SBA IFRs Issued on May 22, 2020

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SECTION: PPP LOAN
PPP FORGIVENESS INTERIM FINAL RULE RELEASED BY THE SMALL BUSINESS ADMINISTRATION

Citation: RIN 3245-AH46, "Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Loan Forgiveness," Small Business Administration, 5/22/2020

A week after issuing the application form for PPP loan forgiveness, the Small Business Administration released an interim final rule covering the forgiveness process.[1] The IFR provides the formal guidance to go with the application package.

While much of the guidance duplicates what is found in the PPP loan forgiveness application and instructions, there are some significant new items of guidance, including:

- Any portion of the loan not forgiven will be eligible for payment over two years at 1%. Some advisers had worried that the SBA might ask for some or all of the funds back immediately, but the new guidance says nothing about that.
- Clarification that the "paid' and "incurred" rules first disclosed in the PPP forgiveness application are intended to allow borrowers to include costs that were incurred over a period of more than 8 weeks.
- Owner-employees are clearly a class distinct from Schedule C self-employed individuals and general partners, and appear to include C and S corporation shareholders.
- Unlike the self-employed, owner-employees can count retirement plan expenses and health plan expenses in their payroll costs, but all of these items in total are limited to 8/52 of the lesser of the 2019 amounts incurred or $100,000.
- Employers who wish to remove employees from the FTE calculation that they have offered to rehire at their same hours and salary/wage will have to report the employee's refusal to return to work to the state unemployment agency in a form to be determined by the SBA.
- A new set of safe harbors are put in place to protect borrowers from a reduction in FTE employees due to an employee's actions, including when an employee is fired for cause, voluntarily resigns or voluntarily requests a reduction in hours.

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[1] RIN 3245-AH46, "Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Loan Forgiveness," Small Business Administration, May 22, 2020, https://home.treasury.gov/system/files/136/PPP-IFR-Loan-Forgiveness.pdf (retrieved May 22, 2020)

The various items noted above are discussed in more detail in the following text.

Definitions of Costs Considered for Forgiveness

The IFR provides guidance on the forgiveness provided to borrowers based on the payment of payroll and non-payroll costs.

Payroll costs are defined by the IFR in a footnote as consisting of compensation to employees whose principal place of residence is in the United States in the form of:

- Salary, wages, commissions, or similar compensation;
- Cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips);
- Payment for vacation, parental, family, medical, or sick leave;
- Allowance for separation or dismissal;
- Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement;
- Payment of state and local taxes assessed on compensation of employees; and
- For an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation. See 15 U.S.C. 636(a)(36)(A)(viii); 85 FR 20811, 20813.[2]

Other costs that count towards forgiveness are referred to as *non-payroll costs* and consist of:

- Interest payments on any business mortgage obligation on real or personal property that was incurred before February 15, 2020 (but not any prepayment or payment of principal);
- Payments on business rent obligations on real or personal property under a lease agreement in force before February 15, 2020; and
- Business utility payments for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.[3]

Non-payroll costs cannot exceed 25% of the loan forgiveness amount.[4]

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[2] RIN 3245-AH46, p. 6

[3] RIN 3245-AH46, p. 7

[4] RIN 3245-AH46, p. 7

Loan Forgiveness Process

The IFR describes the process to obtain loan forgiveness for loans not reviewed by the SBA prior to the lender's decision on forgiveness. The guidance notes that "[i]n a separate interim final rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, SBA will describe its procedures for reviewing PPP loan applications and loan forgiveness applications."[5]

The process begins with the borrower submitting the forgiveness documents to the lender. As the IFR states:

> To receive loan forgiveness, a borrower must complete and submit the Loan Forgiveness Application (SBA Form 3508 or lender equivalent) to its lender (or the lender servicing its loan). As a general matter, the lender will review the application and make a decision regarding loan forgiveness. The lender has 60 days from receipt of a complete application to issue a decision to SBA.[6]

If the lender determines the borrower is eligible for forgiveness of some or all of the loan amount, the process continues as follows:

> If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the lender must request payment from SBA at the time the lender issues its decision to SBA. SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA. If applicable, SBA will deduct EIDL Advance Amounts from the forgiveness amount remitted to the Lender as required by section 1110(e)(6) of the CARES Act.[7]

However, the SBA may decide against the grant of forgiveness. The guidance continues:

> If SBA determines in the course of its review that the borrower was ineligible for the PPP loan based on the provisions of the CARES Act, SBA rules or guidance available at the time of the borrower's loan application, or the terms of the borrower's PPP loan application (for example, because the borrower lacked an adequate basis for the certifications that it made in its PPP loan application), the loan will not be eligible for loan forgiveness.[8]

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[5] RIN 3245-AH46

[6] RIN 3245-AH46, p. 7

[7] RIN 3245-AH46, pp. 7-8

[8] RIN 3245-AH46, p. 8

The borrower will be informed of the SBA's decision by the lender. If only a portion or none of the loan is forgiven, "any remaining balance due on the loan must be repaid by the borrower on or before the two-year maturity of the loan."[9]

What if a borrower's application is only approved after the borrower had made payments on the loan balance and thus the forgiven balance is more than the balance due? The SBA provides:

> If the amount remitted by SBA to the lender exceeds the remaining principal balance of the PPP loan (because the borrower made scheduled payments on the loan after the initial deferment period), the lender must remit the excess amount, including accrued interest, to the borrower.[10]

Incurred and Paid Rules for Payroll Costs

The IFR provides details on payroll costs incurred or paid that are eligible to be considered in the forgiveness calculation. The IFR provides for an option for payroll costs to be accumulated using one of two 8 week periods:

> In general, payroll costs paid or incurred during the eight consecutive week (56 days) covered period are eligible for forgiveness. Borrowers may seek forgiveness for payroll costs for the eight weeks beginning on either:
>
> > i. the date of disbursement of the borrower's PPP loan proceeds from the Lender (i.e., the start of the covered period); or
> >
> > ii. the first day of the first payroll cycle in the covered period (the "alternative payroll covered period").[11]

The IFR justifies the addition of an option to choose the alternative payroll covered period as follows:

> The Administrator of the Small Business Administration (Administrator), in consultation with the Secretary of the Treasury (Secretary), recognizes that the eight-week covered period will not always align with a borrower's payroll cycle. For administrative convenience of the borrower, a borrower with a bi-weekly (or more frequent) payroll cycle may elect to use an alternative payroll covered

[9] RIN 3245-AH46, p. 8

[10] RIN 3245-AH46, p. 8

[11] RIN 3245-AH46, p. 9

> period that begins on the first day of the first payroll cycle in the covered period and continues for the following eight weeks.[12]

The IFR goes on to separately define when payroll costs are deemed paid and when they are deemed incurred for purposes of counting the expenses in the eight week covered period. The timing of "paid" costs is provided for as follows:

> Payroll costs are considered paid on the day that paychecks are distributed or the borrower originates an ACH credit transaction.

