

# PPP Loan Forgiveness: What You Need to Know Now

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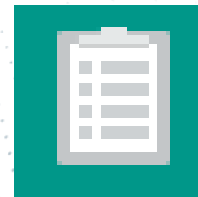
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# Meet Our Speakers

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# Topics Covered

- Robert Hoberman
  - Forgiveness Process
  - Required Forms and Supporting Documentation
  
- Tenley Carp
  - Governing Law
  - SBA Guidance
  - Appeals Process

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# Forgiveness Process

# Forgiveness Process

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- Borrowers can apply for forgiveness any time up to the maturity date of the loan. If borrowers do not apply for forgiveness within 10 months after the last day of the Covered Period, then PPP loan payments are no longer deferred, and borrowers will begin making loan payments to their PPP lender.
  - **Example:** if you applied for a PPP loan on April 1, 2020, and you received it on April 15, 2020 and you elect a 24-week Covered Period, then your Covered Period would end on September 29, 2020 and you will have to apply for forgiveness by July 29, 2021. If you had elected for an 8-week Covered Period, then you will have to apply by April 9, 2021.
- Borrowers can apply after the 10 months are over, but:
  - The loan will have converted to a loan that requires payback over 2 to 5 years at 1% interest, including any accrued interest.
  - There is a question as to whether you will receive 100% forgiveness or just an amount equal to the current outstanding balance.
  - Do not wait - we do not know if the Lenders and the SBA are going to be set up to process these types of applications on time.

# Forgiveness Process

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- 60% or more of the money must be used for Payroll Costs.
- 40% or less of the money can be used for Other Costs.
- Covered Period
  - Starts on the date that you receive the PPP funds (either round one or two)
  - Borrower can use a period between 8 and 24 weeks to calculate the use of the loan proceeds, as well as Salary, and FTE reductions.
    - Generally, 24 weeks is better for most Borrowers, except if you spent the money in 8 weeks and will have a problem with either FTE or wage reductions in a 24-week period.
- The first step is to apply for forgiveness using the proper form, filling it out correctly, and having all the supporting documentation. A mistake at this level will require the Borrower to file with the OHA.

# Forgiveness Process

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- Payroll Costs
  - \$100,000 of wages, per employee that are not owners, on an annualized basis.
    - This is between \$15,385 over 8 weeks to \$46,154 for up to 24 weeks.
- For employees that are non-owners, non-partners, include the following categories up to the cap of \$100,000 annualized per employee:
  - Cash compensation (salary or hourly)
  - Tips
  - Vacation
  - Parental, family, medical or sick leave
  - Dismissal/separation payments
  - Hazard or incentive pay
  - Excludes payroll that you received a credit for under the either the Families First Coronavirus Response Act, the Emergency Paid Sick Leave Act, or the Employee Retention Credit

# Forgiveness Process

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- For employees that are non-owners, non-partners, it includes the following which can push the Payroll Costs to more than \$100,000 annualized per employee:
  - Employer contributions for:
    - Group health care benefits
    - Employer contributions to retirement plans
    - Group life insurance
    - Disability insurance
    - Dental and vision benefits
  - Employer state/local payroll taxes
- Partners – form K-1 box 14a net earnings from self-employment income multiplied by 0.9235 and limited to the lesser of 8- or 24-weeks' worth of 2019 K-1, further limited to \$20,833 or (b) the 2.5-month equivalent of the individual's applicable self-employment income in the year that was used to calculate the loan amount (2019 or 2020), whichever is lower.
  - The multiplier of 0.9235 effectively charges the Partner with the employer portion of the self-employment tax.

# Forgiveness Process

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- Owner-employees – defined as those with a 5% or more ownership interest.
  - Limited to between 8 and 24 weeks chosen period amount of 2019 annual compensation which would at most be between \$15,385 and 46,154. However, this is further limited to 2.5 months of compensation at \$100,000 per year or \$20,833, or (b) the 2.5-month equivalent of the individual’s applicable compensation in the year that was used to calculate the loan amount (2019 or 2020), whichever is lower.
- Self-employed individuals
  - Limited to between 8 and 24 weeks chosen period amount of 2019 Schedule C earnings reported on line 31, even if it has not been filed with the IRS, limited to \$15,385 or 46,154 or the same 2.5-month equivalent in the proceeding paragraph.
- For either employees, owners, Partners, or self-employed individuals
  - Eliminate any payroll where the wages were used to obtain the Employee Retention Credit (“ERC”)
- Best practices tip:
  - Should a sole proprietor, partnerships or S corps write checks to owners during the Covered Period?
    - Yes, form 3508 indicates that amounts must be “paid” to owner.
    - Write a check to yourself from your business account and deposit it in your personal account.

