

What Considerations Should Lenders be Aware of Before Borrowers Apply for Loan Forgiveness?

Amundsen Davis Financial Services Alert
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Over 1.6 million loans have been processed by lenders and approved by the Small Business Administration (SBA) under the Paycheck Protection Program (PPP). Now that you have a handle on the application process, you may be asking, what's next? In the coming weeks, lenders will be faced with borrower applications for loan forgiveness. If the loan approval process is any indication, loan forgiveness will be fraught with challenges and evolving rules and requirements. Here is what we know so far.

How does loan forgiveness work?

Loans made under the PPP may be forgiven in whole or in part if certain criteria are satisfied. Borrowers are eligible for loan forgiveness equal to the amount of certain "costs incurred and payments made" during the 8-week period beginning on the date of initial disbursement (Covered Period). These costs include payroll costs and certain payments of interest on mortgage obligations, payments on rent obligations, and utility payments.

The CARES Act provides that only "costs incurred and payments made" during the Covered Period are eligible. It is unclear whether this phrase will be interpreted by the SBA literally as to require the incurrence and payment during the Covered Period or as alternatives. If the former interpretation is taken, otherwise eligible costs may be excluded.

How much of a borrower's loan may be forgiven?

The CARES Act provides for loan forgiveness up to the principal amount of the loan, but the SBA has indicated that loan forgiveness can be up to the principal amount of the loan plus accrued interest.

How is loan forgiveness calculated?

To calculate loan forgiveness, the borrower will first need to determine the amount of eligible "costs incurred and payments made" during the Covered Period. Unless reduction is required under the CARES Act, the sum of these costs

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equals the amount of loan forgiveness that the borrower is eligible to receive; provided, however, not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs. Adjustments to the amount of loan forgiveness may be necessary to comply with this 75%/25% attribution rule.

Additionally, there are other factors that will need to be taken into consideration and may affect the amount of loan forgiveness:

- Have there been any reductions in the average number of full-time equivalent employees of the borrower?
- Have there been any reductions in total salary or wages for applicable employees of the borrower?
- Has the borrower eliminated any curable reduction in employees and/or salary prior to June 30, 2020?
- Did the borrower have an economic injury disaster loan rolled into their PPP loan?
- Does the borrower have employees and/or is the borrower an independent contractor or sole proprietor?
- Does the borrower have tipped employees?

The CARES Act also gives the SBA authority to establish a de minimis exception from the employment and salary reductions, but the SBA has not indicated whether they will issue a rule providing for a de minimis exception.

What information will a lender need to collect from a borrower?

Borrowers are not eligible for loan forgiveness unless they submit the required documentation to their lender. Borrowers must submit an application to their lender with supporting documentation, including:

- documentation verifying the number of full-time equivalent employees on payroll and pay rates for the applicable periods;
- documentation verifying payments for eligible costs; and
- a certification that (a) the documentation presented is true and correct and (b) the amount for which forgiveness is requested was used to retain employees and make payments for other eligible costs.

Independent contractors and sole proprietors will need to submit similar verifying documentation.

What are a lender's obligations with respect to loan forgiveness?

Lenders are not required to independently verify the amount of loan forgiveness requested if the borrower submits documentation supporting its request and attests that it has accurately verified the payments for eligible costs. Lenders who rely on a borrower's documentation and attestation will be held harmless by

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the SBA. Lenders have 60 days from date of receipt of borrower's application to make a decision on loan forgiveness.

When will the SBA pay lenders for the loan forgiveness amount?

The SBA has 90 days from the date on which loan forgiveness is determined to pay a lender. The SBA will pay accrued interest through the date of payment.

Can a lender receive payment for the loan forgiveness amount earlier?

Lenders may make a request to the SBA for purchase of the "expected forgiveness amount" of a PPP loan or a pool of PPP loans following the seventh week of the Covered Period. The "expected forgiveness amount" is the amount a lender reasonably expects a borrower to spend on eligible costs during the Covered Period. Lenders must submit a report to the SBA requesting advance purchase with supporting documentation, including:

- the Paycheck Protection Program Application Form (SBA Form 2483) and any supporting documentation submitted with such application;
- the Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty (SBA Form 2484) and any supporting documentation;
- a detailed narrative explaining the assumptions used in determining the expected forgiveness amount, the basis for those assumptions, alternative assumptions considered, and why alternative assumptions were not used; and
- any information obtained from the borrower since the loan was disbursed that the lender used to determine the expected forgiveness amount, including the same documentation required to apply for loan forgiveness such as payroll tax filings, cancelled checks, and other payment documentation.

The SBA will purchase the expected forgiveness amount within 15 days of receiving a complete report that demonstrates that the expected forgiveness amount is reasonable.

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