The incurred definition is a bit more involved, providing not only that the costs must be incurred in the period, but those incurred must also be paid by a deadline set in the IFR:

> Payroll costs incurred during the borrower's last pay period of the covered period or the alternative payroll covered period are eligible for forgiveness if paid on or before the next regular payroll date; otherwise, payroll costs must be paid during the covered period (or alternative payroll covered period) to be eligible for forgiveness. Payroll costs are generally incurred on the day the employee's pay is earned (i.e., on the day the employee worked). For employees who are not performing work but are still on the borrower's payroll, payroll costs are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work).[13]

The IFR provides the following example of the application of the payroll period.

EXAMPLE

A borrower has a bi-weekly payroll schedule (every other week). The borrower's eight-week covered period begins on June 1 and ends on July 26. The first day of the borrower's first payroll cycle that starts in the covered period is June 7. The borrower may elect an alternative payroll covered period for payroll cost purposes that starts on June 7 and ends 55 days later (for a total of 56 days) on August 1. *Payroll costs paid during this alternative payroll covered period are eligible for forgiveness. In addition, payroll costs incurred during this alternative payroll covered period are eligible for forgiveness as long as they are paid on or before the first regular payroll date occurring after August 1.* Payroll costs that were both paid and incurred during the covered period (or alternative payroll covered period) may only be counted once.

The example appears to remove a concern some commentators had with regard to the paid and incurred rules provided for in the application. The example makes it clear that a payroll paid in the covered period (or alternative payroll covered period) will be eligible for forgiveness without any concern over how much, if any, of that payroll was actually incurred in the applicable period. Similarly, costs incurred at the end of the 56-

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[12] RIN 3245-AH46, p. 9

[13] RIN 3245-AH46, p. 9

day period but not paid until the first payroll issued outside the 56-day period also count as payroll costs.

Thus, for almost all borrowers, more than 8-weeks worth of payroll costs will end up in the payroll cost component of the forgiveness calculation.

Furloughed Workers, Bonuses and Commissions

Some borrowers and their advisers were concerned about whether their payroll payments might be challenged if they paid workers who were not working, gave workers a bonus during the eight weeks or paid workers to help make up for lost commissions due to decreased demand. Aside from issues related to owners, discussed later, the IFR provides that such payments will count in determining loan forgiveness generally.

The IFR provides the following guidance:

> *Are salary, wages, or commission payments to furloughed employees; bonuses; or hazard pay during the covered period eligible for loan forgiveness?*
>
> Yes. The CARES Act defines the term "payroll costs" broadly to include compensation in the form of salary, wages, commissions, or similar compensation. If a borrower pays furloughed employees their salary, wages, or commissions during the covered period, those payments are eligible for forgiveness as long as they do not exceed an annual salary of $100,000, as prorated for the covered period.[14]

The IFR provides the following explanation for the agency taking this position:

> The Administrator, in consultation with the Secretary, has determined that this interpretation is consistent with the text of the statute and advances the paycheck protection purposes of the statute by enabling borrowers to continue paying their employees even if those employees are not able to perform their day-to-day duties, whether due to lack of economic demand or public health considerations. This intent is reflected throughout the statute, including in section 1106(d)(4) of the Act, which provides that additional wages paid to tipped employees are eligible for forgiveness.

In a final sentence, the agency also adds another category of acceptable pay—hazard pay. Thus if a retailer pays its workers additional pay to recognize the risk of exposure, that extra pay will also count towards forgiveness of the loan.

> The Administrator, in consultation with the Secretary, has also determined that, if an employee's total compensation does not exceed $100,000 on an annualized basis, the employee's hazard pay and bonuses are eligible for loan forgiveness because they constitute a

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[14] RIN 3245-AH46, p. 11

supplement to salary or wages, and are thus a similar form of compensation.[15]

Limits on Payroll Costs for "Owners"

In the application for forgiveness issued on May 15, the SBA appeared to expand the definition of "owners" that had previously been discussed only in regard to self-employed sole proprietors in the prior IFR[16] that looked at loan issues for the self-employed. The application gave a parenthetical definition of owners to include a new class of "owner-employees" along with general partners as part of the owners class that faced an additional limit on the amount of payroll costs that could be counted towards forgiveness.

The IFR provides the following general limitation on the maximum compensation for this group:

> *Are there caps on the amount of loan forgiveness available for owner-employees and self-employed individuals' own payroll compensation?*
>
> Yes, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation can be no more than the lesser of 8/52 of 2019 compensation (i.e., approximately 15.38 percent of 2019 compensation) or $15,385 per individual in total across all businesses.

That sentence provides guidance that is similar to that provided on the application. But the IFR provides some additional guidance on the category.

One quick item to note—while there is no other explanation, the guidance talks about the limit applying across *all businesses* suggesting that someone with an ownership interest in multiple businesses will be subject to an overall limit. Some advisers had wondered if someone with an ownership interest in multiple business could collect multiple $15,385 checks—the answer now appears to be no.

The guidance makes it clear that the category of "owner-employees" is not limited to the self-employed, nor does it appear to be defined by reference to the IRC definition of owner-employee found at IRC §401(c)(3). The ruling provides distinctly different guidance for this group, indicating the term is not simply a duplicative reference to the self-employed.

