

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket No. SBA-2020-0038]

RIN 3245-AH52

DEPARTMENT OF THE TREASURY

RIN 1505-AC70

Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures Interim Final Rule

AGENCY: U.S. Small Business Administration; Department of the Treasury.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted on its website an interim final rule relating to the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act) (published in the Federal Register on April 15, 2020). Section 1102 of the Act temporarily adds a new product, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. Subsequently, SBA and Treasury issued additional interim final rules implementing the Paycheck Protection Program. On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) was signed into law, amending the CARES Act. This interim final rule revises interim final rules posted on SBA’s and the Department of the Treasury’s websites on May 22, 2020 (published on June 1, 2020, in the Federal Register), by changing key provisions to conform to the Flexibility Act. Several of these amendments are retroactive to the date of enactment of the CARES Act, as required by section 3(d) of the Flexibility Act.

DATES: Effective Date: This interim final rule is effective March 27, 2020, except for the provision relating to the maturity date of PPP loans, which is effective June 5, 2020, and the provision relating to the cap on the amount of loan forgiveness for owner-employees and self-employed individuals, which is effective on [INSERT DATE OF FILING AT THE OFFICE OF THE FEDERAL REGISTER].

Comment Date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by number SBA-2020-0038, through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

SBA and Treasury will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA and Treasury should hold this information as confidential. SBA and Treasury will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833-572-0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration

for all states, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, have been implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, have been implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.

Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the "Paycheck Protection Program." Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116-139), which provided additional funding and authority for the PPP. On June 5, 2020, the President signed the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) (Pub. L. 116-142), which changes key provisions of the Paycheck Protection Program, including provisions relating to the maturity of PPP loans, the deferral of

PPP loan payments, and the forgiveness of PPP loans. Section 3(d) of the Flexibility Act provides that the amendments relating to PPP loan forgiveness and extension of the deferral period for PPP loans shall be effective as if included in the CARES Act, which means that they are retroactive to March 27, 2020. Section 2 of the Flexibility Act provides that the amendment relating to the extension of the maturity date for PPP loans shall take effect on the date of enactment (June 5, 2020). Under the Flexibility Act, the extension of the maturity date for PPP loans is applicable to PPP loans made on or after that date, and lenders and borrowers may mutually agree to modify PPP loans made before such date to reflect the longer maturity.

II. Comments and Retroactive/Immediate Effective Date

This interim final rule is effective without advance notice and public comment because section 1114 of the CARES Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the grounds that it would be contrary to the public interest. Specifically, advance public notice and comment would defeat the purpose of this interim final rule given that SBA's authority to guarantee PPP loans expires on June 30, 2020, and that many PPP borrowers can now apply for loan forgiveness following the end of their eight-week covered period. Providing borrowers and lenders with certainty on both loan requirements and loan forgiveness requirements following the enactment of the Flexibility Act will enhance the ability of lenders to make loans and process loan forgiveness applications, particularly in light of the fact that most of the Flexibility Act's provisions are retroactive to March 27, 2020. Specifically, small businesses that have yet to apply for and receive a PPP loan need to be informed of the terms of PPP loans as soon as possible, because the last day on which a lender can obtain an SBA loan number for a PPP loan is June 30, 2020.

Borrowers that have already applied for and received a PPP loan need certainty regarding how loan proceeds must be used during the covered period, as amended by the Flexibility Act, so that they can maximize the amount of loan forgiveness. Additionally, because some borrowers can apply for loan forgiveness now, those borrowers need updated direction on how to do so. These same reasons provide good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Although this interim final rule is effective on or before date of filing, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The SBA and Treasury will consider these comments, comments received on the two interim final rules amended by this interim final rule, which were posted on SBA’s website May 22, 2020 and published on June 1, 2020, in the Federal Register, and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program – Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures and Related Borrower and Lender Responsibilities Interim Final Rule

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the “Paycheck Protection Program.” Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness.