# Forgiveness Process

- Maximum of 40% of the PPP loan money can be used to pay:
  - Mortgage interest payments
  - Rent for leases in effect prior to February 15, 2020
    - Rent payments made pursuant to a lease renewal, after February 15th, 2020, of a qualifying lease are ok.
  - Utility payments – telephone, internet, electric, water, and gas
  - Covered Operations Expenditures
    - Payment for any software, cloud computing, and other human resources and accounting need.
  - Covered Property Damage Costs
    - Costs related to property damage due to public disturbances that occurred during 2020 that are not covered by insurance.
- Covered Supplier Costs
  - Expenditures to a supplier pursuant to a contract, purchase order, or order for goods in effect prior to taking out the loan that are essential to the recipient's operations at the time at which the expenditure was made. Supplier costs of perishable goods can be made before or during the life of the loan.
- Covered Worker Protection Expenditures
  - Personal protective equipment and adaptive investments, including capital expenses for ventilation, barriers, etc., to help a loan recipient comply with federal health and safety guidelines or any equivalent State and Local guidance related to COVID-19 during the period between March 1, 2020, and the end of the national emergency declaration.

# Forgiveness Process

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- If your loan is not completely forgiven, you will have to start making payments on any unforgiven portion of your loan after the SBA remits your forgiveness amount to the Bank or informs them that your loan is not entitled to forgiveness.
  - If all or a part of your loan forgiveness is denied by the SBA, you have 30 days to start the appeals process with the OHA.

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# Required Forms and Supporting Documentation

# Required Forms and Supporting Documentation

- The SBA has three versions of the forgiveness form:
  - 3508S – Almost no work to fill out the form
  - 3508EZ – More work to fill out the form
  - 3508 – complicated to fill out
- All the forms ask for the same initial information:
  1. Business legal name
  2. Business address
  3. DBA or trade name (if applicable)
  4. Taxpayer Identification Number (EIN)
  5. Phone number
  6. Primary contact
  7. Email address
  8. SBA PPP loan number
  9. Lender PPP loan number
  10. PPP loan amount
  11. Disbursement date (date you received the money)
  12. Number of employees at time of loan application
  13. Number of employees at time of forgiveness application
  14. Covered period
  15. Forgiveness amount

# Required Forms and Supporting Documentation

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- Which form should you use?
  - 3508S – one page forgiveness form for PPP loans up to \$150,000
    - Form 3508S is two pages long with four pages of instructions, broken down into the following parts:
      - Signature/certifications/authorization form
      - Demographic information form (optional)
    - Not required to show any calculations
    - FTE and wage reduction haircuts are waived if your loan is less than \$50,000

# Required Forms and Supporting Documentation

- 3508S – one page forgiveness form for PPP loans up to \$150,000
  - Documentation required - but not required to be submitted with the 3508S (only).
    - Payroll – all the following for the covered period
      - » Bank account statements or third party reports showing cash compensation
      - » Tax forms (or equivalent), typically 941's and State Wage Reporting forms
      - » Receipts, cancelled checks, or account statement documenting contributions to health insurance plans
    - Non-payroll
      - » Documentation verifying existence of Mortgage or lease prior to February 15, 2020
      - » Mortgage interest lender amortization schedule with cancelled checks or lender's statements
      - » Business rent – current lease agreement, cancelled checks, or lessor statements
        - Business utility payments – invoices from February 15, 2020 and cancelled checks or account statements verifying payments
        - Receipts showing proof of payment for business software or computing service costs, essential supplier costs, expenditures for employee and customer safety (such as PPE), and property damage costs resulting from the 2020 unrest
        - Certifications must be initialed. (see next page for 3508S certification)

# Required Forms and Supporting Documentation

**By Signing Below, You Make the Following Representations and Certifications on Behalf of the Borrower:**

The Authorized Representative of the Borrower certifies to all of the below by **initialing** next to each one.

