

SBA SIMPLIFIES FORGIVENESS APPLICATION PROCESS FOR PAYCHECK PROTECTION PROGRAM BORROWERS (AND THEIR LENDERS) ON LOANS OF \$50,000 OR LESS

Hodgson Russ COVID-19 Litigation & Employment Action Team Alert
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For the past few months, lenders, trade groups, borrowers, and some lawmakers have been pushing for a more streamlined forgiveness process for Paycheck Protection Program (PPP) loans up to \$150,000, though a consensus has not been reached in Congress. On October 8, 2020, the SBA and Treasury took a smaller step toward simplification. The new SBA Form 3508S and related Interim Final Rule (IFR) for borrowers with PPP loans of \$50,000 or less, except those that together with their affiliates received \$2 million or more in PPP loans, will simplify the forgiveness process. The new procedure affects some 3.57 million PPP loans of \$50,000 or less, representing approximately \$62 billion.

The IFR published by the SBA incorporates the form and modifies previously issued rules. Now, a borrower who applies for forgiveness using Form 3508S “is exempt from any reductions in the borrower’s loan forgiveness amount based on reductions in full-time equivalent (FTE) employees (section 1106(d)(2) of the CARES Act) or reductions in employee salary or wages (section 1106(d)(3) of the CARES Act) that would otherwise apply.” The SBA justified that position by noting that about 1.71 million of the 3.57 million of sub-\$50,000 PPP loans were made to businesses with zero or one employee who would not be affected by these exemptions anyway. That winnows the estimated impact of the streamlined forgiveness process to \$49 billion worth of PPP loans. As to these, the SBA “believes” that most of these borrowers would not be affected by the reduction requirements because these borrowers likely either did not reduce FTE employees or salaries or wages, or the borrower would qualify for one of the existing exemptions from loan forgiveness reductions. The SBA thus concluded that when all of these borrowers are excluded, the impact of the change on the aggregate PPP funds would be *de minimis*.

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The new simplified two-page Form 3508S still requires the borrower to submit to its lender documentation verifying payroll costs, proving the existence of pre-February 15, 2020 nonpayroll obligations and services, and payment of forgivable payroll and nonpayroll expenses in the covered period. The form otherwise relies primarily upon borrower certifications that the information is accurate, has been verified, and meets the following criteria:

- The dollar amount for which forgiveness is requested does not exceed the principal amount of the PPP loan and:
 - was used to pay costs that are eligible for forgiveness (payroll costs to retain employees; business mortgage interest payments; business rent or lease payments; or business utility payments);
 - includes payroll costs equal to at least 60% of the forgiveness amount;
 - if a 24-week Covered Period applies, does not exceed 2.5 months' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at \$20,833 per individual; and
 - if the Borrower has elected an 8-week Covered Period, does not exceed 8 weeks' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at \$15,385 per individual.

The IFR emphasizes that providing correct calculations remains the responsibility of the borrower, who must attest that it accurately calculated and verified the eligible costs and forgiveness amounts set forth in the application. The borrower must also ensure that the information on its forgiveness application matches the information submitted or to-be-submitted to the IRS. Lenders may rely upon borrower representations without independently verifying them so long as the lender confirms receipt of the borrower certifications and documentation of the borrower's payroll and nonpayroll costs per the instructions and the forgiveness application form. The IFR also explains that if a borrower submits documentation of eligible payroll or nonpayroll costs that exceed the PPP loan amount, the amount of forgiveness cannot exceed the amount of the loan. So the lender may need to confirm borrower calculations up to the amount eligible for forgiveness.

The new IFR and simplified form should lessen the burden on lenders, borrowers, and the SBA with respect to a significant volume of smaller PPP loans. Notwithstanding the simplification of the process for the sub-\$50,000 class of PPP loans, the SBA may still conduct a review or audit of any loan for borrower eligibility and forgiveness amounts. The borrower also remains subject to civil and/or criminal liabilities for fraud, unauthorized use of PPP monies, and making knowingly false statements in a forgiveness application. Therefore, all borrowers still need to prepare their applications carefully, take note of the content and import of the required certifications, and ensure that they adequately documented proper use of PPP loan monies for forgivable expenses during the relevant covered period. And per the instructions to the form, borrowers must also retain all records and documentation supporting the application and demonstrating compliance for six years after forgiveness or repayment of the loan.

While the SBA's administrative amendment provides welcome relief for the smallest PPP loans, borrowers with PPP loans in the \$50,001 - \$150,000 range should stay tuned for possible additional relief. Some industry groups, lawmakers, and lenders are still pushing for simplification up to the \$150,000 threshold. Congress may continue to evaluate proposed legislation in the coming weeks or months that could override or broaden the SBA's new IFR and ease the forgiveness process on larger loans, though perhaps with additional safeguards and protections against potential fraud or abuse.

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If you have questions about the PPP or how your business can implement strategies to maximize forgiveness or better protect your business from SBA review or other government scrutiny, please call Jason Markel (716.848.1395), Reetuparna Dutta (716.848.1626) or Benjamin Zuffranieri (716.848.1469).

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