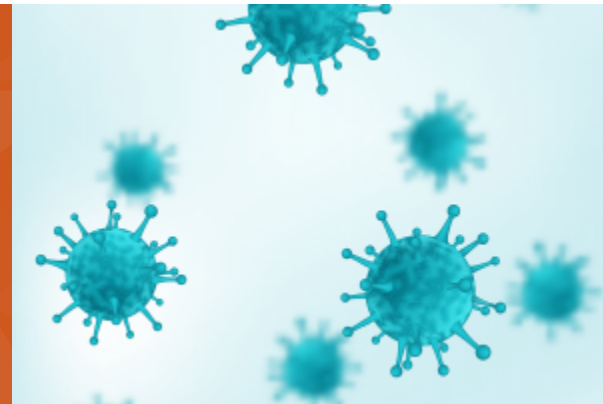


# COVID-19 Alert: PPP Loan Forgiveness Application Form

## Treasury Department Releases PPP Loan Forgiveness Application Form: *Technical Aspects of PPP Loan Forgiveness Explained, But Questions Remain*

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Under the CARES Act, a recipient of a Paycheck Protection Program ("PPP") loan may be excused from the obligation to repay the loan if certain "Forgiveness Criteria" are met:

- The recipient uses the loan proceeds to pay certain payroll costs and certain mortgage interest, rent, and utility costs ("Qualified Non-Payroll Costs") during the eight-week period following the distribution of the loan (the "Forgiveness Period");
- The loan recipient uses no more than 25% of the loan for Qualified Non-Payroll Costs;
- The loan recipient maintains employee headcount during the Forgiveness Period; and
- The loan recipient maintains employee compensation levels for employees earning \$100,000 or less during the Forgiveness Period.

On Friday, March 15, 2020, the Treasury Department released the *Paycheck Protection Program Form Loan Forgiveness Application* (the "Forgiveness Application"). The Forgiveness Application is the first articulation of the specific rules and standards that apply to the calculation of PPP loan forgiveness.

***It is critical that loan recipients that intend to request forgiveness fully understand the elements and requirements of the Forgiveness Application.***

The Forgiveness Application requires the loan recipient to aggregate and disclose a significant amount of financial information, and complete a complex series of calculations, according to a lengthy and dense set of instructions. Given this complexity, we suggest that a recognition of the following "big picture" concepts may assist PPP loan recipients focus their review and comprehension of the Forgiveness Application.

## YOU WILL NEED AN ACCOUNTANT

The Forgiveness Application requires the loan recipient to complete a complex series of multi-factored calculations that require general accounting expertise, including applying accrual and cash basis accounting concepts, and fluency in the general regulatory scheme of the PPP. In most circumstances, accurate completion of the Forgiveness Application will require loan recipients to leverage trusted advisors that are both familiar with the financial and payroll structures of the loan recipient and adept at the calculations required by the application.

## THERE ARE MANY DETAILS OF THE FORGIVENESS CALCULATION THAT REMAIN UNADDRESSED

Despite the length and complexity of the instructions contained in the Forgiveness Application, many variables that may impact loan forgiveness remain unaddressed or ambiguous.

For example, according to the “*Summary of Costs Eligible For Forgiveness*” instruction provided at page 2 of the Forgiveness Application, loan proceeds used for rent may be forgiven if such payments: (i) do not exceed 25% of the total loan forgiveness amount requested; and (ii) are “paid during” the Forgiveness Period or “incurred during” the Forgiveness Period and paid on before the next regular billing date after the Forgiveness Period expires. Does this instruction mean that if a loan recipient decides to use loan proceeds to pre-pay future, but not-yet-incurred rent obligations (or to pay past due rent payments), those pre-payments (or catch-up payments) may be forgiven so long as such pre-payments (or catch-up payments) are “paid during” the Forgiveness Period? Or, does this instruction limit forgiveness to loan proceeds that are used to satisfy rent payments that are due, in the usual course, during the Forgiveness Period?