- \_\_\_\_\_ The Borrower has complied with all requirements in the Paycheck Protection Program Rules (Sections 7(a)(36), (7)(a)(37), and 7A of the Small Business Act, the PPP interim final rules, and guidance issued by SBA through the date of this application), including the rules related to:
- eligible uses of PPP loan proceeds;
  - the amount of PPP loan proceeds that must be used for payroll costs;
  - the calculation and documentation of the Borrower's revenue reduction (if applicable); and
  - the calculation of the Borrower's Requested Loan Forgiveness Amount.

Information regarding these requirements may be found in the Form 3508S Instructions and the Paycheck Protection Program Rules.

- \_\_\_\_\_ The information provided in this application is true and correct in all material respects. I understand that knowingly making a false statement to obtain forgiveness of an SBA-guaranteed loan is punishable under the law, including 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

# Required Forms and Supporting Documentation

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- 3508EZ – if the loan PPP loan amount is more than \$150,000, then this is a simpler forgiveness application form than the 3508. It is for Borrowers who meet specific safe harbor conditions about their employee's wages or the number of Full Time Equivalents.
  - Form 3508EZ is four pages long, with five pages of instructions, broken down into the following parts:
    - Calculation form
    - Signature/certifications/authorization form
    - Demographic information form (optional)
  - For any Borrower that has employees:
    - You did not reduce the number of employees or reduce their wages by more than 25%
    - If you did reduce the number of employees, you did not reduce wages by more than 25%. If you reduced the number of employees, it is because you could not operate as normal due to COVID-19's health guidance compliance.

# Required Forms and Supporting Documentation

- 3508 – the complete application for forgiveness of PPP loan for those who do not qualify for using either the form 3508S or 3508EZ.
  - Form 3508 is five pages long, with seven pages of instructions, and is broken down into the following parts:
    - Calculation form
    - Signature/certifications/authorization form
    - Schedule A
    - Schedule A Worksheet
    - Demographic information form (optional)
  - Must use this form if you do not meet the qualifications to use another form.
  - This form requires the Borrower to calculate their Payroll Costs and Non-payroll Costs using the 60%/40% rule as well as showing the calculations for determining how much to reduce your forgiveness for reductions in FTE's and wages.
  - Documentation required to be submitted includes everything for the form 3508S plus additional documentation supporting the FTE calculations.

# Required Forms and Supporting Documentation

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- For all loans
  - An attestation that the Borrower has accurately provided the required information and certify that they have complied with the PPP loan rules.
  - Borrower is still required to retain relevant records related to employment for six years.
  - Your loan forgiveness may still be reduced if you reduced your number of employees or employee salary by more than 25% (these are the same rules under the original PPP).
  - Your loan may be audited if fraud is suspected.
  - Your lender has the right to make you provide them with the supporting documentation even though the SBA does not require it.

# Required Forms and Supporting Documentation

- What could reduce your PPP forgiveness?
  - Not spending enough money on Payroll Costs and other forgivable costs in the Covered Period
  - Decreasing Full Time Equivalent workers in the Covered Period
  - Decreasing wages to an employee by more than 25%
  - Failing to meet the 60% threshold of the forgivable costs being Payroll Costs
- Forgiveness is Federally tax free.
  - The IRS has not issued guidance as to when the forgiveness is included as tax-free income. Some professionals think that it is includable when all the conditions are met, and others believe it is includable when it is actually forgiven.
- Expenses paid for with PPP funds are tax deductible.
- Tax free forgiveness will not reduce basis.
- Therefore, the tax-free income will increase your Capital in a Partnership, LLC, or S-Corp, which allows you to take out your Capital tax free.
- Eight states have already announced that they will not follow the Federal tax-free treatment.

# Required Forms and Supporting Documentation

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- Other Considerations:
  - Creating the proper documentation trail
    - Without the supporting documentation, the banks will not accept the forgiveness application.
    - We have seen banks arbitrarily adjust the original loan amount requested and reduce the maximum amount of forgiveness available.
      - However, after we spoke to someone at the bank, they allowed additional supporting documentation to be uploaded to support the full amount of the original request.
  - Employee Retention Credit
    - Originally for wages paid after March 12, 2020 and before January 1, 2021, the new Act extended the period to December 31, 2021.
    - Under the new Act, effective January 1, 2021, eligibility was changed from a 50% reduction in receipts to a quarterly 20% reduction calculated for 2021.