The IFR provides the following special rules for each class of "owners" as the term is used on the application:

- **Owner-employees**: Capped by the amount of their 2019 employee cash compensation and employer retirement plan and health care contributions made on their behalf. Note that the retirement contributions and health care contributions

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[15] RIN 3245-AH46, p. 11

[16] 85 CFR 21747, 21749 (April 20, 2020)

are included in the total subject to the 8/52 cap and also appear to factor into the $15,385 limit per individual.[17]

- **Sole proprietor/self-employed:** Schedule C filers are capped by the amount of their owner compensation replacement, calculated based on 2019 net profit. While "owner-employees" are allowed to consider some health insurance and retirement plan contributions in their personal payroll costs, such is not allowed for the self-employed sole proprietor. The IFR holds that "such expenses are paid out of their net self-employment income."[18]

- **General partners:** General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235. Again, no additional forgiveness expenses are allowed for health insurance or retirement plan contributions on behalf of partners, with the same justification given as was given for the sole proprietors.[19]

While it is clear owner-employees are not sole proprietors or partners, the IFR does not specifically define who is an owner-employee. Shareholders who are employees of the corporation they own shares in would seem to be the class that the SBA is referring to, as they have an ownership interest in the business and are also employees. Whether that corporation is taxed as a C or S corporation for federal tax purposes would not seem to make any difference in this treatment.

The guidance, while indicating the maximum that can be claimed for a sole proprietor or general partner towards forgiveness, does not actually indicate what kind of disbursement, if any, needs to be made to a partner or sole proprietor in order to have paid or incurred the payroll costs during the covered period.

Prudence suggests that draws be taken by proprietors and distributions made to partners in the amount of their maximum forgivable payroll costs during the eight-week period to make sure that these amounts are included in the forgiveness calculation.

Non-Payroll Costs and Forgiveness

Non-payroll costs are subject to a similar "paid" and "incurred" set of rules as payroll costs by the IFR, but unlike payroll costs the standard covered period must be used by the borrower to measure costs paid and incurred that are allowed to be included in the forgiveness calculation.

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[17] RIN 3245-AH46, p. 12

[18] RIN 3245-AH46, p. 12

[19] RIN 3245-AH46, p. 12

The general non-payroll rule for timing for inclusion in the forgiveness calculation is stated as follows by the IFR:

> A nonpayroll cost is eligible for forgiveness if it was:
>
> > i. paid during the covered period; or
> >
> > ii. incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period.[20]

The rule is similar to the rule for payroll costs. The IFR provides the following example of applying the rule.

EXAMPLE

A borrower's covered period begins on June 1 and ends on July 26. The borrower pays its May and June electricity bill during the covered period and pays its July electricity bill on August 10, which is the next regular billing date. The borrower may seek loan forgiveness for its May and June electricity bills, because they were paid during the covered period. In addition, the borrower may seek loan forgiveness for the portion of its July electricity bill through July 26 (the end of the covered period), because it was incurred during the covered period and paid on the next regular billing date.[21]

This is the first time the SBA has explicitly stated that the "paid" and "incurred" rule can cause significantly more than 8 weeks worth of expenses to be included in the forgiveness calculation. In the above example two full months plus most of a third will be included in the non-payroll costs included for possible forgiveness. That period covers substantially more than 56 days, both in terms of costs incurred and the dates when payments are made.

The IFR justifies this treatment as follows:

> The Administrator, in consultation with the Secretary, has determined that this interpretation provides an appropriate degree of borrower flexibility while remaining consistent with the text of section 1106(b). The Administrator believes that this simplified approach to calculation of forgivable nonpayroll costs is also supported by considerations of administrative convenience for borrowers, and the Administrator notes that the 25 percent cap on nonpayroll costs will avoid excessive inclusion of nonpayroll costs.

Since the general paid and incurred rule appears to be worded identically to the similar payroll cost rule, it's not clear why the SBA specifically mentioned the 25% limit for these costs, since payroll costs are not subject to any percentage cap on amounts forgiven.

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[20] RIN 3245-AH46, p. 12

[21] RIN 3245-AH46, p. 12

One possible explanation is that the SBA believes the $15,385 cap ($100,000 annual compensation times 8/52) and the cap on owner compensation serve to limit the most likely abuses that might be used for payroll costs. That is, the agency isn't concerned about "excessive inclusion" of payroll costs so long as the excess costs don't cause the employee to go over the $15,385 cap and such funds aren't directed to owners.

While we generally don't worry about when items were incurred if paid in the forgiveness period under these rules, there is one exception. The statute itself bars forgiveness for any prepayment of mortgage interest. The IFR points this out, stating:

> *Are advance payments of interest on mortgage obligations eligible for loan forgiveness?*
>
> No. Advance payments of interest on a covered mortgage obligation are not eligible for loan forgiveness because the CARES Act's loan forgiveness provisions regarding mortgage obligations specifically exclude "prepayments." Principal on mortgage obligations is not eligible for forgiveness under any circumstances.

More interesting is that this is the only bar on accelerating expenses found in the statute or the SBA rules to date.

While this lack of additional prohibitions suggests that other items could be prepaid, caution should be exercised. If the amount in question could be reclaimed by the payor if the expense is not incurred, then the SBA could argue that the amount was not a prepayment of an expense, but rather simply a deposit. At a minimum, payors looking to accelerate payments into the covered period should concentrate on items that would not be subject to refund if the payor later decided not to use the service in question.

General Guidance on Reduction in Forgiveness Amount

Simply spending the funds on specified expenses is not enough to assure full forgiveness. If certain conditions are not fulfilled, the amount forgiven may be reduced.

Two employment related tests are applied to see if there will be a reduction in the forgiveness amount. These two tests are:

- Maintenance of the level of full-time equivalent (FTE) employees in the covered period vs. a reference period
- No more than 25% reduction in annualized salary or hourly wage amount for each employee in the covered period as compared to the first quarter of 2020.

The IFR gives the following overview of the topic:

> Section 1106 of the CARES Act specifically requires certain reductions in a borrower's loan forgiveness amount based on reductions in full-time equivalent employees or in employee salary and wages during the covered period, subject to an important statutory exemption for borrowers who have rehired employees and restored salary and wage levels by June 30, 2020 (with limitations). In addition, SBA and

> Treasury are adopting a regulatory exemption to the reduction rules for borrowers who have offered to rehire employees or restore employee hours, even if the employees have not accepted. The instructions to the loan forgiveness application and the guidance below explains how the statutory forgiveness reduction formulas work.[22]

Employee Turns Down Rehiring Offer from Employer Safe Harbor

With the across the board $600 addition to weekly unemployment benefits for each employee added as part of the CARES Act, a number of employers discovered that their employees were not willing to come back to work when the employer received the PPP loan funds. In many cases, a majority of the employees were being asked to take a pay cut to go back on payroll.

