

# BANKING & FINANCE LAW ALERT

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## Paycheck Protection Program closes; new FAQs on loan forgiveness released

The Paycheck Protection Program (PPP) is now closed to new applicants. While talks on extending or changing the program have stalled on Capitol Hill, the Small Business Administration (SBA) has issued [23 more frequently asked questions](#) specifically related to loan forgiveness. These FAQs are contained in a separate list from the [previously released FAQs](#) last updated on June 25, 2020 that focused on PPP loan eligibility and similar questions. Most of this new SBA guidance confirms interpretations that we and other commentators have previously provided about the program. This law alert will discuss the highlights in the new set of FAQs.

### General loan forgiveness

The first three questions focus on general loan forgiveness. The first question in this section clarifies that independent contractors, sole proprietors, and self-employed individuals should use the EZ Application so long as they had no employees at the time of loan application and did not include any employee salaries in the calculation of their loan amount. Per the second question, lenders may accept scanned copies of signed documents from borrowers. The third question confirms that interest begins accruing at the time the loan is disbursed and continues accruing until the SBA remits the forgiveness amount. Borrowers whose loans are not fully forgiven must pay the accrued interest on any amount of the loan that is not forgiven.

### Loan forgiveness payroll costs FAQs

Payroll costs incurred during a borrower's chosen "covered period" but paid afterwards are forgivable if paid on or before the next regular payroll date after such covered period. Further, payroll costs incurred prior to the covered period but paid during the period are also eligible for forgiveness.

Borrowers who pay twice a month or less frequently will have to calculate partial pay periods.

For purposes of calculating cash compensation, Question 4 confirms that borrowers should use the gross amount before deductions for taxes, employee benefits payments and similar payments. Question 5 confirms that payroll costs include bonuses paid to employees and hazard pay, subject to the \$100,000 cap for cash compensation on an annualized basis.

Question 6 of this section provides some clarity regarding the payment of group health care benefits. Generally, employer expenses for employee group health care benefits, including insurance premiums, that are paid or incurred by the borrower during its covered period are forgivable payroll costs. Insurance premiums incurred during the covered period must be paid by the next premium due date after the end of the applicable period in order to be forgivable. However, "expenses for group health care benefits paid by employees (or beneficiaries of the plan) either pre-tax or after tax, such as the employee share of their health care premium" are not eligible for forgiveness. Additionally, expenses for group health benefits that are accelerated from periods outside the covered period are not forgivable.

Similarly to group health care costs, as Question 7 confirms, employer contributions for employee retirement benefits that are paid or incurred by the borrower during its covered period are eligible for forgiveness. However, this does not include any retirement contributions deducted from employees' pay or otherwise paid by employees. As with group health care costs, employer contributions for retirement benefits accelerated from periods outside its covered period are not forgivable.

Per Question 8, the amount of owner compensation that is forgivable for owner-employees depends on the business type and whether the borrower is using an eight-week or 24-week covered period. If a borrower is using a 24-week covered period, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at \$20,833 per individual in total across all businesses in which he or she has an ownership stake. For borrowers using an eight-week covered period, this cap is \$15,385. The new FAQs identify the various limits applicable to C corporations, S corporations, sole proprietors, general partnerships and limited liability companies.

The new FAQs do not provide any guidance concerning workers compensation insurance premiums or benefits. We continue to view such expenses as not forgivable.

#### **Loan forgiveness non-payroll costs FAQs**

Non-payroll costs incurred during a borrower's chosen covered period but paid afterwards are forgivable if they are paid on or before the next regular billing date after such covered period. Further, non-payroll costs incurred prior to the covered period but paid during it are also eligible for forgiveness.

Questions 4-7 of this section clarify whether certain costs qualify as non-payroll costs eligible for forgiveness. Per Question 4, interest on unsecured credit is not forgivable. Question 5 confirms that payments made on recently renewed leases or interest payments on refinanced mortgage loans are forgivable so long as the original lease or mortgage existed prior to Feb. 15, 2020.

Question 6 finally clarifies what types of “transportation” costs are forgivable. Payment of transportation utility fees assessed by state and local governments are forgivable. According to the Federal Highway Administration, “Transportation utility fees are a financing mechanism that treats the transportation system like a utility in which residents and businesses pay fees based on their use of the transportation system rather than taxes based on the value of property they occupy.” Unfortunately, this definition of transportation costs is very narrow and unlikely to help many borrowers.

Question 7 is more favorable to borrowers and confirms that an entire electricity bill payment is forgivable even if charges are invoiced separately, including supply charges, distribution charges, and other charges such as gross receipts taxes.

#### **Loan forgiveness reduction FAQs**

The last set of FAQs contains questions related to reductions in a borrower’s forgiveness amount. This section, for the most part, confirms or clarifies information already provided in earlier SBA guidance. The first question clarifies that borrowers will not have their forgiveness reduced because of a reduction in FTE employees if the employer is able to document in good faith: (1) an inability to rehire individuals who were employees of the borrower on February 15, 2020, and (2) an inability to hire similarly qualified individuals for unfilled positions on or before December 31, 2020. Importantly, this reduction exemption requires a borrower to inform the applicable state unemployment insurance office of any employee’s rejected rehire offer within 30 days of the employee’s rejection of the offer. In order to qualify for this exemption, borrowers should maintain (1) the written offer to rehire an individual, (2) a written record of the offer’s rejection, and (3) a written record of efforts to hire a similarly qualified individual.

Per Question 2 of this section, a seasonal employer that chooses a 12-week period between May 1, 2019 and September 15, 2019 in its original PPP loan application must use that same 12-week period as the reference period for calculation of the amount of loan forgiveness. Question 3 provides that the FTE Reduction Exceptions apply to all employees, including those who made more than \$100,000 in 2019 (unlike the Salary/Hourly Wage Reduction). Question 5 clarifies that for purposes of salary/hourly wage reductions, the borrower should only take into account decreases in salaries or wages, not all forms of cash compensation, such as bonuses.



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While these FAQ's mostly confirm information derived from previous SBA guidance, the FAQ's nevertheless provide clarification on several issues, such as "transportation" costs.

If borrowers have questions about these FAQs or anything else related to PPP forgiveness, contact [Jack Beeler](#), [Jack Meadows](#), [Cassandra Rice](#) or any member of Porter Wright's [Banking & Finance practice group](#).