

**Critical Considerations Before Requesting
PPP Loan Forgiveness:
Lack of Eligibility, False Claim Issues, and
When to Apply for Forgiveness**

Presented By

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Mike litigates out of the firm's Tampa office where his litigation practice focuses on business, employment, construction, real estate, securities, shareholder disputes, and creditor rights. Mike has developed a particular aptitude for litigating complex federal and state statutes, and has a reputation for devising unique strategies to handle unusual factual and legal situations. Mike handles litigation matters throughout Florida's state and federal courts, and has experience litigating cases throughout the United States.

Originally from New York, Mike moved to Florida in 2010 to clerk with now-Chief United States District Judge Steven D. Merryday. He lives in Southeast Hillsborough County with his wife, Hope, and their two sons, Michael and Ross. Mike represents District 57 (Southeast Hillsborough County) in the Florida House of Representatives and has gained a unique understanding of the law and government process. Mike also serves on the Judicial Nominating Commission for Florida's 13th Circuit, which recommends Judicial applicants to Florida's Governor for nomination to the Circuit and County Courts in Hillsborough County.

Admissions

- Florida
- New York
- United States District Court for the Middle District of Florida
- United States District Court for the Southern District of Florida
- United States District Court for the Southern District of New York
- United States District Court for the Eastern District of New York
- U.S. Court of Appeals for the Eleventh Circuit

Education

- Harvard Law School, J.D. (2008)
- B.A., University of Pennsylvania, Magna Cum Laude, with honors in International Relations (2005)

Statutory Provisions

- 15 U.S.C. § 636(a)(1)(A)(36) - PAYCHECK PROTECTION PROGRAM (“PPP”), Created in Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) on March 27, 2020 and Modified in Paycheck Protection Program Flexibility Act (“PPPFA”) on June 5, 2020.
- 15 U.S.C. § 9005 - LOAN FORGIVENESS (SPECIFIC TO PPP), created in CARES ACT and also modified in PPPFA.
- 31 U.S.C. § 3729 et seq. – FALSE CLAIMS ACT, longstanding federal criminal and civil statute covering fraud and false claims against the government. Initially passed during the Civil War and updated since. Formerly known as the “Lincoln Law.”

Contents of Presentation



- Overview of PPP
- Employee retention and pay requirements
- Certification and regulatory clarification
- Government review
- False Claims Act
- Forgiveness process
- Litigation issues
- FOIA Confidentiality

Items to Keep in Mind

- Remember that loan eligibility is key to forgiveness. Only eligible borrowers may obtain forgiveness.
- The PPP's waiver of a personal guarantee and nonrecourse provision only applies to eligible recipients.
- Permissible uses of loans and uses that may be credited toward forgiveness are different.
- Very few businesses would have borrowed this money, and gone through the underwriting process, unless they expected the loan to be forgivable.

Overview of PPP

- Businesses with 500 or fewer employees are eligible for the “Paycheck Protection Program” (“PPP”). PPP loans provide up to (1) 2.5 months of payroll or (2) \$10 million, whichever is less. Businesses may use PPP proceeds toward payroll, health insurance, mortgage interest, rent, utility payments, and other debt service on debt incurred before February 15, 2020.
- PPP loans are forgiven to the extent they are actually used for covered purposes during the period after the origination of the loan. (Note: Permissible uses are different from covered costs that will be credited toward forgiveness. For example, other debt service is not a covered cost that may be credited toward forgiveness.)
- If an employer uses the loan proceeds for other purposes, fires employees, or substantially reduces their salaries, then it loses the benefit of loan forgiveness to the extent the proceeds were not used for eligible purposes.

Overview of PPP

(cont.)

- In its website section on the program, under Loan Details and Forgiveness, the US Small Business Administration (SBA) states:

The loan will be fully forgiven if the funds are used for payroll costs, interest on mortgages, rent, and utilities (due to likely high subscription, at least 75% [now 60%] of the forgiven amount must have been used for payroll). Loan payments will also be deferred for six months. No collateral or personal guarantees are required. Neither the government nor lenders will charge small businesses any fees. Forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels. Forgiveness will be reduced if full-time headcount declines, or if salaries and wages decrease.

Overview of PPP

(cont.)

- Unlike most typical SBA loans, the PPP Loans are unsecured loans requiring no collateral, no personal guarantee, and no showing that credit is unavailable elsewhere.
- Underwriting is based simply on whether the borrower was in operation on March 1, 2020, and had employees for whom the borrower paid salaries and payroll taxes.

Selected Restrictions

- Only employees who are United States residents may be counted in the payroll calculations of the PPP.
- Independent contractors are independently eligible for the forgivable loans, and they should not be included in calculating an employer's loan.
- Payroll costs exclude amounts over \$100,000 a year for any employee, prorated for the covered period. 15 U.S.C. § 636(a)(36)(A)(viii).
- Businesses may not count sick and family leave paid pursuant to the FFCRA for which the business receives a tax credit. 15 U.S.C. § 636(a)(36)(A)(viii)(II).
- The Department of Treasury has clarified that businesses may not deduct any expenses which are used to obtain loan forgiveness under the Paycheck Protection Program. Forgiveness is not taxable per 15 U.S.C. § 9005(i). This Treasury rule prevents a double tax benefit.