SBA and Treasury have posted several documents on the loan forgiveness provisions in the CARES Act on their websites. On April 2, 2020, SBA posted its first PPP interim final rule (85 FR 20811) covering in part loan forgiveness. On April 8, 2020 and April 26, 2020, SBA also posted Frequently Asked Questions relating to loan forgiveness. On April 14, 2020, SBA posted an interim final rule covering in part loan forgiveness for individuals with self-employment income. On May 22, 2020, SBA and Treasury jointly posted an additional interim final rule on loan forgiveness (85 FR 33004) (First Loan Forgiveness Rule). The SBA also posted an interim final rule on May 22, 2020 on SBA loan review procedures and related borrower and lender responsibilities (85 FR 33010) (First Loan Review Rule). On June 11, 2020, SBA posted an interim final rule revising the first PPP interim final rule to incorporate Flexibility Act amendments, including those relating to loan forgiveness. On June 17, 2020, SBA posted an interim final rule revising the interim final rule covering individuals with self-employment income to incorporate Flexibility Act amendments, including those relating to loan forgiveness.

The Flexibility Act amends the CARES Act, including its provisions relating to loan terms and loan forgiveness. The purpose of this interim final rule is to update the First Loan Forgiveness Rule and the First Loan Review Rule in light of the amendments under the Flexibility Act. The First Loan Forgiveness Rule and First Loan Review Rule, as amended by this interim final rule, should be interpreted consistent with the frequently asked questions (FAQs) regarding the PPP that are posted on SBA's website¹ and the other interim final rules issued regarding the PPP.²

1. Changes to the First Loan Forgiveness Rule

a. General

¹ See <https://www.sba.gov/document/support--faq-lenders-borrowers>.

² See <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

Section 3(b) of the Flexibility Act amended the requirements regarding forgiveness of PPP loans to reduce, from 75 percent to 60 percent, the portion of PPP loan proceeds that must be used for payroll costs for the full amount of the PPP loan to be eligible for forgiveness.

Therefore, Part III.1 of the First Loan Forgiveness Rule (85 FR 33004, 33005) is revised by striking “25 percent” in the last sentence and replacing it with “40 percent”.

b. Maturity

Section 2(a) of the Flexibility Act provides a minimum maturity of five years for all PPP loans made on or after the date of enactment of the Flexibility Act (June 5, 2020), and permits lenders and borrowers to extend the maturity date of earlier PPP loans by mutual agreement. Section 3(c) of the Flexibility Act extended the deferral period for PPP loans to the date that SBA remits the forgiveness amount to the lender. Further, SBA has issued an alternative Loan Forgiveness Application Form, SBA Form 3508EZ. Therefore, in Part III.2 of the First Loan Forgiveness Rule (85 FR 33004, 33005), the introductory question is redesignated as paragraph a. and revised to read as follows:

2. Loan Forgiveness Process

a. What is the general process to obtain loan forgiveness?

To receive loan forgiveness, a borrower must complete and submit the Loan Forgiveness Application (SBA Form 3508, 3508EZ, or lender equivalent) to its lender (or the lender servicing its loan). As a general matter, the lender will review the application and make a decision regarding loan forgiveness. The lender has 60 days from receipt of a complete application to issue a decision to SBA. If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the

lender must request payment from SBA at the time the lender issues its decision to SBA. SBA will, subject to any SBA review of the loan or loan application, remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA. If applicable, SBA will deduct EIDL Advance Amounts from the forgiveness amount remitted to the Lender as required by section 1110(e)(6) of the CARES Act. If SBA determines in the course of its review that the borrower was ineligible for the PPP loan based on the provisions of the CARES Act, SBA rules or guidance available at the time of the borrower's loan application, or the terms of the borrower's PPP loan application (for example, because the borrower lacked an adequate basis for the certifications that it made in its PPP loan application), the loan will not be eligible for loan forgiveness. The lender is responsible for notifying the borrower of the forgiveness amount. If only a portion of the loan is forgiven, or if the forgiveness request is denied, any remaining balance due on the loan must be repaid by the borrower on or before the maturity date of the loan. The lender is responsible for notifying the borrower of remittance by SBA of the loan forgiveness amount (or that SBA determined that no amount of the loan is eligible for forgiveness) and the date on which the borrower's first payment is due, if applicable. If SBA determines that the full amount of the loan is eligible for forgiveness and remits the full amount of the loan to the lender, the lender must mark the PPP loan note as "paid in full" and report the status of the loan as "paid in full" on the next monthly 1502 report filed by the lender.