Needless to say, taking a pay cut is never something an employee is going to want to volunteer to do, so many refused to come back to work. That put the employer in a difficult position, as they would now be unable to maintain the same number of full time equivalents.

The SBA announced, in question 40 of its Payroll Protection Program Loans Frequently Asked Questions (FAQ), that an employer would be granted relief in this situation if certain conditions were met. This relief was also found in the forgiveness application released by the SBA, with some additional information on the mechanics of calculating this relief.

In the IFR we have the formal guidance that grants this relief—and it also contains one new requirement not previously mentioned that some employers may feel is going to create employee relations issues.

The IFR provides:

> *Will a borrower's loan forgiveness amount be reduced if the borrower laid-off or reduced the hours of an employee, then offered to rehire the same employee for the same salary and same number of hours, or restore the reduction in hours, but the employee declined the offer?*
>
> No. Employees whom the borrower offered to rehire are generally exempt from the CARES Act's loan forgiveness reduction calculation. This exemption is also available if a borrower previously reduced the hours of an employee and offered to restore the employee's hours at the same salary or wages.[23]

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[22] RIN 3245-AH46, pp. 12-13

[23] RIN 3245-AH46, p. 14

The IFR provides that an employer can exclude "any reduction in full-time equivalent employee headcount that is attributable to an individual employee"[24] if all of the following conditions are met:

- The borrower made a good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the covered period or the alternative payroll covered period;
- The offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;
- The offer was rejected by such employee;
- The borrower has maintained records documenting the offer and its rejection; and
- *The borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the employee's rejection of the offer. (emphasis added)*[25]

The last requirement had not previously been mentioned by the SBA. The requirement shows signs of being a requirement the agency had only recently decided to add to the rules, since the SBA provides the following in a footnote that indicates they are still working on how exactly an employer will need to comply with this provision:

> Further information regarding how borrowers will report information concerning rejected rehire offers to state unemployment insurance offices will be provided on SBA's website.[26]

To put it simply, the SBA is telling employers they will get back to them on this. Of course, if the employee rejected the offer on May 3 when the SBA first mentioned this relief, time is rapidly running out for the employer to make this report.

Employers should not assume that any reporting they may have done to state unemployment offices earlier will comply with the procedures the SBA does eventually publish. The employer will need to study this upcoming SBA guidance on reporting to see if the employer will need to take some other action to preserve the benefit.

The SBA defends its right to carve this exception into the rules by citing the right to make *de minimis* exemptions in this area. As the IFR states:

> The Administrator and the Secretary determined that this exemption is an appropriate exercise of their joint rulemaking authority to grant *de minimis* exemptions under section 1106(d)(6). Section 1106(d)(2) of the CARES Act reduces the amount of the PPP loan that may be forgiven if the borrower reduces full-time equivalent employees during

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[24] RIN 3245-AH46, p. 14

[25] RIN 3245-AH46, p. 14

[26] RIN 3245-AH46, p. 14

> the covered period as compared to a base period selected by the borrower. Section 1106(d)(5) of the CARES Act waives this reduction in the forgiveness amount if the borrower eliminates the reduction in full-time equivalent employees occurring during a different statutory reference period by not later than June 30, 2020. The Administrator and the Secretary believe that the additional exemption set forth above is consistent with the purposes of the CARES Act and provides borrowers appropriate flexibility in the current economic climate.[27]

The IFR then goes on to provide a more detailed justification for the exemption.

> The Administrator, in consultation with the Secretary, have determined that the exemption is *de minimis* for two reasons. First, it is reasonable to anticipate that most laid-off employees will accept the offer of reemployment in light of current labor market conditions. Second, to the extent this exemption allows employers to cure FTE reductions attributable to terminations that occurred before February 15, 2020 (the start of the statutory FTE reduction safe harbor period), it is reasonable to anticipate those reductions will represent a relatively small portion of aggregate employees given the historically strong labor market conditions before the COVID-19 emergency.[28]

Effect of Reduction of FTE on Loan Forgiveness Amount

The IFR notes that "[i]n general, a reduction in FTE employees during the covered period or the alternative payroll covered period reduces the loan forgiveness amount by the same percentage as the percentage reduction in FTE employees."[29]

The IFR walks through the calculation, noting that first a borrower must select a *reference period*. The borrower will choose from:

- February 15, 2019 through June 30, 2019;
- January 1, 2020 through February 29, 2020; or
- In the case of a seasonal employer, either of the two preceding methods or a consecutive 12-week period between May 1, 2019 and September 15, 2019.[30]

A borrower would normally select the period from the choices available that produces the lowest FTE number to avoid or limit any reduction in forgiveness.

The average FTE during the selected reference period is then compared to the average FTE during the covered period the borrower selected for payroll cost purposes. If the

[27] RIN 3245-AH46, p. 15

[28] RIN 3245-AH46, p. 15

[29] RIN 3245-AH46, p. 16

[30] RIN 3245-AH46, p. 16

FTE during the applicable covered period is less than the FTE during the selected reference period, the forgiveness is reduced proportionately by the percentage reduction in FTE.[31]

The SBA provides the following example to illustrate this rule.

EXAMPLE

[I]f a borrower had 10.0 FTE employees during the reference period and this declined to 8.0 FTE employees during the covered period, the percentage of FTE employees declined by 20 percent and thus only 80 percent of otherwise eligible expenses are available for forgiveness.[32]

Definition of a Full Time Equivalent (FTE) Employee

The IFR confirms the definition of a full-time equivalent employee found on the application for forgiveness.

> Full-time equivalent employee means an employee who works 40 hours or more, on average, each week. The hours of employees who work less than 40 hours are calculated as proportions of a single full-time equivalent employee and aggregated, as explained further below in subsection d.[33]

Note that no single employee can account for more than one FTE, since once an employee works 40 hours or more they are counted as one FTE.