# Required Forms and Supporting Documentation

- Credit originally was 50% of wages, up to \$10,000 of wages paid in 2020, for each employee. The new Act increases it to 70% of wages up to \$10,000 per quarter for 2021.
  - \$5,000 for the year ended December 31, 2020.
  - \$7,000 per quarter for 2021 for a total of \$28,000 per employee.
  - This equates to a potential total credit of \$33,000 (\$5,000 for the year ended December 31, 2020 and \$7,000 per quarter for 2021).
- Retroactively allows PPP Borrowers to qualify for the ERC. Under the original rules, Borrowers were excluded from getting the credit.
- Wages paid for with PPP funds do not qualify for the ERC calculation.
- Payroll Costs that are funded with the Proceeds from a PPP loan are not eligible for the ERC calculation.
- **Tip:** You may want to hold off asking for PPP forgiveness until you take full advantage of the Employee Retention Credit.

# Appealing Denial of Your PPP Loan Forgiveness Application

Explaining the Appeal Process at SBA's Office of Hearings & Appeals

# Summary of All PPP-Approved Lending

- Date as of May 31, 2021

<b>Loans Approved</b>	11,823,594
<b>Total Net Dollars</b>	\$799,832,866,520
<b>Total Lenders</b>	5,467

# Summary of All 2021 PPP-Approved Lending

- Date as of May 31, 2021

<b>Loans Approved</b>	6,681,929
<b>Total Net Dollars</b>	\$277,700,108,079
<b>Total Lenders</b>	5,242

# Forgiveness by Loan Count

- Date as of May 24, 2021

<b>Total 2020 PPP Volume</b>	5.2 million
<b>Forgiven</b>	3.3 million
<b>Amount Not Forgiven</b>	-
<b>Under Review</b>	145,000
<b>Applications Not Yet Received</b>	1.7 million

# Forgiveness by Dollar Amount

- Date as of May 24, 2021

<b>Total 2020 PPP Volume</b>	\$521.2 billion
<b>Forgiven</b>	\$279.4 billion
<b>Amount Not Forgiven</b>	\$1.0 billion
<b>Under Review</b>	\$81.5 billion
<b>Applications Not Yet Received</b>	\$159.1 billion

# What Is the Timeline?

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- A borrower may submit a loan forgiveness application **any time on or before the maturity date of the loan**—including **before the end of the covered period**—if the borrower has used all of the loan proceeds for which the borrower is requesting forgiveness.
- The lender has **60 days** from receipt of a complete loan forgiveness application to issue a decision.
  - Options are: 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.
- SBA has **90 days** after the lender issues its decision to review the application and issue its decision.
- Borrowers can also request a separate SBA review of a lender's decision to deny loan forgiveness.

# SBA Began Accepting Loan Forgiveness Applications 8/10/20

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- Borrower may submit a loan forgiveness application **any time on or before the maturity date of the loan**—including **before the end of the covered period**—if borrower has used all of the loan proceeds for which the borrower is requesting forgiveness.
- Borrower submits Loan Forgiveness Application directly to Lender – or Lender servicing its loan (need not be same Lender), not directly to SBA.
- Lender has 60 days after receipt of a Borrower’s Loan Forgiveness Application to submit a decision on it to SBA as follows:
  - Approved in Full
  - Approved in Part
  - Denied
  - Denied with Prejudice
- Borrower deemed ineligible for claimed forgiveness amount may appeal.

# Governing Law

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- The PPP was originally established in the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”) passed on March 27, 2020 and extended by the Economic Aid Act to Hard-Hit Small Businesses, Nonprofits and Venues Act (“Economic Aid Act”) on December 27, 2020.
- The Interim Final Rule on Loan Forgiveness Requirements and Loan Review Procedures, which was originally published on 8/10/20, was amended by the Economic Aid Act on February 5, 2021.

# Governing Regulations

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- On 8/12/20, SBA issued an Interim Final Rule establishing the process by which borrowers may appeal decisions relating to PPP.
- The new Rule supplemented SBA's previous 5/22/20 Interim Final Rule on loan review procedures.
- SBA's 8/12/20 Interim Final Rule added a new subpart to part 134 of Title 13 of the Code of Federal Regulations, which governs adjudications before the SBA's Office of Hearings and Appeals (OHA).
- The new subpart is Subpart L – Rules of Practice for Appeals of Certain SBA Loan Review Decisions under the Paycheck Protection Program.