Restrictions on Dismissal / Reduction in Salary of Employees

- The amount of loan forgiveness is reduced by multiplying the average number of full-time employees during the covered period by the average number of employees during the reference period.
- Borrower has option (in statute) of reference periods:
 - February 15, 2019 to June 30, 2019, or
 - January 1, 2020 to February 29, 2020.
- Borrower has option (in regulations) in calculating part-time employees:
 - Either divide number of hours worked by part time employees by 40 to arrive at FTE equivalent, or
 - Count each part time employee working under 40 hours per week as .5 FTE.
 - Must use one method for all employees.

Highly Paid Employees Excluded from Salary Protection

15 U.S. Code § 9005(d)

...

(3) REDUCTION RELATING TO SALARY AND WAGES

(A) In general

The amount of loan forgiveness under this section shall be reduced by the amount of any reduction in total salary or wages of any *employee described in subparagraph (B)* during the [covered period](#) that is in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the [covered period](#).

(B) Employees described

An employee described in this subparagraph is any employee who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000.

Highly Paid Employees Excluded from Salary Protection (cont.)

- Reduction of pay by more than 25% for employees paid under \$100,000 of prorated annual pay results in a reduction of loan forgiveness for the employer equivalent to the amount of the reduction.
- Employees earning more than \$100,000 are not protected from salary reductions through a reduction in the employer's loan forgiveness.
- Drafting oversight? For any employee who you pay \$100,000.01 or more, you can reduce their salary as much as you want (even below \$75,000, but subject to the FLSA) as long as you use at least 60% of the loan on payroll. There is no statutory backstop to stop employers from severely reducing highly paid employees compensation. Don't really do this. The loophole may be fixed by regulation or legislation.

Changes under the PPPFA

- The PPPFA reduces the amount of the loan that needs to be spent on payroll from 75% to 60%, and therefore increases the amount of funds available for other uses (such as rent) from 25% to 40%.
- Regulatory guidance indicates that the 60% requirement is not a cliff. Borrowers may still obtain forgiveness if they spend less than 60% on payroll, but forgiveness will be limited such that 60% of the forgiveness amount has been spent on payroll.
- Some businesses' rent exceeds 25% of their overhead, and rent is not normally abated even when revenues or activity decline. This change assists businesses with high rent or other eligible fixed costs.
- The PPPFA also extends the time businesses have to use PPP funds from eight weeks to 24 weeks after disbursement of the loan. H.R. 7070 at § 3(b). The PPPFA also extends the time for businesses to repay their PPP loans. *Id.* at §3(c).
- These changes provide businesses with significant additional flexibility in using PPP funds while still maintaining eligibility for forgiveness.
- The PPPFA and recent regulations also provide flexibility in businesses' employment practices. The PPPFA extends the deadline to rehire workers to December 31, 2020.
- The PPPFA further allows business owners to avoid this requirement (and the resulting loss of loan forgiveness) if they show that they could not rehire workers or reopen.
- The PPPFA eliminates a previous loss of eligibility to defer payroll taxes on account of Coronavirus for PPP participants.

Certification

- The PPP requires a business to certify “that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient . . .” 15 U.S.C. § 636(a)(36)(G)(i)(I).
- Very subjective certification. Likely to be the subject of litigation.
- The subsection providing deferment for impacted borrowers presumes that any eligible borrower is impacted by Coronavirus. 15 U.S.C. § 636(a)(36)(M)(i).
- Elsewhere in the CARES Act, furthermore, Congress states that “It is the sense of Congress that—(1) all borrowers are adversely affected by COVID–19 [and that] relief payments by the Administration are appropriate for all borrowers . . .” CARES Act Section 1112(b).
- The certification is under penalty of false statement and the civil and criminal provisions of the False Claims Act, as detailed below.

Regulatory Guidance on the Certification

- After controversies arose from PPP loans to large companies such as Ruth's Chris Steak House, the Treasury issued the following guidance:

For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

FAQ #31. (Appears to contradict the statutory waiver of the credit not available elsewhere requirement.)

- Large companies should be wary of requesting PPP loans or forgiveness.
- Further, the FAQ now suggests that “private companies with adequate sources of liquidity to support the business’s ongoing operations” may not qualify for a PPP loan. FAQ #37.
- Thus, companies that are held by larger companies or private equity groups, or businesses that are otherwise well capitalized, may be deemed ineligible for PPP loans (or forgiveness).

Regulatory Guidance on the Certification

(cont.)

- Lastly, the Government has now announced an intent to determine eligibility for purposes of loan forgiveness based upon the statutory and regulatory provisions in place at the time of the borrower's loan application. 85 Fed. Reg. 33004, 33006 (to be codified at 13 C.F.R. Pt. 120).
- BUT, the Government continuously extended an "amnesty" period for companies to return PPP loans based upon new guidance.
- Given the Government's intent to apply the law existing at the time of the loan application to the forgiveness analysis, the Government would seem to have no reason to continuously extend an amnesty period as it rolls out new guidance.