The general loan forgiveness process described above applies only to loan forgiveness applications that are not reviewed by SBA prior to the lender's decision on the forgiveness application. A separate interim final rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities describes SBA's procedures for reviewing PPP loan applications and loan forgiveness applications.

c. Deferral Period and Forgiveness

Section 3(c) of the Flexibility Act provides that if the borrower does not apply for forgiveness of a loan within 10 months after the last day of the covered period, the PPP loan is no longer deferred and the borrower must begin paying principal and interest. Therefore, the following text is added as a new paragraph b. at the end of Part III.2:

b. When must a borrower apply for loan forgiveness or start making payments on a loan?

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. If the borrower applies for forgiveness before the end of the covered period and has reduced any employee's salaries or wages in excess of 25 percent, the borrower must account for the excess salary reduction for the full 8-week or 24-week covered period, as described in Part III.5. If the borrower does not apply for loan forgiveness within 10 months after the last day of the covered period, or if SBA determines that the loan is not eligible for forgiveness (in whole or in part), the PPP loan is no longer deferred and the borrower must begin paying

principal and interest. If this occurs, the lender must notify the borrower of the date the first payment is due. The lender must report that the loan is no longer deferred to SBA on the next monthly SBA Form 1502 report filed by the lender.

d. Payroll Costs Eligible for Loan Forgiveness

Under section 1106 of the CARES Act, certain provisions regarding the forgiveness of PPP loans are limited to the “covered period.” “Covered period,” as that term is used in section 1106 of the CARES Act, was originally defined as the eight-week period beginning on the date of the origination of a covered loan. However, section 3(b) of the Flexibility Act extended the length of the covered period as defined in section 1106 of the CARES Act from eight to 24 weeks, while allowing borrowers that received PPP loans before June 5, 2020 to elect to use the original eight-week covered period. As set forth below, several provisions in Part III.3 of the First Loan Forgiveness Rule require revisions to conform to these amendments under Flexibility Act.

Part III.3.a of the First Loan Forgiveness Rule (85 FR 33004, 33006) is revised to read as follows:

a. When must payroll costs be incurred and/or paid to be eligible for forgiveness?

In general, payroll costs paid or incurred during the covered period are eligible for forgiveness. For purposes of loan forgiveness, the covered period is the 24-week period beginning on the date the lender disburses the PPP loan.³ Alternatively, a borrower that received a PPP loan before June 5, 2020 may elect for the covered period to end eight weeks after the date of disbursement of the PPP loan.

³ Under section 3(b)(1) of the Paycheck Protection Program Flexibility Act of 2020, the loan forgiveness covered period of any borrower will end no later than December 31, 2020.

Borrowers may seek forgiveness for payroll costs for the applicable covered period beginning on either:

- i. the date of disbursement of the borrower's PPP loan proceeds from the Lender (i.e., the start of the covered period); or
- ii. the first day of the first payroll cycle in the covered period (the "alternative payroll covered period").

Payroll costs are considered paid on the day that paychecks are distributed or the borrower originates an ACH credit transaction. Payroll costs incurred during the borrower's last pay period of the covered period or the alternative payroll covered period are eligible for forgiveness if paid on or before the next regular payroll date; otherwise, payroll costs must be paid during the covered period (or alternative payroll covered period) to be eligible for forgiveness. Payroll costs are generally incurred on the day the employee's pay is earned (i.e., on the day the employee worked). For employees who are not performing work but are still on the borrower's payroll, payroll costs are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work).