Some in the tax community had posited that 30 hours would be used as the FTE hours number based on that number of hours being used in the Affordable Care Act to define an FTE when determining if an employer had 50 or more FTEs on average in the prior year and thus was subject to the shared responsibility payment in the current year. The SBA explains how they arrived at 40 hours in the IFR:

> The CARES Act does not define the term "full-time equivalent employee," and the Administrator, in consultation with the Secretary, has determined that full-time equivalent is best understood to mean 40 hours or more of work each week. The Administrator considered using a 30 hour standard, but determined that 40 hours or more of work each week better reflects what constitutes full-time employment for the vast majority of American workers.[34]

Just as with the "owner-employee" definition discussed earlier (where some in the tax community were sure that IRC §401(c)(3)'s definition of that term is what would apply), this ruling illustrates the risk of using tax specific definitions when attempting to

[31] RIN 3245-AH46, p. 16

[32] RIN 3245-AH46, p. 16

[33] RIN 3245-AH46, pp. 16-17

[34] RIN 3245-AH46, p. 17

interpret these provisions unless the SBA itself brings in tax concepts (as the agency did when discussing how to determine the maximum loan for an LLC).

Calculation of FTE Employees

The IFR confirms that computing FTE for the reference period is done by employee by week. The guidance provides:

> Borrowers seeking forgiveness must document their average number of FTE employees during the covered period (or the alternative payroll covered period) and their selected reference period. For purposes of this calculation, borrowers must divide the average number of hours paid for each employee per week by 40, capping this quotient at 1.0. For example, an employee who was paid 48 hours per week during the covered period would be considered to be an FTE employee of 1.0.[35]

The IFR also describes the option to use a simplified method to compute FTE employees for those who work less than 40 hours:

> For employees who were paid for less than 40 hours per week, borrowers may choose to calculate the full-time equivalency in one of two ways. First, the borrower may calculate the average number of hours a part-time employee was paid per week during the covered period. For example, if an employee was paid for 30 hours per week on average during the covered period, the employee could be considered to be an FTE employee of 0.75. Similarly, if an employee was paid for ten hours per week on average during the covered period, the employee could be considered to be an FTE employee of 0.25. Second, for administrative convenience, borrowers may elect to use a full-time equivalency of 0.5 for each part-time employee. The Administrator recognizes that not all borrowers maintain hours-worked data, and has decided to afford such borrowers this flexibility in calculating the full-time equivalency of their part-time employees.[36]

The application did not clearly indicate if an employer deciding to use the simplified computation for employees who work less than 40 hours a week could use a different method for each applicable testing period. The IFR *does require using the same method for each period*, noting:

> Borrowers may select only one of these two methods, and must apply that method consistently to all of their part-time employees for the covered period or the alternative payroll covered period and the selected reference period.[37]

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[35] RIN 3245-AH46, p. 17

[36] RIN 3245-AH46, pp. 17-18

[37] RIN 3245-AH46, p. 18

After having computed the FTE employees for each week, the rules continue to describe how to compute the overall average for the period.

> In either case, the borrower shall provide the aggregate total of FTE employees for both the selected reference period and the covered period or the alternative payroll covered period, by adding together all of the employee-level FTE employee calculations. The borrower must then divide the average FTE employees during the covered period or the alternative payroll covered period by the average FTE employees during the selected reference period, resulting in the reduction quotient.[38]

Reduction in Employee's Salary or Wages Forgiveness Reduction

The IFR provides information about the reduction in salary or wage rate provision that also can lead to a reduction in the amount of loan forgiven, noting that "[u]nder section 1106(d)(3) of the CARES Act, a reduction in an employee's salary or wages in excess of 25 percent will generally result in a reduction in the loan forgiveness amount, unless an exception applies."[39]

The guidance continues:

> Specifically, for each new employee in 2020 and each existing employee who was not paid more than the annualized equivalent of $100,000 in any pay period in 2019, the borrower must reduce the total forgiveness amount by the total dollar amount of the salary or wage reductions that are in excess of 25 percent of base salary or wages between January 1, 2020 and March 31, 2020 (the reference period), subject to exceptions for borrowers who restore reduced wages or salaries (see g. below). This reduction calculation is performed on a per employee basis, not in the aggregate.[40]

The IFR provides the following example of such a calculation.

EXAMPLE

A borrower reduced a full-time employee's weekly salary from $1,000 per week during the reference period to $700 per week during the covered period. The employee continued to work on a full-time basis during the covered period with an FTE of 1.0. In this case, the first $250 (25 percent of $1,000) is exempted from the reduction. Borrowers seeking forgiveness

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[38] RIN 3245-AH46, p. 18

[39] RIN 3245-AH46, p. 18

[40] RIN 3245-AH46, pp. 18-19

would list $400 as the salary/hourly wage reduction for that employee (the extra $50 weekly reduction multiplied by eight weeks).[41]

One interesting item to note is that while the forgiveness application uses the annualized salary for the calculation and comparison in its instructions,[42] the IFR example uses a highly simplified calculation.

Later in the IFR, the SBA does introduce the separate hourly rate calculation that works like the calculation on the application form. That example reads:

EXAMPLE

An hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE employee of 1.0) and the borrower reduced the employee's hours to 20 hours per week during the covered period (FTE employee of 0.5). There was no change to the employee's hourly wage during the covered period. Because the hourly wage did not change, the reduction in the employee's total wages is entirely attributable to the FTE employee reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee.[43]

The SBA explains that if the wage calculation took into consideration the hours worked in addition to the hourly rate, this would create a double reduction since the reduction in hours would also reduce the average FTE employees:

> The Administrator considered applying the salary/wage reduction provision in addition to the FTE reduction in situations similar to the example above because section 1106(d)(3) refers to reductions in "total salary or wages" in excess of 25 percent. However, the Administrator determined that, based on the structure of section 1106(d)(2) and section 1106(d)(3), Congress intended to distinguish between an FTE reduction on the one hand and a reduction in hourly wages or salary on the other hand. This interpretation harmonizes the two loan forgiveness reduction provisions in a logical manner consistent with the statute.[44]

The SBA's IFR notes that the Act itself did not address the interaction of the salary/hourly rate reduction and the reduction in FTE employees:

> The Act does not address the intersection between the FTE employee reduction provision in section 1106(d)(2) and the salary/wage reduction provision in section 1106(d)(3). To help ensure uniformity across all borrowers in applying the FTE

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[41] RIN 3245-AH46, p. 19

[42] Payroll Protection Program Loan Application, Small Business Administration Form 3508 (05/20), p. 7

[43] RIN 3245-AH46, p. 20

[44] RIN 3245-AH46, p. 20

> reduction provision and the salary/wage reduction provision, the Administrator, in consultation with the Secretary, has determined that the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction. This approach will help ensure that borrowers are not doubly penalized for reductions.[45]

Thus, the agency decided:

> To ensure that borrowers are not doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is not attributable to the FTE reduction.[46]

June 30 Restoration Safe Harbors

For taxpayers facing a reduction in the amount forgiven due to an FTE or salary/hourly wage issue, the law provides a potential second chance if a taxpayer meets the requirements to be able to escape reduction by restoring the FTEs or salary/hourly wage amounts by the payroll that includes June 30, 2020.