Uncertainty Regarding Government's Intent

- First, the CARES Act removes the “credit not available elsewhere” requirement and allows borrowers to obtain PPP loans regardless of whether they have other sources of credit.
- Second, the Government issues guidance that suggests that publicly traded or private equity company holdings are not eligible for PPP loans because they can access the capital markets.
- Third, the Government announces an amnesty designed to encourage borrowers to return their loans based upon purported clarifications of the CARES Act by the SBA and Treasury. See e.g. FAQ # 47.
- Lastly, the Government announces that in reviewing forgiveness, it will apply the statutory and regulatory provision in place at the time of application. 85 Fed. Reg. 33006.
- Government itself appears confused about which standards will be applied by which agencies to which borrowers. This undermines the purposes of the CARES Act by creating additional regulatory uncertainty on top of the economic uncertainty that triggered the need for the PPP loans in the first place.

Government will Target Borrowers, Not Lenders

- The fundamental problem with the PPP is that no underwriting is conducted before the loan is approved, disbursed, and spent, to definitively determine that a borrower is eligible for the loan and also for forgiveness.
- The PPP provides no incentive for lenders to engage in any due diligence, other than reviewing the borrower's documents for sufficiency on their face. Instead, in an effort to ensure rapid distribution of PPP loans, the CARES Act effectively immunizes lenders from liability for underwriting if they have received documentation that appears, on its face, to comply. In other words, the lenders are not responsible for verifying the representations of the borrowers.
- Government guidance states that:

The outcome of SBA's review of loan files will not affect SBA's guarantee of any loan for which the lender complied with the lender obligations set forth in paragraphs III.3.b(i)-(iii) of the Paycheck Protection Program Rule (April 2, 2020) and further explained in FAQ #1.
- FAQ #39. In other words, the lender guarantee will remain and the risk of nonpayment will not be shifted to the lender, even if the loan is later determined to be improper.
- Rather, the Government will refuse to allow forgiveness and may even seek aggressive recoupment from the borrower and its principals.

Government's Targeting Priorities

- Recent regulatory guidance indicates that publicly traded companies, private equity-backed companies, companies that have profited from Coronavirus, and companies that received large loans (over \$2 million), are likely to be scrutinized by the Government if they apply for forgiveness of PPP loans.
- Businesses with demonstrable misstatements on their applications for loans or forgiveness, such as inflated payrolls or headcounts, or misrepresentations regarding eligibility or the use of the funds, will be obvious targets as well.
- Although the PPP was passed with very broad eligibility standards, the guidance issued by the Government has substantially narrowed the field of eligible borrowers. As such, the Government has now indicated that loans to particular types of businesses will be heavily scrutinized.

Government Reviewing Loans over \$2 million

The Government has indicated 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.” [Frequently Asked Questions \(FAQ\) #39](#). The Government further explains the rationale for scrutinizing loans over \$2 million:

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

FAQ #46.

Government Will Deny Forgiveness if the Borrower Lacks Adequate Basis for the Certification

Further, the Government explains the consequences of failing to meet its (apparently subjective) eligibility requirements:

Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. *If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.*

FAQ #46 (emphasis supplied).

Amnesty and Mitigating Exposure

- This guidance provides an additional amnesty (in addition to the amnesty for borrowers who returned their loans after promulgation of eligibility criteria under the CARES Act) from administrative enforcement or referrals “[i]f the borrower repays the loan after receiving notification from the SBA.” FAQ #46. However, this guidance also suggests that the SBA intends to pursue civil and criminal penalties to companies based upon the highly subjective good faith certification if they do not repay the loan.
- Even companies that have missed the previously extended amnesty period can mitigate exposure by simply repaying the loan without seeking forgiveness. (Note that Government review will follow submission of a forgiveness application.)

False Claims Act

- The Federal False Claims Act (“FCA”) governs filings (such as a PPP application) that are designed to obtain funds from the federal government.
- The FCA provides for criminal penalties, including incarceration and fines, as well as civil (including whistleblower) actions where liability is three times the amount obtained, plus attorney fees and civil penalties.
- Government has announced its intention to aggressively police the PPP.
- Borrowers must also be concerned about disgruntled employees, executives, and even customers and investors who might learn about the company’s loan and file a whistleblower claim regarding any impropriety.
- At least some information is likely to be available in the public domain (FOIA considerations below).
- Whistleblowers may combine inside knowledge with documents obtained from other sources to pursue a *qui tam*.
- Whistleblowers are entitled to a portion of any recovery pursuant to the FCA and are well-incentivized to report improper claims.

False Claims Act

(cont.)