The Administrator of the Small Business Administration (Administrator), in consultation with the Secretary of the Treasury (Secretary), recognizes that the covered period will not always align with a borrower's payroll cycle. For administrative convenience of the borrower, a borrower with a bi-weekly (or more frequent) payroll cycle may elect to use an alternative payroll covered period that begins on the first day of the first payroll cycle in the covered period and

continues for either (a) eight weeks, in the case of a borrower that received its PPP loan before June 5, 2020 and elects to use an eight-week covered period, or (b) 24 weeks, in the case of all other borrowers. If payroll costs are incurred during this alternative payroll covered period, but paid after the end of the alternative payroll covered period, such payroll costs will be eligible for forgiveness if they are paid no later than the first regular payroll date thereafter. The Administrator, in consultation with the Secretary, determined that this alternative computational method for payroll costs is justified by considerations of administrative feasibility for borrowers, as it will reduce burdens on borrowers and their payroll agents while achieving the paycheck protection purposes manifest throughout the CARES Act, including section 1102. Because this alternative computational method is limited to payroll cycles that are bi-weekly or more frequent, this computational method will yield a calculation that the Administrator does not expect to materially differ from the actual covered period, while avoiding unnecessary administrative burdens and enhancing auditability.

Example: A borrower that received a PPP loan before June 5, 2020 and elects to use an eight-week covered period has a bi-weekly payroll schedule (with payments made every other week). The borrower's eight-week covered period begins on June 1 and ends on July 26. The first day of the borrower's first payroll cycle that starts in the covered period is June 7. The borrower may elect an alternative payroll covered period for payroll cost purposes that starts on June 7 and ends 55 days later (for a total of 56 days), on August 1. Payroll costs paid during this alternative payroll covered period are eligible for forgiveness. In

addition, payroll costs incurred during this alternative payroll covered period are eligible for forgiveness if they are paid on or before the first regular payroll date occurring after August 1. Payroll costs that were both paid and incurred during the covered period (or alternative payroll covered period) may only be counted once.

Part III.3.c of the First Loan Forgiveness Rule (85 FR 33004, 33006) is revised to read as follows:

c. Are there caps on the amount of loan forgiveness available for owner-employees and self-employed individuals' own payroll compensation?

Yes. For borrowers that received a PPP loan before June 5, 2020 and elect to use an eight-week covered period, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at eight weeks' worth (8/52) of 2019 compensation (i.e., approximately 15.38 percent of 2019 compensation) or \$15,385 per individual, whichever is less, in total across all businesses. For all other borrowers, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at 2.5 months' worth (2.5/12) of 2019 compensation (i.e., approximately 20.83 percent of 2019 compensation) or \$20,833 per individual, whichever is less, in total across all businesses.

In particular, C-corporation owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health insurance contributions made on their behalf. S-corporation owner-employees are capped by the amount of their 2019 employee cash compensation and employer

retirement contributions made on their behalf, but employer health insurance contributions made on their behalf cannot be separately added because those payments are already included in their employee cash compensation. Schedule C or F filers are capped by the amount of their owner compensation replacement, calculated based on 2019 net profit.⁴ General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235. For self-employed individuals, including Schedule C or F filers and general partners, retirement and health insurance contributions are included in their net self-employment income and therefore cannot be separately added to their payroll calculation.

The Administrator, in consultation with the Secretary, determined that it is appropriate to limit the forgiveness of owner compensation to either eight weeks' worth (8/52) of their 2019 compensation (up to \$15,385) for an eight-week covered period or 2.5 months' worth (2.5/12) of their 2019 compensation (up to \$20,833) for a 24-week covered period per owner in total across all businesses.

This approach is consistent with the structure of the CARES Act and its overarching focus on keeping workers paid, and will prevent windfalls that Congress did not intend. Specifically, Congress determined that the maximum loan amount is generally based on 2.5 months of a borrower's average monthly payroll costs during the one-year period preceding the loan. 15 U.S.C.

