

# PPP Loan Forgiveness

Next Steps in the Paycheck Protection Program



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# BeachFleischman PC

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# Disclaimer

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This presentation is based on relevant government guidance available as of May 13, 2020. There are many areas of the CARES Act and related guidance that are unclear and additional clarification from the government is needed. This presentation includes our best interpretation of the guidance.

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# PPP Loan Forgiveness

- I received my loan, what's next?
- What dates are important?
- Do wage rates matter?
- What costs do I need to capture?
- What paperwork do I need to maintain?
- How do I maximize forgiveness?

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# What's Next?

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## What's Next?

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- Save the signed PPP loan documents with your permanent records
- Consider keeping the loan proceeds in a separate business savings account and transferring into checking or payroll accounts as the funds are used
- Recognize the work isn't over yet



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## What's Next?

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- Apply for loan forgiveness with the lender that you received the loan
- Costs must be captured and documented
- Timing and format of the application for loan forgiveness is unknown
- Lender has 60 days to review and approve/deny

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## What's Next?

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- In the last few weeks, there has been an increased spotlight on the certification that you signed when you filed your PPP Application
- We recommend you prepare a formal, written document that spells out exactly what factors you were considering when you decided to apply
- Factors to consider: industry, COVID impact at time of application, supply chain, subcontractors, contract status, social distancing, A/R collections, unknowns, etc.

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## What's Next?

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- On May 13, a new Interim Final Rule provides a safe harbor for companies that, when combined with their Affiliates, have a loan less than \$2M.
- Under the safe harbor, the company will be deemed to have met the good-faith certification.
- We still recommend that you document the decision process as noted on the previous slide.

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# Dates and FTEs

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## Dates: Covered period

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- Determine your “covered period”, which is the 8 weeks following receipt of your PPP loan proceeds
- Example: Proceeds received 4/21/20  
Covered period: 4/21/20 – 6/16/20

**20. Question:** The amount of forgiveness of a PPP loan depends on the borrower’s payroll costs over an eight-week period; when does that eight-week period begin?

**Answer:** The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.<sup>5</sup>

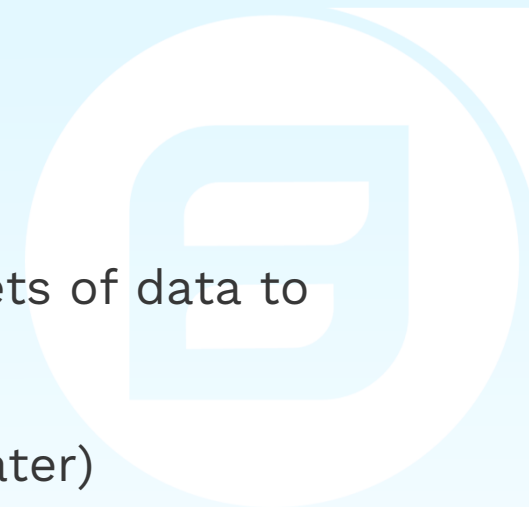
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## Covered period

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- During the covered period, there are two sets of data to maintain and document:
  - Covered costs incurred and paid (more later)
  - FTE count, captured by pay period  
FTE = Full-time Equivalent
  - We recommend using 30 hours/week for determining full-time in computing FTEs  
(30 hours in the standard in the Affordable Care Act)

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## FTEs

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- The FTE average during the covered period is compared to the FTE average during the “base period”
- There are two options for the base period:
  - Option 1: 2/15/19 – 6/30/19
  - Option 2: 1/1/20 – 2/29/20
- Compute your FTE averages for both periods to determine which one is lower.

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## FTEs

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- Pick the lower average, compare it to your covered period.
- Any reduction in FTEs is a reduction in the forgivable portion of the loan.
- Example: If you have a 5% reduction in FTEs, there will be a 5% reduction in the otherwise forgivable portion of the loan.



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## **Wait.... What if an employee doesn't come back or was fired for cause?**

**There is no requirement for you to pay the exact same people during the covered period as were employed prior to the covered period. If you offer re-employment to someone that was laid off, and they decline, you will not be penalized in the FTE analysis. To qualify for this exemption, you need to document the offer of employment, and their decline, in writing. (See SBA Q&A Question #40)**

**If you have any concerns about the re-hire process, we recommend you consult an attorney specializing in employment law.**

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# Covered Costs

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## Covered Costs

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- The amount of forgiveness is based on the amount of loan proceeds spent on “covered costs” during the “covered period”
- Covered costs:
  - Payroll costs
  - Rent
  - Interest
  - Utilities



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## Wait... Is this cash basis or accrual?

