

## New PPP Forgiveness Application Forms

The Paycheck Protection Program Flexibility Act (Flexibility Act), which became effective June 5, significantly changed key elements of the Paycheck Protection Program (PPP), as discussed in Cozen O'Connor's Alerts posted on June 5 and June 9, 2020. In response, the SBA has now released amendments to PPP rules and two new PPP loan forgiveness applications. The rule amendments are effective as of March 27, the effective date of the CARES Act, and the new application forms become effective immediately and replace the previously published forgiveness application.

### Rule Amendments

The rule amendments are straightforward. They change the SBA's first interim rule and sixth interim rule to conform to the Flexibility Act, principally changing references from eight weeks to 24 weeks and from June 30, 2020, to December 31, 2020.

Significantly, the SBA's interim final rule on loan forgiveness is **not** amended by the new rules. Consequently, previous SBA guidance on loan forgiveness will remain unchanged, except for the changes in the covered period and related matters contained in the Flexibility Act. The Cozen O'Connor Alerts posted May 19 and May 28, 2020, provide a summary and analysis of the previous SBA forgiveness guidance.

### Simplified Application Form

The original SBA forgiveness form had been criticized as being overly complicated and requiring burdensome documentation. Some had suggested forgiving all PPP loans under a certain amount with no documentation required. The new forms do not go this far, but they do provide a simplified process for eligible borrowers.

New Form 3508EZ may be used by three categories of borrowers:

1. self-employed individuals, independent contractors, or sole proprietors who had no employees at the time of the PPP loan application and did not include any employee salaries in the computation of average monthly payroll in the loan application,
2. borrowers that (a) did not reduce annual salary or hourly wages of any employee by more than 25 percent during the covered period compared to the period between January 1, 2020, and March 31, 2020, and (b) did not reduce the number of employees or the average paid hours of employees between January 1, 2020, and the end of the covered period, or
3. borrowers that (a) did not reduce annual salary or hourly wages of any employee by more than 25 percent during the covered period compared to the period between January 1, 2020, and March 31, 2020, and (b) were unable to operate during the covered period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020, and December 31, 2020, by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.

For purposes of items 2(a) and 3(a), the calculation only includes employees who did not receive, during any single period during 2019, wages or salary at an annualized rate of pay of more than \$100,000. For purposes of item 2(b) and 3(b), a reduction in employees is disregarded if it arose from an inability to rehire individuals who were employees on February 15, 2020, if the borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020, and a reduction in an employee's hours is disregarded if the borrower offered to restore



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### Related Practice Areas

- Corporate

them and the employee refused. Details on these exclusions are provided in the SBA's interim final rule on revisions to first interim final rule and the Cozen O'Connor Alert posted on June 9, 2020.

Form 3508EZ is a simplified form that requires the borrower to list amounts paid for payroll costs, mortgage interest, rent, and utilities, the four categories of eligible costs. These amounts are calculated in the same manner as in the previous forgiveness application.

For loans originated before June 5, the borrower may choose the new 24-week covered period or the old eight-week period. For loans on June 5 and after, the 24-week covered period is mandatory.

If an eight-week covered period is used, the cap on cash compensation is the same as in original Form 3508. For employees other than owner-employees or self-employed individuals/general partners, the cash compensation cap is \$15,385, and cash compensation to owner-employees or self-employed individuals/general partners is capped at the lesser of eight weeks' worth of 2019 compensation or \$15,385.

If a 24-week covered period is used, for employees other than owner-employees or self-employed individuals/general partners, the cash compensation cap is \$46,154, which is \$100,000 prorated for 24 weeks. However, cash compensation to owner-employees or self-employed individuals/general partners is capped at the lesser of 2.5 months' worth of 2019 compensation or \$20,833. The instructions indicate \$20,833 is used because it is \$100,000 prorated for 2.5 months. Of course, 2.5 months was the basis for calculating the original loan amount, but it is unclear why that should be used instead of the full 24-week covered period.

The form then specifies three amounts — the total eligible costs, the loan amount, and payroll cost divided by 0.60 (to implement the requirement that at least 60 percent of the forgiven amount be for payroll costs). The smallest of these three amounts is the amount forgiven.

The borrower is still required to provide documentation of the eligible costs and documentation that the leases, utilities, and mortgages were all in effect on February 15.

The borrower is also required to make several certifications and representations. Some of these are the same as in the previous version of Form 3508, and discussed in the Alerts mentioned above. In addition, the borrower must certify that it did not reduce compensation by more than 25 percent, as described in 2(a) and 3(a) above, and that it meets one or both of the safe harbors described in 2 and 3 above.

## Standard Application Form

Borrowers not eligible for Form 3508EZ must use the new Form 3508. It resembles the original Form 3508, with adjustments for the Flexibility Act similar to those in Form 3508EZ. The covered periods, calculations of payroll costs (including cash compensation caps), rent, interest, and utilities and the amount to be forgiven are the same as Form 3508EZ, although Form 3508 contains forgiveness reductions due to decreases in compensation compared to the first three months of 2020 or decreases in FTEs compared to one of the permitted reference periods. Such reductions would cause a borrower to be ineligible to use Form 3508EZ.

Form 3508 contains three safe harbors:

1. the borrower did not reduce the number of employees or the average paid hours of its employees between January 1, 2020, and the end of the covered period,
2. the borrower was unable to operate between February 15, 2020, and the end of the covered period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020, and December 31, 2020, by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19, and
3. the "rehire" safe harbor provided in the CARES Act, for borrowers who have restored reductions in FTE levels by December 31, 2020 (June 30, 2020, prior to the Flexibility Act).

In calculating the number of FTEs during the covered period, the form also implements the rehire exceptions contained in the Flexibility Act and the SBA rules. FTE reductions are disregarded in three situations: (i) positions for which the borrower made a good-faith, written offer to rehire an individual who was an employee on February 15, 2020, and the borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020, (ii) positions for which the borrower made a good-faith, written offer to restore any reduction in hours, at the same salary or wages, during the covered period or the alternative payroll covered period and the employee rejected the offer, and (iii) employees who during the covered period or the alternative payroll covered period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours.

Form 3508 contains certifications similar to those in the previous form and requires comparable information with regard to employee and owner compensation and other eligible costs.

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