To meet this test, first the taxpayer must have had a reduction in employees or salary/hourly wages between February 15, 2020 and April 26, 2020. If this reduction did not take place, the borrower cannot use the safe harbor even though there may be a reduction that took place during the covered period when compared to the appropriate reference period.[47]

The IFR holds:

> Section 1106(d)(5) of the CARES Act provides that if certain employee salaries and wages were reduced between February 15, 2020 and April 26, 2020 (the safe harbor period) but the borrower eliminates those reductions by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in salaries and wages under section 1106(d)(3) of the CARES Act. Similarly, if a borrower eliminates any reductions in FTE employees occurring during the safe harbor period by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in FTE employees.[48]

Meeting the safe harbors does not mean that the taxpayer will not face issues with loan forgiveness. For instance, the IFR warns that "[t]his does not change or affect the requirement that at least 75 percent of the loan forgiveness amount must be

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[45] RIN 3245-AH46, p. 20

[46] RIN 3245-AH46, p. 20

[47] RIN 3245-AH46, p. 21

[48] RIN 3245-AH46, p. 21

attributable to payroll costs."[49] Similarly, the shortfall in FTE employees, salaries and wages during the covered period could very well mean the borrower is unable to spend the necessary funds to obtain full forgiveness of the debt.

Employees Fired for Cause, Voluntarily Resigns or Voluntarily Requests a Schedule Reduction

The IFR adds some additional protection against the loss of FTEs for reasons other than an employee who refuses to return to work when offered his/her prior hours and salary/wages. Under the prior IFR and the forgiveness form instructions, an employer could only avoid being penalized for a reduction in FTE employees if the employer offered the employee his/her prior hours and salary/rate of pay and the employee refused to accept the position.

The IFR has added three more categories of exceptions. The employer can count an employee "at the same full-time equivalency level before the FTE reduction event when calculating the section 1106(d)(2) FTE employee reduction penalty" if an FTE reduction event occurs during the applicable covered period due to:

- The employee being fired for cause;
- The employee voluntarily resigned his/her position; or
- The employee voluntarily requests a reduced schedule.[50]

The IFR provides the following justification for the relief:

> Section 1106 is silent concerning how to account for employees who are fired for cause, voluntarily resign, or voluntarily request a reduced schedule. The Administrator and the Secretary have determined that such an exemption is *de minimis*, because a limited number of borrowers will face an FTE reduction event during the covered period or the alternative payroll covered period. Further, borrowers should not be penalized for changes in employee headcount that are the result of employee actions and requests.[51]

An employer making use of this relief will face recordkeeping requirements, described in the IFR as follows:

> Borrowers that avail themselves of this *de minimis* exemption shall maintain records demonstrating that each such employee was fired for cause, voluntarily resigned, or voluntarily requested a schedule

[49] RIN 3245-AH46, p. 21

[50] RIN 3245-AH46, p. 22

[51] RIN 3245-AH46, p. 22

> reduction. The borrower shall provide such documentation upon request.[52]

Documentation Requirements

The IFR primarily refers back to the forgiveness application and instructions to provide borrowers with information on documentation issues. The IFR provides:

> The loan forgiveness application form details the documentation requirements; specifically, documentation each borrower must submit with its Loan Forgiveness Application (SBA Form 3508 or a lender equivalent), documentation each borrower is required to maintain and make available upon request, and documentation each borrower may voluntarily submit with its loan forgiveness application. Section 1106(e) of the Act requires borrowers to submit to their lenders an application, which includes certain documentation, and section 1106(f) provides that the borrower shall not receive forgiveness without submitting the required documentation.[53]

The IFR explains the reasoning behind the documentation guidance as follows:

> For purposes of administrative convenience for both lenders and borrowers, the Administrator, in consultation with the Secretary, has determined that requiring borrowers to submit certain documentation, maintain certain documentation, and choose whether to submit additional documentation will reduce initial reporting burdens on borrowers and reduce initial recordkeeping burdens on lenders.[54]

SECTION: PPP LOAN
SBA GIVES DETAILS OF LOAN REVIEWS AND STEPS A LENDER SHOULD TAKE IN DETERMING IF BORROWER QUALIFIES FOR FORGIVENESS

Citation: RIN 3245-AH47, "Business Loan Program Temporary Changes; Paycheck Protection Program – SBA

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[52] RIN 3245-AH46, p. 22

[53] RIN 3245-AH46, p. 23

[54] RIN 3245-AH46, p. 23

Loan Review Procedures and Related Borrower and Lender Responsibilities," Small Business Administration, 5/22/20

The Small Business Administration issued a second interim final regulation late in the evening of May 22, 2020, this one entitled "Business Loan Program Temporary Changes; Paycheck Protection Program – SBA Loan Review Procedures and Related Borrower and Lender Responsibilities."[55]

The SBA's potential review of loans has been a topic of discussion since the SBA released Q&A 31 in the "Paycheck Protection Program Loans Frequently Asked Questions (FAQs)," where the agency indicated concern over loans taken by various public companies, followed up by Q&A 39 where the agency announced:

> To further ensure PPP loans are limited to eligible borrowers in need, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of $2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application.[56]

This particular IFR was issued to describe the review process and related responsibilities for the borrower and the lender.

The SBA begins the guidance by noting that there *will* be reviews conducted by the SBA, something the agency had already announced.

> *Will SBA review individual PPP loans?*
>
> Yes. SBA may review any PPP loan, as the Administrator deems appropriate, as described below.

