

New PPP Forgiveness Guidance And Forms

On January 19, SBA issued an [interim final rule](#) governing forgiveness of Paycheck Protection Program loans and also issued new versions of the three forgiveness application forms, including a streamlined form for loans up to \$150,000. The changes apply to the many original PPP loans that have not yet filed for forgiveness, as well as the new first draw and second draw PPP loans created by the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (the Economic Aid Act) that became effective on December 27, 2020.¹

The forgiveness rule incorporates and restates seven prior rules on forgiveness. The forgiveness rule is to be interpreted consistently with SBA's previously issued FAQs, except as superseded by the Economic Aid Act, and with the first draw and second draw rules.

The forgiveness rule consolidates SBA's previous forgiveness guidance, with changes to implement the Economic Aid Act and SBA policy decisions. Earlier Cozen O'Connor alerts² summarized the previous guidance. Consequently, this article will not cover every aspect of the new rule and forms, but rather will focus on significant features and changes from the previous rules and forms.

Forgiveness Guidance

The Economic Aid Act added group life, vision, disability, and dental premiums to the definition of "payroll costs" and added four new categories of costs that may be paid with PPP proceeds — "covered operations expenditures" (software or cloud computing services), "covered property damage costs" (uninsured damage caused by 2020 disturbances), "covered supplier costs" (expenditures to suppliers under contracts entered into prior to the date of the loan that are essential to operations), and "covered worker protection expenditures" (PPP and adaptive investments to comply with health and safety requirements or guidelines). With one exception, the forgiveness rule merely repeats the wording of the Economic Aid Act and the implementing rules on these new categories.

The rule clarifies the meaning of "covered worker protection expenditures." According to the rule, this means an operating expenditure or a capital expenditure to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a state or local government related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19, during the period beginning on March 1, 2020, and ending the date on which the declared COVID-19 national emergency expires. This may include purchase, maintenance, or renovation of these assets. The rule gives examples of items that are included in this definition, such as a drive-through window facility; an indoor, outdoor, or combined air or air pressure ventilation or filtration system; a physical barrier such as a sneeze guard; an expansion of additional indoor, outdoor, or combined business space; an onsite or offsite health screening capability; N95 masks and other items identified in allocation orders issued under the Defense Production Act; and particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health. However, residential real property and intangible property are **not** eligible costs.

Forgiveness is available for eligible costs paid or incurred during the covered period, applying the existing definitions of those terms. The borrower selects a covered period of between eight and 24 weeks, depending on how long it takes to spend the proceeds. Salary, wages, and commissions are capped at an annual rate of \$100,000, prorated for the length of the covered period. Previously, SBA allowed all borrowers to use a compensation cap of \$46,154 (24/52 of \$100,000). However,



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the Economic Aid Act changed this to a pro rata amount based on the actual covered period. There is a lower cap for compensation of self-employed individuals and employees with a 5 percent or greater ownership interest in either a S corporation or C corporation.

The forgiveness reduction calculations remain largely unchanged, except that the previous safe harbor deadlines of December 31, 2020, are extended to the end of a loan's covered period. The reference periods for the FTE reduction quotient are unchanged. Exemptions from reduction for employees that refuse rehire or additional hours, or that are terminated for cause, remain unchanged. One significant change is that loans of \$50,000 or less are exempt from the FTE and salary reductions and will simply be forgiven in whole.

In general, the forgiveness administration process is unchanged. After the end of the covered period, the borrower files the appropriate forgiveness application form, as discussed under "Forgiveness Applications" below. The form may be filed at any time prior to the last payment on the loan. If the application is filed within 10 months after the end of the covered period, payments are deferred until the forgiveness amount is determined. As provided in the Economic Aid Act, Economic Impact Disaster Loan grants are no longer deducted from the forgiveness amount. SBA reserves the right to review all applications and will deny forgiveness if it determines that the borrower is not eligible or lacked an adequate basis for its certifications in the loan application. Loans may be forgiven in whole or in part, and the borrower may challenge an adverse determination as provided in existing SBA rules.

Second draw loans are available to previous first draw (or original program) borrowers. The Economic Aid Act requires that the proceeds of the loan must be spent before the date on which the borrower receives the proceeds of the second draw loan. The implementing rules modified this to require that the first loan must have been spent only on eligible costs. The forgiveness rules require that a borrower with a first draw loan over \$150,000 must file a forgiveness application for the first draw loan no later than the date it applies for forgiveness of its second draw loan.

Borrowers have asked how the second draw program relates to SBA's position that all loans over \$2 million would be reviewed for "necessity."³ SBA has not issued any statements on this question, but the new forgiveness applications may provide the answer. The previous Form 3508 asked whether the borrower and its affiliates had received loans totaling over \$2 million. If the borrower checked yes, they entered SBA's review process. The new Form 3508 asks whether the borrower and its affiliates received first draw loans totaling over \$2 million or received second draw loans totaling over \$2 million. This indicates that SBA does not intend to aggregate first and second draw loans in determining whether a borrower exceeds the \$2 million threshold.

Forgiveness Applications

Together with the forgiveness rule, SBA adopted revised versions of the three forgiveness application forms — 3508, 3508 EZ, and 3508S.

Form 3508 is the general form to be used by borrowers that do not qualify for Form 3508EZ or 3508S. It is very similar to previous Form 3508, with minor changes to implement the Economic Aid Act, such as adding the four new categories of eligible costs. Borrowers must submit payroll and nonpayroll documentation as described in the instructions.

Previous Form 3508EZ was available to three categories of borrowers — (1) self-employed individuals, independent contractors, or sole proprietors with no employees, (2) borrowers that did not reduce salary or wages of any employee by more than 25 percent and did not reduce the number of employees or average paid hours, and (3) borrowers that did not reduce salary or wages of any employee by more than 25 percent and were unable to operate at the same level of business capacity because of COVID-related restrictions. New Form 3508EZ retains the second and third categories and eliminates the first category, although many of those borrowers will now be eligible for the simplified Form 3508S. Borrowers must submit payroll and nonpayroll documentation as described in the instructions.

Previous Form 3508S was a simplified form available to borrowers receiving loans of \$50,000 or less. New Form 3508S implements the requirement of the Economic Aid Act that SBA adopt a one-page application form with simplified documentation requirements for borrowers with loans of

\$150,000 or less. SBA Form 3508S requires fewer calculations and less documentation for eligible borrowers. These borrowers are not required to submit any supporting documentation with the application but are mandated to maintain payroll, nonpayroll, and other documents that could be requested during an SBA loan review or audit.

Cozen O'Connor has advised many borrowers on the full range of PPP issues, including eligibility, use of proceeds, forgiveness and necessity. We are here to help you with all aspects of your PPP loan.

¹ The Economic Aid Act and implementing rules are discussed in The "New and Improved" Paycheck Protection Program (December 28, 2020) and Restarting the Paycheck Protection Program (January 8, 2021)

² SBA'S Long-Awaited PPP Loan Forgiveness Guidance (May 19, 2020); SBA Additional Guidance on PPP Loan Forgiveness and Loan Reviews (May 29, 2020); New PPP Forgiveness Application Forms (June 18, 2020); and SBA to Begin Accepting PPP Forgiveness Applications on August 10 (July 27, 2020).

³ See New "Necessity" Forms Create Headaches and Risks for PPP Borrowers (December 3, 2020).