# Loan Forgiveness Appeal Process

- Within 30 calendar days after borrower receives final SBA loan review decision (which it may learn from lender), borrower has right to appeal if SBA finds that borrower:
  - was ineligible for a PPP loan;
  - was ineligible for PPP loan amount received or used PPP loan proceeds for unauthorized uses;
  - is ineligible for PPP loan forgiveness in amount determined by lender in its full or partial approval decision issued to SBA; and/or
  - is ineligible for PPP loan forgiveness in any amount when lender has issued a full denial decision to SBA

# Loan Forgiveness Appeal Process

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- Lender Decision to Deny Forgiveness in Full

If Lender issues to SBA a decision denying Borrower's loan forgiveness application in full, Lender must notify Borrower of decision within 5 business days and include reasons that Lender concluded that Borrower is not entitled to loan forgiveness in any amount. Lender must also inform Borrower that Borrower has 30 calendar days from receipt of notification to seek, through Lender, SBA review of Lender's decision.

Lenders that receive from Borrowers requests for SBA review of full denial of forgiveness decisions must submit those requests to SBA through the SBA Paycheck Protection Platform within 5 business days of receipt. SBA will accept or decline in its sole discretion Borrower requests for review of Lender forgiveness full denial decisions. SBA will notify Lender if SBA decides to review Lender's decision or if SBA declines such request.

# Loan Forgiveness Appeal Process

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- The appeal must be timely filed with SBA's Office of Hearings and Appeals (referred to as “OHA”).
- Borrowers may represent themselves pro se before OHA or may be represented by outside counsel.
- The standard of review by OHA for PPP loan appeals is “whether the SBA loan review decision was based on clear error of fact or law” and appellant has the burden of proof by a “preponderance of the evidence.”

# Loan Forgiveness Appeal Process

- Time limits and contents
  - The Judge will issue his or her decision within 45 calendar days after the close of record, as practicable. The decision will contain findings of fact and conclusions of law, the reasons for such findings and conclusions, and any relief ordered. The decision will be served on each party.

# Loan Forgiveness Appeal Process

- Initial decision
  - The Judge's decision on the appeal is an initial decision. However, unless a request for review is filed pursuant to §134.228(a) or a request for reconsideration is filed pursuant to paragraph (c) of this section, an initial decision shall become the final decision of SBA 30 calendar days after its service. The final OHA decision creates precedent only for appeals involving the PPP. Any OHA decision pursuant to this subpart L applies only to the PPP and does not apply to SBA's 7(a) Loan Program generally or to any interpretation or application of the regulations in part 120 or part 121 of this title.

# Loan Forgiveness Appeal Process

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- Reconsideration
  - An initial decision of the Judge may be reconsidered. Either SBA or the appellant may request reconsideration by filing with the Judge and serving a petition for reconsideration within 10 calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative within 20 calendar days after service of the written decision.

# Loan Forgiveness Appeal Process

- Request for review
  - Within 30 calendar days after the service of an initial decision or a reconsidered initial decision of a Judge, any party or SBA's Office of General Counsel may file and service a request for review by the Administrator pursuant to §134.228(a). In order for a borrower to exhaust its administrative remedies and preserve its right to seek judicial review of an SBA final decision in a federal district court, a borrower that disputes an initial decision or reconsidered initial decision must file and serve a request for review of the initial decision or reconsidered initial decision by the Administrator pursuant to §134.228(a). If a request for review is filed pursuant to §134.228(a), the provisions in §134.228(a) will apply.

# Loan Forgiveness Appeal Process

- OHA may affirm, reverse, or remand an SBA loan review decision. If remanded, OHA no longer has jurisdiction over the matter unless a new appeal is filed as a result of a new SBA loan review decision.

# Loan Forgiveness Appeal Process

- §134.1215 Equal Access to Justice Act (EAJA), 5 U.S.C. 504
  - A prevailing appellant is not entitled to recover attorney's fees. Appeals to OHA from SBA loan review decisions under the PPP are not proceedings that are required to be conducted by an Administrative Law Judge under §134.603.
- §134.1216 Exhaustion of administrative remedies
  - An appeal to OHA and request for review by the Administrator of a disputed initial decision or reconsidered initial decision are administrative remedies that must be exhausted before judicial review of an SBA loan review decision may be brought in a federal district court.

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**Questions?**

# Thank you

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