636(a)(36)(E). For example, a borrower with one other employee would receive a

⁴ See 85 FR 21747, 21749 (April 20, 2020).

maximum loan amount equal to 5 months of payroll (2.5 months of payroll for the owner plus 2.5 months of payroll for the employee). If the owner laid off the employee and availed itself of the exemption in the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) related to reductions in business activity described in e. below, the owner could treat the entire amount of the PPP loan as payroll, with the entire loan being forgiven. This would not only result in a windfall for the owner, by providing the owner with five months of payroll instead of 2.5 months, but also defeat the purpose of the CARES Act of protecting the paycheck of the employee. For owners with no employees, this limitation will have no effect, because the maximum loan amount for such borrowers already includes only 2.5 months of their payroll.

e. Nonpayroll Costs Eligible for Loan Forgiveness

Part III.4.a of the First Loan Forgiveness Rule (85 FR 33004, 33007) is revised to read as follows:

a. When must nonpayroll costs be incurred and/or paid to be eligible for forgiveness?

A nonpayroll cost is eligible for forgiveness if it was:

- i. paid during the covered period; or
- ii. incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period.

Example: A borrower that received a loan before June 5, 2020 uses a 24-week covered period that begins on June 1 and ends on November 15. The borrower pays its electricity bills for June through October during the covered period and

pays its November electricity bill on December 10, which is the next regular billing date. The borrower may seek loan forgiveness for its June through October electricity bills, because they were paid during the covered period. In addition, the borrower may seek loan forgiveness for the portion of its November electricity bill through November 15 (the end of the covered period), because it was incurred during the covered period and paid on the next regular billing date. The Administrator, in consultation with the Secretary, has determined that this interpretation provides an appropriate degree of borrower flexibility while remaining consistent with the text of section 1106(b). The Administrator believes that this simplified approach to calculation of forgivable nonpayroll costs is also supported by considerations of administrative convenience for borrowers, and the Administrator notes that the 40 percent cap on nonpayroll costs as a portion of the total loan forgiveness amount will avoid excessive inclusion of nonpayroll costs.

f. Reductions to Loan Forgiveness Amount

As described above, section 3(b) of the Flexibility Act amended provisions of the CARES Act regarding the covered period and the portion of PPP loan proceeds that must be used for payroll costs for the full amount of the PPP loan to be eligible for forgiveness. As set forth below, these amendments necessitate several revisions to Part III.5 of the First Loan Forgiveness Rule. First, the introductory paragraph in Part III.5 of the First Loan Forgiveness Rule (85 FR 33004, 33007) is revised to read as follows:

5. Reductions to Loan Forgiveness Amount

Section 1106 of the CARES Act, as amended by Section 3(b)(2) of the Flexibility Act, specifically requires certain reductions in a borrower's loan forgiveness

amount based on reductions in full-time equivalent employees or in employee salary and wages, subject to an important statutory exemption for borrowers that have eliminated the reduction on or before December 31, 2020. Section 3(b)(2) of the Flexibility Act also adds exemptions from reductions in loan forgiveness amounts based on employee availability and business activity. In addition, SBA and Treasury have adopted a regulatory exemption to the reduction rules for borrowers that have offered to restore employee hours at the same salary or wages, even if the employees have not accepted. The instructions to the loan forgiveness applications and the guidance below explains how the statutory forgiveness reduction formulas work.

Section 1106(d)(2) of the CARES Act reduces the amount of the PPP loan that may be forgiven if the borrower reduces full-time equivalent employees during the covered period as compared to a base period selected by the borrower. Section 1106(d)(5) of the CARES Act originally waived this reduction in the forgiveness amount if the borrower eliminates the reduction in full-time equivalent employees occurring during a different statutory reference period by not later than June 30, 2020. Section 3(b)(2) of the Flexibility Act amended this provision to replace “June 30” with “December 31.” To conform the First Loan Forgiveness Rule to this amendment under the Flexibility Act, Part III.5.a of the First Loan Forgiveness Rule (85 FR 33004, 33007) is revised by striking “June 30, 2020” and replacing it with “December 31, 2020.” Section 3(d) of the Flexibility Act provides that this amendment shall be effective as if included in the CARES Act, which was enacted on March 27, 2020.