- Even if the request for a loan does not in itself constitute an FCA “claim” the risk of an FCA claim from a PPP loan is likely higher than under a conventional SBA loan. Most SBA loans, even if fraudulent, do not necessarily result in FCA liability, much less discovery and litigation, because such loans are usually repaid and the government guarantee is not invoked. *See e.g. United States v. McNinch*, 356 U.S. 595 (1958).
- An FCA case arises from a conventional SBA loan only upon a default, when the lender files a claim with the government for reimbursement pursuant to the guarantee. If the loan did not conform to the requirements of the program, and the lender claims reimbursement, the lender is subject to FCA liability.
- However, in the case of forgivable loans under the CARES Act, it is clearly contemplated that the loan will be forgiven if the employer maintains its workforce throughout the covered period. (This is the purpose of the program.)
- Unlike the traditional SBA financing situation, where a borrower receives a loan from a bank, which is guaranteed by the SBA, and which is expected to be repaid by the borrower in full with interest to the bank, under the CARES Act, it is virtually certain that the “guarantee” will be invoked and that the government will repay the bank for the funds loaned to the borrower.
- Every loan under the CARES Act is therefore expected to result in a “claim” against the United States government.

False Claims Act (cont.)

The simple act of requesting a PPP loan falls within the definition of a claim under the FCA, which states that:

the term “claim”-

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that-

(i) is presented to an officer, employee, or agent of the United States; or

(ii) *is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government—*

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) *will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; . . .*

31 U.S.C. § 3729(b)(2). A PPP application falls within the definition of a “claim” under the FCA because it is a “request . . . for money . . . that is made to a . . . recipient . . . to advance a Government program . . . and . . . the United States Government . . . will reimburse . . . [the] recipient for any portion of the money or property which is requested or demanded.” *Id.*

False Claims Act

(cont.)

- Caselaw recognizes borrower liability for SBA-backed loans when a lender seeks payment from the government. *United States v. Van Oosterhout*, 96 F. 3d 1491 (D.C. Cir. 1996) (noting that even an innocent third-party lender can effectuate a “claim” against the government when the lender demands payment from the government when a guaranteed loan defaults.)
- A forgiven PPP loan is the same as a conventional SBA loan when the borrower defaults and the lender claims under the government guarantee. CARES Act Section 1106(c). Because a “claim” for forgiveness of a PPP loan is likely unless the borrower fires employees or misuses the money and loses eligibility, potential borrower FCA liability for fraud under the PPP is much higher than with an ordinary SBA loan.

Avoiding Liability

- Do not refer to the loan as “free money”.
- Ensure that representations regarding their payroll cost, number of employees, and responses to any questions, inquiries, or audits are completely accurate.
- Ensure that representations in connection with PPP loans are consistent with other public and private communications and documents, including social media posts, press releases, marketing materials, financial statements, tax returns, customer and investor communications, and the like.
- Companies requesting and receiving a forgivable loan should adopt an “austerity policy” during the time period applicable to the subsidy.
- Avoid even the appearance that loan monies are being used for bonuses, perks, travel, parties, new capital improvements, etc.
- Simply repay the loan without seeking forgiveness.



Forgiveness

- Loans under the PPP are eligible for forgiveness if employers maintain headcount and salaries and they use the money for eligible expenses, including payroll, rent, and utilities. CARES Act Section 1106(b).
- Amounts forgiven are treated as a normal SBA-guaranteed loan that is defaulted in that they are purchased by the SBA and the lender is thereby repaid. Section 1106(c).
- Under the PPP, the SBA guarantees and pays principal and interest in the event of forgiveness. 1106(c).

Forgiveness

(cont.)

- Under the PPP, the borrower submits the forgiveness application to the lender, and not the SBA. 1106(e).
- The lender then determines whether the loan is forgivable based only upon supporting documentation and borrower certification. 1106(f)-(h).
- The lender benefits from a “safe harbor” provision that allows a lender receiving and reviewing all required documentation to rely upon such documentation in determining loan forgiveness without fear of later penalties or enforcement action by the SBA. 1106(h).
- Under the PPP, the SBA has no clear textual role in this process, other than to pay the amount of forgiveness to the lender.
- However, both the statute and the Interim Rule promulgated thereunder imply SBA review of lender determinations. Section 1106(e)(4) (calling for “any other documentation the Administrator determines necessary”); SBA Business Loan Program Temporary Changes; Paycheck Protection Program, Interim Final Rule, Docket No. SBA-2020-0015, 13 CFR Part 120, III(4)(e) (referring, in the context of the advance purchase provision, to a requirement of “and any additional information the Administrator may require to determine whether the expected forgiveness amount is reasonable.”)

When to Apply for Forgiveness?