Borrower Representations and Statements SBA Will Review

The guidance indicates the following items that the SBA plans to review:

> The Administrator is authorized to review the following:
>
> Borrower Eligibility: The Administrator may review whether a borrower is eligible for the PPP loan based on the provisions of the

[55] RIN 3245-AH47, "Business Loan Program Temporary Changes; Paycheck Protection Program – SBA Loan Review Procedures and Related Borrower and Lender Responsibilities," Small Business Administration, May 22, 2020, https://home.treasury.gov/system/files/136/PPP-IFR-SBA-Loan-Review-Procedures-and-Related-Borrower-and-Lender-Responsibilities.pdf (retrieved May 22, 2020)

[56] Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Small Business Administration, May 19, 2020 edition, https://www.sba.gov/sites/default/files/2020-05/Paycheck-Protection-Program-Frequently-Asked-Questions_05%2019%2020.pdf (retrieved May 23, 2020)

> CARES Act, the rules and guidance available at the time of the borrower's PPP loan application, and the terms of the borrower's loan application. See FAQ 17 (posted April 6, 2020).2 These include, but are not limited to, SBA's regulations under 13 CFR 120.110 (as modified and clarified by the PPP Interim Final Rules) and 13 CFR 121.301(f) and the information, certifications, and representations on the Borrower Application Form (SBA Form 2483 or lender's equivalent form) and Loan Forgiveness Application Form (SBA Form 3508 or lender's equivalent form).
>
> Loan Amounts and Use of Proceeds: The Administrator may review whether a borrower calculated the loan amount correctly and used loan proceeds for the allowable uses specified in the CARES Act.
>
> Loan Forgiveness Amounts: The Administrator may review whether a borrower is entitled to loan forgiveness in the amount claimed on the borrower's Loan Forgiveness Application (SBA Form 3508 or lender's equivalent form).[57]

Borrowers with loans of less than $2 million won't face a question regarding whether their certification of the necessity of the loan was true,[58] but all other issues noted above could be subject to review.

When Will the SBA Undertake a Review?

The IFR provides the time frame during which the SBA may review the loan. The IFR notes:

> For a PPP loan of any size, SBA may undertake a review at any time in SBA's discretion. For example, SBA may review a loan if the loan documentation submitted to SBA by the lender or any other information indicates that the borrower may be ineligible for a PPP loan, or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower. 13 CFR 120.524(c). As noted on the Loan Forgiveness Application Form, the borrower must retain PPP documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.
>
> Lenders must comply with applicable SBA requirements for records retention, which for Federally regulated lenders means compliance with the requirements of their federal financial institution regulator and for SBA supervised lenders (as defined in 13 CFR 120.10 and

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[57] RIN 3245-AH47, pp. 7-8

[58] Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Small Business Administration, May 19, 2020 edition, Q&A 46

including PPP lenders with authority under SBA Form 3507) means compliance with 13 CFR 120.461.[59]

Providing Additional Information to the SBA in Response to Questions

The IFR indicates that borrowers will be asked to, and have the opportunity to, provide additional information to the SBA as questions arise due to the review.

> *Will I have the opportunity to respond to SBA's questions in a review?*
>
> Yes. If loan documentation submitted to SBA by the lender or any other information indicates that the borrower may be ineligible for a PPP loan or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower, SBA will require the lender to contact the borrower in writing to request additional information. SBA may also request information directly from the borrower. The lender will provide any additional information provided to it by the borrower to SBA. SBA will consider all information provided by the borrower in response to such an inquiry.
>
> Failure to respond to SBA's inquiry may result in a determination that the borrower was ineligible for a PPP loan or ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower.[60]

Borrower Found to Be Ineligible for the Loan Cannot Obtain Forgiveness

Not surprisingly, the IFR provides that if the SBA in the review determines that the borrower was not eligible for the loan, the borrower will no longer be eligible to qualify for forgiveness.

> *If SBA determines that a borrower is ineligible for a PPP loan, can the loan be forgiven?*
>
> No. If SBA determines that a borrower is ineligible for the PPP loan, SBA will direct the lender to deny the loan forgiveness application. Further, if SBA determines that the borrower is ineligible for the loan amount or loan forgiveness amount claimed by the borrower, SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate. SBA may also seek repayment of the outstanding PPP loan balance or pursue other available remedies.
>
> Section 1106(b) of the CARES Act provides for forgiveness of a PPP loan only if the borrower is an "eligible recipient." The Administrator has determined that to be an eligible recipient that is entitled to

[59] RIN 3245-AH47, pp. 8-9

[60] RIN 3245-AH47, p. 9

> forgiveness under section 1106(b), the borrower must be an "eligible recipient" under 15 U.S.C. § 636(a)(36)(A)(iv) and rules and guidance available at the time of the borrower's loan application. This requirement promotes the public interest, aligns SBA's functions with other governmental policies, and appropriately carries out the CARES Act's PPP provisions, including by preventing evasion of the requirements for PPP loan eligibility and ensuring program integrity with respect to this emergency financial assistance program. It is also consistent with the CARES Act's nonrecourse provision, 15 U.S.C. § 636(a)(36)(F)(v), which limits SBA's recourse against individual shareholders, members, or partners of a PPP borrower for nonpayment of a PPP loan only if the borrower is an eligible recipient of the loan. Accordingly, the PPP Loan Forgiveness Application (SBA Form 3508 or lender's equivalent form) notes that SBA may direct a lender to disapprove a borrower's loan forgiveness application if SBA determines that the borrower does not qualify as an eligible recipient for the PPP loan.[61]

Appeals Process

Although no details are available, the IFR provides that there will be an appeals process.

> *May a borrower appeal SBA's determination that the borrower is ineligible for a PPP loan or ineligible for the loan amount or the loan forgiveness amount claimed by the borrower?*
>
> Yes. SBA intends to issue a separate interim final rule addressing this process.

Documents a Lender Should Review in Forgiveness Process

The IFR moves on to give rules for the forgiveness process for lenders, the process all borrowers who apply for forgiveness will need to go through. The guidance provides the following information about what the lender should review.

> *What should a lender review?*
>
> For all PPP Loan Forgiveness Applications, each lender shall:
>
> > i. Confirm receipt of the borrower certifications contained in the Loan Forgiveness Application Form.
> >
> > ii. Confirm receipt of the documentation borrowers must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the Loan Forgiveness Application Form.