As described above, section 3(b) of the Flexibility Act extended the length of the covered period as defined in section 1106 of the CARES Act from eight to 24 weeks, while allowing borrowers that received PPP loans before June 5, 2020 to elect to use the original eight-week covered period. For consistency with this amendment, the paragraph consisting of the example in Part III.5.e of the First Loan Forgiveness Rule (85 FR 33004, 33008) is revised to provide two examples that read as follows:

Example: A borrower is using a 24-week covered period. This borrower reduced a full-time employee's weekly salary from \$1,000 per week during the reference period to \$700 per week during the covered period. The employee continued to work on a full-time basis during the covered period, with an FTE of 1.0. In this case, the first \$250 (25 percent of \$1,000) is exempted from the loan forgiveness reduction. The borrower seeking forgiveness would list \$1,200 as the salary/hourly wage reduction for that employee (the extra \$50 weekly reduction multiplied by 24 weeks). If the borrower applies for forgiveness before the end of the covered period, it must account for the salary reduction for the full 24-week covered period (totaling \$1,200).

Example: A borrower that received a PPP loan before June 5, 2020 has elected to use an eight-week covered period. This borrower reduced a full-time employee's weekly salary from \$1,000 per week during the reference period to \$700 per week during the covered period. The employee continued to work on a full-time basis during the covered period, with an FTE of 1.0. In this case, the first \$250 (25 percent of \$1,000) is exempted from the loan forgiveness reduction. The

borrower seeking forgiveness would list \$400 as the salary/hourly wage reduction for that employee (the extra \$50 weekly reduction multiplied by eight weeks).

In light of the amendments under the Flexibility Act described above, Part III.5.g of the First Loan Forgiveness Rule (85 FR 33004, 33009) is revised by striking “June 30, 2020” each place that it appears and replacing it with “December 31, 2020,” and by striking “75 percent” and replacing it with “60 percent.” Section 3(d) of the Flexibility Act provides that these amendments shall be effective as if included in the CARES Act, which was enacted on March 27, 2020.

Lastly, section 3(b)(2)(B) of the Flexibility Act established two new exemptions based on employee availability and business activity, respectively, that would eliminate a reduction in the loan forgiveness amount that would otherwise be required due to a reduction in full-time equivalent (FTE) employees. Specifically, that section of the Flexibility Act states that the amount of loan forgiveness “shall be determined without regard to a proportional reduction in the number of full-time equivalent employees” if an eligible recipient, in good faith, (A) is able to document (i) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020; and (ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or (B) is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued 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 during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social

distancing, or any other worker or customer safety requirement related to COVID–19.

The new exemption pertaining to individuals who refuse an offer to be rehired is very similar, but not identical, to a *de minimis* exemption that was provided in the First Loan Forgiveness Rule; therefore, the Administrator and the Secretary have determined that this new statutory exemption should supersede the previous *de minimis* exemption relating to reductions in FTE employees. However, a related *de minimis* exemption in the First Loan Forgiveness Rule for borrowers that have reduced the hours of an employee and offered to restore the reduction in hours, but the employee declined the offer, is not addressed in the Flexibility Act and is therefore being retained.

In order to implement these exemptions, Part III.5.a of the First Loan Forgiveness Rule (85 FR 33004, 33007) is revised to read:

a. Will a borrower’s loan forgiveness amount be reduced if the borrower reduced the hours of an employee, then offered to restore the reduction in hours, but the employee declined the offer?

No. In calculating the loan forgiveness amount, a borrower may exclude any reduction in full-time equivalent employee headcount that is attributable to an individual employee if:

- i. The borrower made a good faith, written offer to restore the reduced hours of such employee;
- ii. the offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the reduction in hours;
- iii. the offer was rejected by such employee; and
- iv. the borrower has maintained records documenting the offer and its rejection.