- Borrowers may apply for forgiveness any time before the maturity of loan, including before the end of the covered period, if the borrower has already spent the loan proceeds for which the borrower seeks forgiveness.
- 15 U.S.C. § 636(a)(36)(K) (amended by the PPPFA) sets the minimum maturity at 5 years. (Previously 2 years under the CARES Act). Borrowers and lenders may agree to extend previously issued PPP loans to 5 years. *Id.*
- Borrowers who borrowed before June 5 may use either the 8-week or the 24-week covered period.
- Why apply early? Get the loan off your books and obtain comfort on forgiveness.
- Don't apply early if you've reduced employees. You have until December 31, 2020 to add them back and you could lose forgiveness eligibility if you apply for forgiveness before replacing employees.
- If you have reduced wages in excess of 25%, then the borrower must account for the excess salary reduction for the full covered period.
- If you apply for forgiveness, a denial of forgiveness could trigger your obligation to begin repaying the PPP loan.
- If you have not applied for forgiveness within 10 months after the last day of the covered period (or you are determined to not be eligible for forgiveness), then the loan is no longer deferred and the borrower must begin repaying the loan.

Application for Forgiveness

(e)Application An eligible recipient seeking loan forgiveness under this section shall submit to the lender that is servicing the covered loan an application, which shall include—

(1)documentation verifying the number of full-time equivalent employees on payroll and pay rates for the periods described in subsection (d), including—

(A)payroll tax filings reported to the Internal Revenue Service; and

(B)State income, payroll, and unemployment insurance filings;

(2)documentation, including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments;

(3)a certification from a representative of the eligible recipient authorized to make such certifications that—

(A)the documentation presented is true and correct; and

(B)the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments; and

(4)any other documentation the Administrator determines necessary.

Paycheck Protection Program
Loan Forgiveness Application Revised June 16, 2020

OMB Control Number 3245-0407
Expiration Date: 10/31/2020

PPP Loan Forgiveness Calculation Form

Business Legal Name ("Borrower")		DBA or Tradename, if applicable	
Business Address		Business TIN (EIN, SSN)	Business Phone
		Primary Contact	E-mail Address

SBA PPP Loan Number: _____ Lender PPP Loan Number: _____

PPP Loan Amount: _____ PPP Loan Disbursement Date: _____

Employees at Time of Loan Application: _____ Employees at Time of Forgiveness Application: _____

EIDL Advance Amount: _____ EIDL Application Number: _____

Payroll Schedule: The frequency with which payroll is paid to employees is:

Weekly Biweekly (every other week) Twice a month Monthly Other _____

Covered Period: _____ to _____

Alternative Payroll Covered Period, if applicable: _____ to _____

If Borrower (together with affiliates, if applicable) received PPP loan in excess of \$2 million, check here:

Forgiveness Amount Calculation:

Payroll and Nonpayroll Costs

Line 1. Payroll Costs (enter the amount from PPP Schedule A, line 10): _____

Line 2. Business Mortgage Interest Payments: _____

Line 3. Business Rent or Lease Payments: _____

Line 4. Business Utility Payments: _____

Adjustments for Full-Time Equivalency (FTE) and Salary/Hourly Wage Reductions

Line 5. Total Salary/Hourly Wage Reduction (enter the amount from PPP Schedule A, line 3): _____

Line 6. Add the amounts on lines 1, 2, 3, and 4, then subtract the amount entered in line 5: _____

Line 7. FTE Reduction Quotient (enter the number from PPP Schedule A, line 13): _____

Potential Forgiveness Amounts

Line 8. Modified Total (multiply line 6 by line 7): _____

Line 9. PPP Loan Amount: _____

Line 10. Payroll Cost 60% Requirement (divide line 1 by 0.60): _____

Forgiveness Amount

Line 11. Forgiveness Amount (enter the smallest of lines 8, 9, and 10): _____

SBA Form 3508 (06/20)
Page 1

Paycheck Protection Program
Loan Forgiveness Application Revised June 16, 2020

OMB Control Number 3245-0407
Expiration Date: 10/31/2020

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 dollar amount for which forgiveness is requested:

- 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 all applicable reductions due to decreases in the number of full-time equivalent employees and salary/hourly wage reductions;
- 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.

I understand that if the funds were knowingly used for unauthorized purposes, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges.

The Borrower has accurately verified the payments for the eligible payroll and nonpayroll costs for which the Borrower is requesting forgiveness.

I have submitted to the Lender the required documentation verifying payroll costs, the existence of obligations and service (as applicable) prior to February 15, 2020, and eligible business mortgage interest payments, business rent or lease payments, and business utility payments.

The information provided in this application and the information provided in all supporting documents and forms 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.

The tax documents I have submitted to the Lender are consistent with those the Borrower has submitted/will submit to the IRS and/or state tax or workforce agency. I also understand, acknowledge, and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of ensuring compliance with PPP requirements and all SBA reviews.

I understand, acknowledge, and agree that SBA may request additional information for the purposes of evaluating the Borrower's eligibility for the PPP loan and for loan forgiveness, and that the Borrower's failure to provide information requested by SBA may result in a determination that the Borrower was ineligible for the PPP loan or a denial of the Borrower's loan forgiveness application.

If the Borrower has checked the box for FTE Reduction Safe Harbor 1 on PPP Schedule A, the Borrower was unable to operate between February 15, 2020 and the end of the Covered Period at the same level of business activity as before February 15, 2020 due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020, by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.