The above is just one example of several technical questions that may apply to many loan recipients that remain unanswered. In a [press release](#), the SBA has indicated that further regulatory instruction related to PPP loan forgiveness is forthcoming. However, whether future guidance will address these types of detailed questions is unknown at this time.

## THE FORGIVENESS APPLICATION REQUIRES LOAN RECIPIENTS TO DISCLOSE DETAILED TAX, FINANCIAL, AND SENSITIVE EMPLOYEE WAGE DATA, WHICH MAY LATER BE SUBJECT TO PUBLIC ACCESS

The Forgiveness Application requires loan recipients to include with the application, among other information:

- The wages earned by *each* employee, *by name* and *by last four digits of the employee's social security number*, during applicable time periods;
- Bank account statements documenting the amount of cash compensation paid to each employee during applicable time periods;
- Payroll tax and unemployment insurance tax filings for each employee during applicable time periods;
- Payment receipts documenting the amount of employer contributions to employee health insurance and retirement plans during applicable time periods;
- Copies of lease agreements relevant to applicable time periods; and
- Business records documenting utility payments during applicable time periods.

Given that the Forgiveness Application requires the loan recipient to disclose sensitive employee data to their private lender, a loan recipient may need to inform (or even obtain consent of) their employees before submitting the application. In addition, there may be other laws that bear on the processing of this employee data in the context of these disclosures.

In addition, the Forgiveness Application anticipates that the lender that receives the application may be required to share the information contained in the application with the SBA for audit purposes. Given that the SBA – a public agency – may come into possession of a loan recipient's Forgiveness Application, the detailed wage and financial data described above may be subject to public record access rights. Although there may be some limits on such access rights for personal

employee information, loan recipients that file a Forgiveness Application should assume that portions of the application will be subject to public access.

## THE FORGIVENESS APPLICATION ANTICIPATES BROAD SBA AUDIT AUTHORITY OVER ALL LOAN RECIPIENTS

As previously reported, the "Question 46 Guidance" raises questions regarding the scope of SBA audits for recipients of PPP loans of under \$2 Million. The Forgiveness Application clarifies that the SBA is reserving the right to audit any loan recipient, irrespective of loan size, with respect to loan eligibility criteria. Specifically, the Forgiveness Application indicates that the SBA may audit loan recipients (including loan recipients of loan amounts of less than \$2 million) for compliance with economic necessity standards, and *"may direct a lender to disapprove the Borrower's loan forgiveness application if the SBA determines that the Borrower was ineligible for the PPP loan."* Further, the Forgiveness Application instructs that *"the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges"* against any loan recipient (including a loan recipient of loan amounts of less than \$2 million) that knowingly uses funds for "unauthorized purposes." (*Forgiveness Application*, Page 4)

In addition, all loan recipients seeking forgiveness, including loan recipients seeking forgiveness of loan amounts of less than \$2 million, are instructed to maintain, for a period of *"six years after the date the loan is forgiven,"* documentation that supports *"the Borrower's certification as to the necessity of the loan request."* Such loan recipients are also instructed to permit the SBA to access such documentation upon request. (*Forgiveness Application*, Page 10)

As such, all loan recipients that apply for forgiveness, irrespective of loan size, should retain documentation that establishes the economic necessity of the loan, and should assume that such information will be subject to government scrutiny at the time that loan forgiveness is applied for or at some later time.

## IS SEEKING FORGIVENESS WORTH IT?

Whether intentional or not, the complexity and onerous documentation requirements of the Forgiveness Application will likely have the effect of dissuading some loan recipients from seeking forgiveness. This outcome implies a threshold question for each PPP loan recipient: *Is loan forgiveness worth the burden of obtaining it?* In examining this question, the loan recipient should recognize that absent forgiveness, a PPP loan remains a low interest, favorable term loan (1% interest; payable over 2 years; loan payments deferred for 6 months).

Morse continues to review the evolving regulatory landscape related to PPP loans and is focused on assisting our clients through these unprecedented and challenging times. Please contact the Firm should you have questions concerning this subject, or any other COVID-19 response matters.

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