The Administrator and the Secretary determined that this exemption is an appropriate exercise of their joint rulemaking authority to grant a *de minimis* exemption under section 1106(d)(6).⁵ Section 1106(d)(2) of the CARES Act reduces the amount of the PPP loan that may be forgiven if the borrower reduces full-time equivalent employees during the covered period as compared to a base period selected by the borrower. Section 1106(d)(5) of the CARES Act waives this reduction in the forgiveness amount if the borrower eliminates the reduction in full-time equivalent employees occurring during a different statutory reference period⁶ by not later than December 31, 2020. The Administrator and the Secretary believe that the additional exemption set forth above is consistent with the purposes of the CARES Act and provides borrowers appropriate flexibility in the current economic climate. The Administrator, in consultation with the Secretary, has determined that the exemption is *de minimis* for two reasons. First, it is reasonable to anticipate that most employees will accept the offer of restored hours in light of current labor market conditions. Second, to the extent this exemption allows employers to cure FTE reductions attributable to reductions in hours that occurred before February 15, 2020 (the start of the statutory FTE reduction safe harbor period), it is reasonable to anticipate those reductions will represent a relatively small portion of aggregate employees given the historically strong labor market conditions before the COVID-19 emergency.

⁵ Section 1106(d)(6) is the sole joint rulemaking authority exercised in this interim final rule. All other provisions of this interim final rule are an exercise of rulemaking authority by SBA, except as expressly noted otherwise.

⁶ Section 1106(d)(5) specifies that this reference period is between February 15, 2020 and 30 days after the date of enactment of the CARES Act or April 26, 2020 (the safe harbor period).

In addition, Part III.5.b of the First Loan Forgiveness Rule (85 FR 33004, 33007-08) is revised by adding the following at the end thereof:

Borrowers are exempted from the loan forgiveness reduction arising from a proportional reduction in FTE employees during the covered period if the borrower is able to document in good faith the following: (1) an inability to rehire individuals who were employees of the borrower on February 15, 2020; and (2) an inability to hire similarly qualified individuals for unfilled positions on or before December 31, 2020. Borrowers are required to inform the applicable state unemployment insurance office of any employee's rejected rehire offer within 30 days of the employee's rejection of the offer.⁷ The documents that borrowers should maintain to show compliance with this exemption include, but are not limited to, the written offer to rehire an individual, a written record of the offer's rejection, and a written record of efforts to hire a similarly qualified individual. Borrowers are also exempted from the loan forgiveness reduction arising from a reduction in the number of FTE employees during the covered period if the borrower is able to document in good faith an inability to return to the same level of business activity as the borrower was operating at 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 (CDC), or the Occupational Safety and Health Administration related to the maintenance of standards for sanitation, social distancing, or any other worker or customer

⁷ Further information regarding how borrowers will report information concerning rejected rehire offers to state unemployment insurance offices will be provided on SBA's website.

safety requirement related to COVID-19 (COVID Requirements or Guidance). Specifically, borrowers that can certify that they have documented in good faith that their reduction in business activity during the covered period stems directly or indirectly from compliance with such COVID Requirements or Guidance are exempt from any reduction in their forgiveness amount stemming from a reduction in FTE employees during the covered period. Such documentation must include copies of applicable COVID Requirements or Guidance for each business location and relevant borrower financial records.

The Administrator, in consultation with the Secretary, is interpreting the above statutory exemption to include both direct and indirect compliance with COVID Requirements or Guidance, because a significant amount of the reduction in business activity stemming from COVID Requirements or Guidance is the result of state and local government shutdown orders that are based in part on guidance from the three federal agencies.

Example: A PPP borrower is in the business of selling beauty products both online and at its physical store. During the covered period, the local government where the borrower's store is located orders all non-essential businesses, including the borrower's business, to shut down their stores, based in part on COVID-19 guidance issued by the CDC in March 2020. Because the borrower's business activity during the covered period was reduced compared to its activity before February 15, 2020 due to compliance with COVID Requirements or Guidance, the borrower satisfies the Flexibility Act's exemption and will not have its forgiveness amount reduced because of a reduction in FTEs during the covered

period, if the borrower in good faith maintains records regarding the reduction in business activity and the local government's shutdown orders that reference a COVID Requirement or Guidance as described above.

g. Documentation requirements.