The Borrower's eligibility for loan forgiveness will be evaluated in accordance with the PPP regulations and guidance issued by SBA through the date of this application. SBA may direct a lender to disapprove the Borrower's loan forgiveness application if SBA determines that the Borrower was ineligible for the PPP loan.

Signature of Authorized Representative of Borrower _____ Date _____

_____ Title _____

SBA Form 3508 (06/20)
Page 2

Key Items on Forgiveness Application (Page 1)

- Must indicate if you received more than \$2 million (Government intends to flag these loans for scrutiny.)
- Forgiveness amount is calculated as the lowest of:
 - Eligible costs multiplied by the FTE Reduction quotient (reduction for terminating employees).
 - The PPP loan amount (forgiveness cannot exceed amount of the loan).
 - The Payroll cost divided by .6 (the proportion that needed to be spent on payroll). Ex: \$100k loan, spent \$60k on payroll and \$40k on other eligible expenses. Divide the \$60k payroll costs by .6 = \$100k forgiveness eligibility.

Required Certifications (Selection) (Page 2)

- Attest to the accuracy of the information submitted, compliance with program requirements, and documentation.
- “I understand that if the funds were knowingly used for unauthorized purposes, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges.”
- “The information provided in this application and the information provided in all supporting documents and forms is true and correct in all material respects. [Listing criminal penalties.]”
- The tax documents I have submitted to the Lender are consistent with those the Borrower has submitted/will submit to the IRS and/or state tax or workforce agency. I also understand, acknowledge, and agree that the Lender can share the tax information with SBA’s authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of ensuring compliance with PPP requirements and all SBA reviews.
- “I understand, acknowledge, and agree that SBA may request additional information for the purposes of evaluating the Borrower’s eligibility for the PPP loan and for loan forgiveness, *and that the Borrower’s failure to provide information requested by SBA may result in a determination that the Borrower was ineligible for the PPP loan or a denial of the Borrower’s loan forgiveness application.*” (emphasis supplied)
- “SBA may direct a lender to disapprove the Borrower’s loan forgiveness application if SBA determines that the Borrower was ineligible for the PPP loan.”

Regulatory Provisions Governing Forgiveness Standards and Review Procedures

- On June 1, 2020, after roughly two months of operating the PPP, the SBA finally promulgated both: (1) Forgiveness Requirements and (2) Review Procedures. PPP Loan Forgiveness Requirements, 85 Fed. Reg. 33004 (to be codified at 13 C.F.R. Pt. 120) ("[Forgiveness Requirements](#)"); Paycheck Protection Program-SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010 (to be codified at 13 C.F.R. Pt. 120) ("[Review Procedures](#)").
- The Rules are effective immediately, despite a two-month delay in their promulgation. Both Rules contain identical language noting that “[a]n immediate effective date also is necessary for PPP lenders who generally will make the loan forgiveness determinations as provided in the CARES Act.” Forgiveness Requirements at 33005, Review Procedures at 33011.

Regulatory Provisions Governing Forgiveness Standards and Review Procedures (cont.)

- The Forgiveness Requirements provide that the borrower must submit a Loan Forgiveness Application (“LFA”) to the lender, which is in turn reviewed by the lender for a decision on loan forgiveness. *Id.* at 33005.
- The lender has 60 days from receipt of the LFA to issue a decision on loan forgiveness to the SBA. *Id.*
- If the lender denies the loan forgiveness application, the borrower may request review by the SBA. Review Procedures at 33013.
- The lender must request payment from the SBA at the time it issues its decision to the SBA. Forgiveness Requirements, *id.* at 33005.

Regulatory Provisions Governing Forgiveness Standards and Review Procedures (cont.)

- The SBA must review the loan and loan application and then pay the lender the forgiveness amount within 90 days. *Id.* at 33005.
- Thus, the forgiveness process can take up to 5 months to complete. *Id.*
- The PPPFA extends deferment of any payments on a PPP loan until the time that any forgiveness payment is remitted to the lender. Section 3(c), to be codified at 15 U.S.C. § 636(a)(36)(M)(ii)(II).

Forgiveness Review Includes Initial Eligibility!

- **WARNING:** SBA reviews not only the claimed amount of the forgiveness, but also the borrower's initial eligibility for the PPP loan. Review Procedures at 33011-012.
- The CARES Act's nonrecourse provision, 15 U.S.C. § 636(a)(36)(F)(v), "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." Review Procedures at 33012-013.
- If the SBA determines that the borrower was ineligible for the loan or that the borrower lacked an adequate basis for its certification of necessity at the time it received the loan, then the loan will not be eligible for forgiveness. *Id.* at 33005.
- Furthermore, the borrower's principals also lose any protections against recourse by the Government.
- Although disputes over whether particular expenses give rise to loan forgiveness are likely, the most critical issue is whether a borrower was eligible for the PPP loan at the time it applied.
- An adverse ruling on loan eligibility could have ruinous consequences for a borrower who has already spent funds and structured its affairs in erroneous reliance on the PPP forgiveness provision.