There is no clear answer yet to this question. We are waiting for the SBA to clarify, as the answer is critical to capturing covered costs during the covered period.

For example: Your loan was funded 4/21/20. May rent and June rent should easily fall within the covered period of 4/21/20 – 6/16/20. Can you prepay your July rent on 6/16?

Until we get more guidance, assume the answer is no.

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## Wait.... How many payrolls do I include?

We really need an answer on cash vs accrual to answer this one with certainty. Until then, assume cash and try to work with the dates.

For example: Your loan was funded 5/1/20, which is also pay day. Do you have to count that payroll?

Your covered period will end 6/25. Consider the need for a special payroll on 6/25 to “squeeze” one more in.

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## Covered Costs

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- Once you have all of your covered costs captured for the covered period, you have to evaluate the total and the components.
- At least 75% of total proceeds must be spent on payroll costs.
- There is a “penalty” to forgiveness if you don’t reach 75% or if you don’t spend all of the money.

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## Summary of the Forgiveness Reductions

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- If you don't spend all of the proceeds, there is a reduction.
- If you don't spend 75% of the proceeds on payroll costs, there is a reduction.
- If your FTE count drops, there is a reduction.
- If you cut base wages more than 25%, there is a reduction.

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## Remember This?

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Math. Lots of math.



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# Documentation

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## Documentation

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- When you submit your application for loan forgiveness to your lender, they will expect documentation of everything we just covered:
  - Average FTEs for the covered period
  - Average FTEs for the chosen base period
  - Payroll tax reports to support gross wages
  - Account statements for health insurance, utilities, rent, interest, etc.
  - Verification of payment: bank statements, cancelled checks, etc.



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# Documentation

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## Best practices:

- Keep a spreadsheet of all covered expenses.
- As you pay a bill for a covered cost, put a copy in a designated file folder (paper or digital).
- Put copies of bank statements in the folder.
- Put copies of your payroll reports in the folder.

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## Documentation

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- What happens if I don't provide the necessary documentation to my lender?

The SBA is clear on this point...  
No documentation = No forgiveness

- What happens if I don't follow the rules for use of proceeds?

The SBA can charge you with fraud in addition to making you repay the misused amounts.

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## Documentation

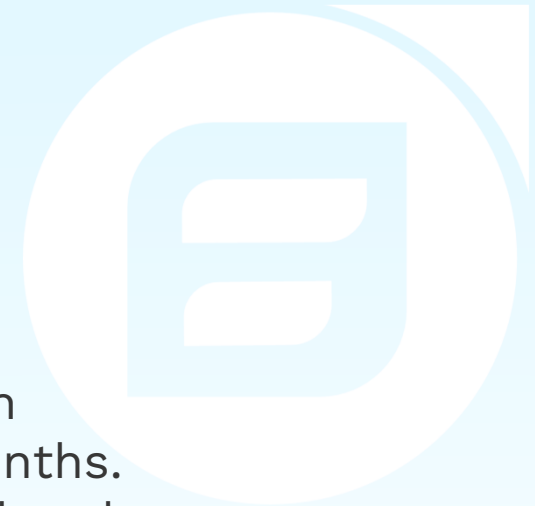
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What happens if I don't get 100% forgiveness?

The unforgiven portion turns into a loan, which bears interest at 1% and is payable over 18 months. No collateral or personal guarantee is required and there is no prepayment penalty.

Payments begin six months after you received your loan proceeds. Interest accrues during the six-month deferral period.

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# Maximizing Forgiveness

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## Maximizing Forgiveness

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- Maximizing forgiveness will require constant monitoring over the 8-week period.
- In the following slides, we have outlined several weeks and tasks, as a possible road map to maximizing the loan forgiveness.
- For questions related to employment issues, we recommend you contact your employment law attorney.

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# Maximizing Forgiveness

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- Week 1:
  - Compute FTEs for your base period.
  - Compute FTEs for your most recent pay period.
  - Consider the need to hire or rehire.
  - Consider eliminating pay cuts.



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# Maximizing Forgiveness

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- Week 1:
  - Project out your covered expenses for the covered period (8 weeks).
  - Use your most recent pay period for gross wages, recent bills, etc.
  - Determine how much of the proceeds you will be able to spend based on these projections.

