required data and documentation, monitor the status of forgiveness requests, and respond to the SBA. The PPP forgiveness platform is scheduled to go live and begin accepting lender submissions on **Aug. 10, 2020**. The SBA will email all PPP lender Authorizing Officials (AOs) currently in the CAFS/ETRAN system instructions on how to access the platform. If an AO does not receive these instructions, it should call the PPP Lender Hotline at 833-572-0502. AOs may add up to 10 additional users in the platform for purposes of submitting and monitoring forgiveness requests. Using the platform, lenders will provide ACH information for the accounts to which they wish to receive PPP forgiveness payments. Such account information must be for an account owned by the lender of record (i.e., the lender who initiated the loan, not a transferee or Lender Service Provider). Lenders who provide invalid account information will not receive forgiveness payments.

The new guidance provides that "[i]f the lender of record authorizes an agent or Lender Service Provider (as those terms are defined in 13 CFR 103.1) or the lender servicing the loan (if not the lender of record) to submit any information or make any entries or certifications on the lender of record's behalf for any purpose through the PPP Forgiveness Platform or otherwise, the lender of record acknowledges that the agent, Lender Service Provider, or servicing lender is acting within the scope of the Lender of record's authority and the lender of record acknowledges that it is responsible for all information submitted and entries and certifications made by such other person or entity." Lenders must provide contact information for an AO who will respond to SBA inquiries and work with the SBA on its reviews. If the lender fails to provide this information, all lender submissions will be rejected and returned to the lender. In this guidance, the SBA indicated that it expects full cooperation from lenders with respect to any SBA inquiries or loan reviews. Failure to cooperate with the SBA may result in the forfeiture of a lender's forgiveness payment.

How to submit loan forgiveness decisions

The PPP Forgiveness Platform will enable lenders to submit forgiveness requests for individual loans or for multiple loans using an automated method. Lenders should be on the lookout for future guidance on how to

use the PPP Forgiveness Platform, which will be published on the platform.

If a lender's submission is incomplete or has errors, the platform will reject such submissions in an initial screening process and then notify the lender of the rejection. The lender must then correct the submission and resubmit it to the SBA; any resubmissions will restart the 90-day period for the SBA to remit the payment.

Lender confirmation required for PPP forgiveness submissions

Lenders must confirm the following when submitting forgiveness requests:

1. The submission accurately reflects the lender's decision (i.e., full or partial approval or denial);
2. The information provided by the lender to the SBA accurately reflects the Lender's records for the PPP loan;
3. The Lender has made its decision in accordance with the requirements set forth in Part III.2.a. of the PPP Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, as amended;
4. The PPP loan has not been cancelled or repaid; and
5. The lender has not issued a previous loan forgiveness decision to the SBA for the same PPP loan, unless it is a resubmission following a rejection or a reconsideration of a denial without prejudice.

Documentation and data required to be submitted

When the lender issues its decision to the SBA, the lender must check a box indicating its decision as follows:

1. Approved in Full
2. Approved in Part
3. Denied
4. Denied without prejudice (a lender should check this box when a loan is pending review from SBA)

If a lender partially approves a borrower's forgiveness amount, it must provide its own data for each line item for which it determined a different amount than the amount on the borrower's forgiveness application.

When submitting their decisions, lenders must submit the following documents to the PPP Forgiveness Platform:

1. The PPP Loan Forgiveness Calculation Form or SBA Form 3508EZ (including the representations and certifications page of the application initialed, signed, and dated by an authorized representative of the Borrower);
2. PPP Schedule A (not applicable if the Borrower used the EZ

Application); and

3. The PPP Borrower Demographic Information Form (if submitted by the Borrower).

If a lender rejects a borrower's forgiveness request, it must provide an explanation for its denial with all of the above required documentation and data.

SBA loan review

The SBA has discretion to review any PPP loan at any time. If the SBA decides to review a loan, it will notify the lender via the PPP Forgiveness Platform. The lender must then notify the borrower in writing and submit the following documents via the PPP Forgiveness Platform within five business days of receipt of notification:

1. The Borrower Application Form (SBA Form 2483 or Lender's equivalent form) and all supporting documentation provided by the Borrower.
2. The Loan Forgiveness Application (SBA Form 3508, 3508EZ, or Lender's equivalent form), and all supporting documentation required to be submitted by the borrower to the lender with the Loan Forgiveness Application, including payroll documentation, nonpayroll documentation, and full-time equivalent employee documentation, if applicable. **Contrary to existing SBA forms, a lender must also request that the borrower provide the lender with certain documentation that the instructions to the Loan Forgiveness Application Form (SBA Form 3508, 3508EZ, or Lender's equivalent form) instruct the borrower to not submit (documentation listed under "Documents that Each Borrower Must Maintain but is Not Required to Submit").** Once the lender receives the necessary documentation, it has five days to submit the additional documents to the SBA.
3. A signed and certified transcript of account.
4. A copy of the executed Promissory Note evidencing the PPP loan.
5. Any other documents related to the loan requested by the SBA.

If a borrower's loan documentation indicates that the borrower may be ineligible for a PPP loan or may be ineligible to receive the original loan amount or the loan forgiveness amount claimed, the SBA will require the lender to request additional information from the borrower, or it may directly request such additional information itself. The lender must forward to the SBA any additional information provided to it by the borrower. If a borrower fails to respond to an SBA inquiry, the SBA may determine that the borrower was ineligible for a PPP loan or ineligible to receive the loan amount or loan forgiveness amount claimed. Borrowers may appeal SBA decisions regarding its forgiveness determination. The SBA intends to issue an interim final rule discussing the appeals process soon.

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If lenders have questions about the forgiveness process or anything else in this new SBA guidance, contact [Jack Beeler](#), [Jack Meadows](#), [Cassandra Rice](#) or any member of Porter Wright's [Banking & Finance practice group](#).