Appeal of Adverse Determinations

- If a borrower wishes to appeal the SBA's determination that the borrower is ineligible for a PPP loan or the loan forgiveness amount claimed, then the borrower may further appeal that decision.
- The Review Procedures announce that the SBA will issue a "separate interim final rule addressing this [further] appeal process." *Id.* at 33013.
- Loan forgiveness may be reviewed under a standard deferential to the initial determination, whether in a further agency process or in court.

Litigation under the PPP

- Presumption against civil right of action absent express Congressional enactment applies to SBA loans in general and PPP program in particular.
- *Profiles v. Bank of America*, 20-0894, 2020 WL 1849710 (D. Md. April 13, 2020), holds that a prospective borrower does not have a cause of action against a bank for refusing to accept or process its application based upon the bank's own criteria for accepting and processing Paycheck Protection Program applications.
- *Profiles* deals with origination, not payment, collection, recoupment, or forgiveness. Because the SBA contemplates a cause of action for collection, the PPP must at least contemplate an affirmative defense of loan forgiveness.
- Most litigation under the PPP is likely to arise on the back end, in the form of litigation over forgiveness eligibility or under the False Claims Act.

Litigating Forgiveness Claims under the PPP

- The SBA may pressure the lender to refuse to treat a loan as forgivable (or may itself determine that the loan is not forgivable). The PPP creates no explicit statutory right of action or process for the borrower to contest this determination.
- However, borrowers have litigated the forgivability of loans under other emergency SBA programs without any party questioning the procedural right to do so. *See e.g. Pottharst v. Small Business Administration*, 329 F.Supp. 1142 (E.D. La. 1971) (allowing forgiveness of loan due to property damage that could have been insured but was not insured due to the borrower's neglect). When litigating other loan forgiveness programs, such as student loan forgiveness, courts have also reviewed such claims on the merits without suggesting that they suffer from any procedural infirmity. *See e.g. Chavez-Romero v. DoE*, 6:11-1639-MGL (D.S.C. Nov. 28, 2012) (discussing pro se claim on the merits without discussing cause of action); and *Drake v. DoE*, 3:14CV30 DPJ-FKB (S.D. Miss. Feb. 17 2015) (suggesting that a borrower might contest forgivability under the Administrative Procedures Act after an administrative garnishment proceeding by attacking the agency action as arbitrary and capricious.)
- Borrower could litigate forgiveness determination via a declaratory judgment, as a defense to a collection action, or under the Administrative Procedures Act.

FOIA Considerations

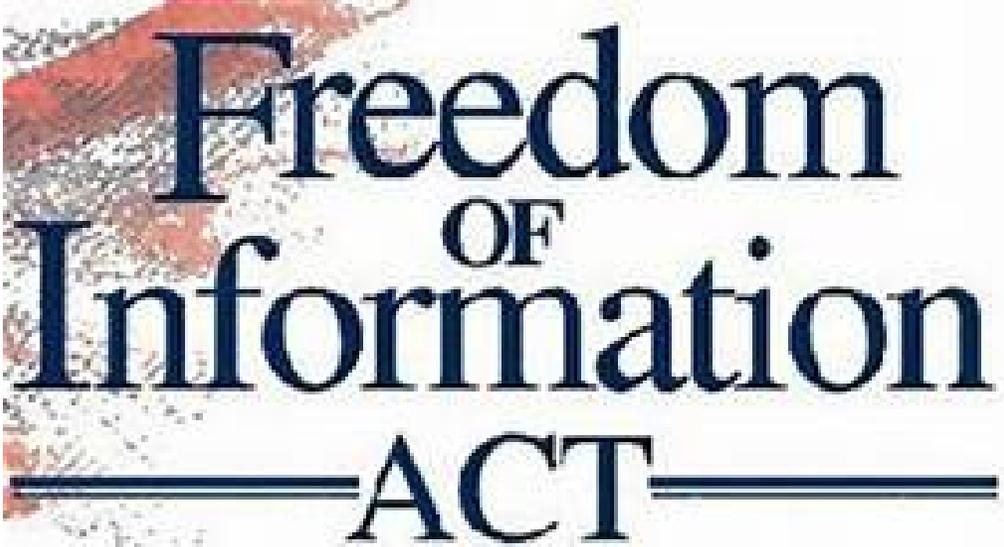
- A consortium of newspapers filed a lawsuit against the SBA seeking information on Paycheck Protection Program (“PPP”) loans under the Freedom of Information Act (“FOIA”). *WP Company v. SBA*, 20-cv-1240 (D.D.C. June 12, 2020).
- Although the SBA has published statistical data on PPP loans issued to date, it has not yet provided loan-specific information.
- The PPP is one of the largest government programs ever benefitting private businesses, and the press and others will expend considerable effort on scrutinizing these loans.
- The SBA has been compelled to provide information on specific SBA loans in the past. *See e.g. Buffalo Evening News, Inc. v. Small Business Admin.*, 666 F. Supp. 467 (W.D.N.Y. 1987).