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# Maximizing Forgiveness

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- Week 1:
  - Based on the projections, determine if you will meet the 75% test.
  - Consider whether you can make adjustments to wages (justifiable wage increases, hazard pay, etc.), health insurance or retirement in order to get to 75%

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# Maximizing Forgiveness

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- Week 4:
  - Compute average FTEs for the first four weeks to see if you are maintaining the number necessary to keep your average equal to or above the base period.
  - Compile all expenditures on covered costs for the first four weeks. Project out costs for the next four weeks. See where you are at.

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# Maximizing Forgiveness



- Week 7:
  - Compile all expenditures on covered costs for the first six weeks. Project out costs for the next two weeks. See where you are at.
  - If you will be short on the 75% test, consider adjustments in the last pay period of the covered period. Just keep in mind those compensation limits for highly compensated individuals (total of \$15,385 includible for forgiveness).

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# Maximizing Forgiveness

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Closing thoughts....

The primary intent of the PPP is to get money into the hands of workers through your payroll.

They gave you a little extra to pay some bills.

The math is worth it. 😊

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**Thank** you for the opportunity  
to share with you today!

**CariAnn J. Todd**

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# The Threat

**Taking out a PPP loan that is not “necessary” is a criminal offense, and the penalty could be a fine of up to \$1,000,000 and imprisonment for up to 30 years.**



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# The Certification

Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.



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# Who is Going to be Subject to Additional Scrutiny

1. If your loan was over \$2,000,000 and you have a question of its necessity, hire an attorney and an accountant to go in-depth.
2. If the company that received the loan or its parent company is required to make SEC filings.
3. Falsified numbers were provided in the application.
4. Political Target – this will become public.



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# Guidance from May 13th

The SBA in its FAQ at Question 46 stated that Borrowers including subsidiaries that received loans in an “Original Principal Amount of less than \$2Million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.”

This guidance from the SBA only governs SBA determination of whether the certification was made in good faith – it does not preclude Congress, whistleblowers or the DOJ. This is going to play out over the coming weeks, months and years.



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# Who Else Can Enforce the Certification?

1. Special Inspector General of Pandemic Recovery
2. Pandemic Response Accountability Committee
3. Directive from DOJ that prioritizes COVID related fraud schemes
4. State Attorney Generals
5. Whistleblowers – Civil False Claims Act



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# The False Claims Act

**Civil False Claims Act** – knowingly make false statements to the government – suits can be brought “qui tam” by persons and entities with evidence of fraud – government can then intervene but is not required to do so.

- Treble Damages
- Civil Penalties
- Fees and Expenses

**Reverse False Claims Act** – knowingly retain benefit after you know the information is false.



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# **Evolving Standard for Loan Forgiveness**

There may be additional scrutiny during the forgiveness stage – look to further regulations.

- More questions under oath
  - Liquidity
  - Cash status
  - Access to other funds
  - Do you still think these funds are necessary?



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# Good Faith

## 1. Subjective

- Your intent is a key factor but not determinative.

## 2. Objective

- If your reason to believe is no longer accurate, there is an **obligation** to perform a diligent investigation.



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# PAPER, PAPER, PAPER

## DUE DILIGENCE

- **Create a Contemporaneous Memo**
- **Company's Perspective on Uncertainty**
- **Projections**
- **Compare Current Status to Historical Data**
  - Debt-to-equity ratio
  - Historical capital cushion
  - Industry standard for capital
- **Business Risks and Effects**
- **Identify Sources of Liquidity**
  - Document the Use of those Funds for Something Other than Keeping Employees Retained
  - Are terms available reasonable
  - Include a Discussion of Capital Infusions
- **Damage to Business without PPP Loans**
- **Industry Journals and Articles - Trends**
- **Customer and Industry Issues**
- **Limit Discretionary Spending**



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# PAPER, PAPER, PAPER

(CONTINUED)

## GOOD FACTS

- Already slow paying
- Forced to close
- Supply chain threatened
- Substantial drop in customers or revenue
- Asked to increase credit line prior to PPP
- Withheld owners' paychecks or distributions



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# **BAD FACTS**

## **(Call your Professionals)**

- Untapped credit line
- Made a quarterly discretionary distribution in excess of \$100,000 annualized at the end of March
- Government contracts without disruption
- Emails or texts referencing the PPP in a negative light (e.g., government handout, lack of need)
- Increased revenues since pandemic, without foreseeing future disruptions



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