[61] RIN 3245-AH47, pp. 9-10

> iii. Confirm the borrower's calculations on the borrower's Loan Forgiveness Application, including the dollar amount of the (A) Cash Compensation, Non-Cash Compensation, and Compensation to Owners claimed on Lines 1, 4, 6, 7, 8, and 9 on PPP Schedule A and (B) Business Mortgage Interest Payments, Business Rent or Lease Payments, and Business Utility Payments claimed on Lines 2, 3, and 4 on the PPP Loan Forgiveness Calculation Form, by reviewing the documentation submitted with the Loan Forgiveness Application.
>
> iv. Confirm that the borrower made the calculation on Line 10 of the Loan Forgiveness Calculation Form correctly, by dividing the borrower's Eligible Payroll Costs claimed on Line 1 by 0.75.

Providing an accurate calculation of the loan forgiveness amount is the responsibility of the borrower, and the borrower attests to the accuracy of its reported information and calculations on the Loan Forgiveness Application. Lenders are expected to perform a good-faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning amounts eligible for loan forgiveness. For example, minimal review of calculations based on a payroll report by a recognized third-party payroll processor would be reasonable. By contrast, if payroll costs are not documented with such recognized sources, more extensive review of calculations and data would be appropriate. The borrower shall not receive forgiveness without submitting all required documentation to the lender.

As the First Interim Final Rule3 indicates, lenders may rely on borrower representations. If the lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue. As stated in paragraph III.3.c of the First Interim Final Rule, the lender does not need to independently verify the borrower's reported information if the borrower submits documentation supporting its request for loan forgiveness and attests that it accurately verified the payments for eligible costs. [62]

60-Day Timeline on a Lender's Determination on a Forgiveness Application

The IFR provides the following information on the lender's determination.

> *What is the timeline for the lender's decision on a loan forgiveness application?*
>
> The lender must issue a decision to SBA on a loan forgiveness application not later than 60 days after receipt of a complete loan

[62] RIN 3245-AH47, pp. 10-11

forgiveness application from the borrower. That decision may take the form of an approval (in whole or in part); denial; or (if directed by SBA) a denial without prejudice due to a pending SBA review of the loan for which forgiveness is sought. In the case of a denial without prejudice, the borrower may subsequently request that the lender reconsider its application for loan forgiveness, unless SBA has determined that the borrower is ineligible for a PPP loan. The Administrator has determined that this process appropriately balances the need for efficient processing of loan forgiveness applications with considerations of program integrity, including affording SBA the opportunity to ensure that borrower representations and certifications (including concerning eligibility for a PPP loan) were accurate.

When the lender issues its decision to SBA approving the application (in whole or in part), it must include (1) the PPP Loan Forgiveness Calculation Form; (2) PPP Schedule A; and (3) the (optional) PPP Borrower Demographic Information Form (if submitted to the lender). The lender must confirm that the information provided by the lender to SBA accurately reflects lender's records for the loan, and that the lender has made its decision in accordance with the requirements set forth in 2.a. If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the lender must request payment from SBA at the time the lender issues its decision to SBA. SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA. If applicable, SBA will deduct EIDL Advance Amounts from the forgiveness amount remitted to the Lender as required by section 1110(e)(6) of the CARES Act.

When the lender issues its decision to SBA determining that the borrower is not entitled to forgiveness in any amount, the lender must provide SBA with the reason for its denial, together with (1) the PPP Loan Forgiveness Calculation Form; (2) PPP Schedule A; and (3) the (optional) PPP Borrower Demographic Information Form (if submitted to the lender). The lender must confirm that the information provided by the lender to SBA accurately reflects lender's records for the loan, and that the lender has made its decision in accordance with the requirements set forth in 2.a. The lender must also notify the borrower in writing that the lender has issued a decision to SBA denying the loan forgiveness application. SBA reserves the right to review the lender's decision in its sole discretion. Within 30 days of notice from the lender, a borrower may request that SBA review the lender's decision by reviewing the loan in accordance with 2.c. below. Enabling SBA to use the statutory 90-day period to review the PPP loan and forgiveness documentation is an appropriate procedural protection to prevent fraud or misuse of PPP funds, ensure that recipients of PPP loans are within the scope of entities that the CARES Act is intended to assist, and confirm compliance with the PPP requirements set forth in the statute, rules, and guidance. This protection is also important in light of the large number and diverse

types of PPP lenders, many of which were not previously SBA participating lenders and which were approved rapidly in order to enable financial assistance to be provided as rapidly as feasible to millions of small businesses. SBA will use the 90-day period to help ensure that applicable legal requirements have been satisfied.

SBA will issue additional procedures on the process for advance purchase of PPP loans.[63]

Lender's Action Upon Receiving a Notice of SBA Loan Review

The IFR provides the following guidance to lenders if the lender receives notice that the SBA is reviewing a loan:

What should a lender do if it receives notice that SBA is reviewing a loan?

SBA may begin a review of any PPP loan of any size at any time in SBA's discretion. If SBA undertakes such a review, SBA will notify the lender in writing and the lender must notify the borrower in writing within five business days of receipt.

Within five business days of receipt of such notice, the lender shall transmit to SBA electronic copies of the following:

i. The Borrower Application Form (SBA Form 2483 or lender's equivalent form) and all supporting documentation provided by the borrower.

ii. The Loan Forgiveness Application (SBA Form 3508 or lender's equivalent form), and all supporting documentation provided by the borrower (if the lender has received such application). If the lender receives such application after it receives notice that SBA has commenced a loan review, the lender shall transmit electronic copies of the application and all supporting documentation provided by the borrower to SBA within five business days of receipt. The lender must also request that the borrower provide the lender with a copy of the Schedule A Worksheet to the Loan Forgiveness Application, and the lender must submit the worksheet to SBA within 5 business days of receipt from the borrower.

iii. A signed and certified transcript of account.

iv. A copy of the executed note evidencing the PPP loan.

v. Any other documents related to the loan requested by SBA.

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[63] RIN 3245-AH47, pp. 12-14

If SBA has notified the lender that SBA has commenced a loan review, the lender shall not approve any application for loan forgiveness for such loan until SBA notifies the lender in writing that SBA has completed its review.[64]

[64] RIN 3245-AH47, pp. 14-15