FOIA Considerations - Government Response

- The Government initially claimed to be too busy disbursing PPP funds and managing PPP.
- The Government also claims that some of the materials requested by the news organizations may be FOIA-exempt.
- In its answer to the Complaint, the Government stated that it might apply a FOIA Exemption to requests for individual borrower information. *WP Company v. SBA*, 20-cv-1240 (D.D.C. June 12, 2020) (Doc. 9, Page 24) (“Some or all of the requested documents and information are exempt from disclosure under FOIA. See 5 U.S.C. 552(b).”)
- Treasury Secretary Mnuchin then said that he believes that the names of borrowers and the amounts they receive are “proprietary” and “confidential” and that he will not release the information.
- After facing backlash from Congress (and unsuccessful legislative attempts to provide for disclosure), Secretary Mnuchin later indicated flexibility on this issue.

Government's Current Position on FOIA Requests

- On June 19, 2020, the Government announced that, for PPP loans over \$150,000, it would provide “the business names, addresses, NAICS codes, zip codes, business type, demographic data, non-profit information, jobs supported, and loan amount ranges”
- Not committing to providing exact amounts of loans.
- Not committing to providing information on loans under \$150,000.
- Not committing to providing documents such as PPP Loan Applications, PPP Loan Forgiveness Applications, audit documents, etc.

The logo for the Freedom of Information Act. It features the words "Freedom OF Information" in a large, dark blue, serif font. Below this, the word "ACT" is written in a smaller, dark blue, serif font, flanked by two horizontal lines. The background of the logo is a textured, light-colored surface with some reddish-brown and grey tones, possibly representing a stone or concrete wall.

Freedom
OF
Information
—ACT—

Future FOIA and Reverse FOIA Litigation

- FOIA Exemption 4 protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”
- This exemption is construed to apply to corporate entities. 5 U.S.C. § 551(2).
- In *Chrysler v. Brown*, 441 U.S. 281, 293-94 (1979), the United States Supreme Court found that although the FOIA exemptions allow the government to withhold information, they do not compel the government to withhold information, and thus application of the FOIA exemptions by the government is discretionary.

Future FOIA and Reverse FOIA Litigation

(cont.)

- Reverse-FOIA plaintiffs ordinarily argue that an agency's contemplated release would be "arbitrary and capricious" within the meaning of the Administrative Procedures Act ("APA"). This is a deferential standard of review.
- The Supreme Court recently reviewed FOIA Exemption 4 in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019). In that case, the Court determined that "confidential" information must be closely held by the submitter in order to be "confidential" under FOIA Exemption 4. *Id.* at 2363.
- The Court did not resolve the second question posed, which was whether the submitter must obtain an assurance from the Government that the information will be kept confidential. *Id.* (This was clearly the case in *Argus Leader* and so it was not necessary to adjudicate the issue.)

Future FOIA and Reverse FOIA Litigation

(cont.)

- Subsequent Department of Justice guidance indicates that if the submitter keeps the information closely held, then unless the Government indicated that it would release the information, the submitter need not obtain a specific assurance of confidentiality from the Government. *Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA*, United States Department of Justice, October 7, 2019, available at: <https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential>.

Future FOIA and Reverse FOIA Litigation

(cont.)

- Businesses that previously submitted information to the Government may claim that the reversal of position is “arbitrary and capricious” because they submitted information based upon previous assurances of confidentiality.
- Parties arguing for disclosure may respond that all borrowers submitted information knowing that previous SBA loan programs resulted in disclosure of borrower information.
- News outlets and other parties seeking disclosure may argue that even the information that the Government proposes to disclose is insufficient because it does not include details including exact loan amounts, and does not cover all borrowers.
- Congress might yet provide for disclosure by statute. Previous legislative attempts failed.
- In any event, controversy and litigation over disclosure of PPP information will continue, and borrowers are advised to be wary of disclosure of information they submit to the Government in connection with the PPP program.

Practical Tip – Mark your Documents Confidential

- Mark PPP Loan or Loan Forgiveness Applications and documents in support “FOIA Confidential Commercial Information, Exemption 4.”
- Detail the basis for this FOIA-confidentiality in a cover letter accompanying the submission.
- The FOIA statute itself neither allows the submitter of information to insist that the Government deny a FOIA request nor obligates the Government to inform the submitter of any request.
- However, fortunately for PPP borrowers, where the requested information is determined to contain “confidential commercial information,” the agency is required by executive order to notify the submitter of that information prior to its release. Exec. Order No. 12,600, 52 Fed. Reg. 23781 (June 23, 1987).
- PPP borrowers who mark their submissions to the SBA as FOIA Confidential are likely to be provided a right to contest the release of any of their information in response to FOIA requests.

Still want a loan?

- Act soon! The program closes on June 30, 2020.
- Money still available, due to supplemental funding. (April 24, 2020, Paycheck Protection Program and Health Care Enhancement Act, Pub. L. 116–139)
- Applications slowed dramatically after supplemental funding, due to scandals, controversies, and changing regulations.
- Over \$100B left.





Questions?

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