Because SBA has issued an alternative loan forgiveness application, SBA Form 3508EZ, the parenthetical in the first sentence of Part III.6 of the First Loan Forgiveness Rule (85 FR 33004, 33009) is revised to read as follows: “(SBA Form 3508 or SBA Form 3508EZ, as applicable, or lender equivalent)”.

2. Changes to the First Loan Review Rule

a. Alternative Loan Forgiveness Application

The First Loan Review Rule informs borrowers and lenders of SBA's process for reviewing PPP loan applications and loan forgiveness applications. Because SBA has issued an alternative Loan Forgiveness Application, SBA Form 3508EZ, the following changes are necessary.

Parts III.1.b and III.1.e are revised by striking each reference in those sections to “SBA Form 3508 or lender's equivalent form” and replacing it with “SBA Form 3508, 3508EZ, or lender's equivalent form”.

b. The Loan Forgiveness Process for Lenders

As noted above, SBA has issued an alternative Loan Forgiveness Application Form, SBA Form 3508EZ. Further, Section 3(b)(2) of the Flexibility Act reduced, from 75 percent to 60 percent, the portion of PPP loan proceeds that must be used for payroll costs for the full amount of the PPP loan to be eligible for forgiveness. As set forth below, these developments necessitate several revisions to Part III.2 of the First Loan Review Rule.

Part III.2.a. is revised to read as follows:

a. What should a lender review?

When a borrower submits SBA Form 3508 or lender's equivalent form, the lender shall:

- i. Confirm receipt of the borrower certifications contained in the SBA Form 3508 or lender's equivalent form.
- ii. Confirm receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the SBA Form 3508 or lender's equivalent form.
- iii. Confirm the borrower's calculations on the borrower's SBA Form 3508 or lender's equivalent form, including the dollar amount of the (A) Cash Compensation, Non-Cash Compensation, and Compensation to Owners claimed on Lines 1, 4, 6, 7, 8, and 9 on PPP Schedule A and (B) Business Mortgage Interest Payments, Business Rent or Lease Payments, and Business Utility Payments claimed on Lines 2, 3, and 4 on the PPP Loan Forgiveness Calculation Form, by reviewing the documentation submitted with the SBA Form 3508 or lender's equivalent form.
- iv. Confirm that the borrower made the calculation on Line 10 of the SBA Form 3508 or lender's equivalent form correctly, by dividing the borrower's Eligible Payroll Costs claimed on Line 1 by 0.60.

When the borrower submits SBA Form 3508EZ or lender's equivalent form, the lender shall:

- i. Confirm receipt of the borrower certifications contained in the SBA Form 3508EZ or lender's equivalent form.
- ii. Confirm receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the SBA Form 3508EZ or lender's equivalent form.
- iii. Confirm the borrower's calculations on the borrower's SBA Form 3508EZ or lender's equivalent form, including the dollar amount of the Payroll Costs, Business Mortgage Interest Payments, Business Rent or Lease Payments, and Business Utility Payments claimed on Lines 1, 2, 3, and 4 of the SBA Form 3508EZ or lender's equivalent form, by reviewing the documentation submitted with the SBA Form 3508EZ or lender's equivalent form.
- iv. Confirm that the borrower made the calculation on Line 7 of the SBA Form 3508EZ or lender's equivalent form correctly, by dividing the borrower's Eligible Payroll Costs claimed on Line 1 by 0.60.

Providing an accurate calculation of the loan forgiveness amount is the responsibility of the borrower, and the borrower attests to the accuracy of its reported information and calculations on the Loan Forgiveness Application Form. Lenders are expected to perform a good-faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning amounts eligible for loan forgiveness. For example, minimal review of calculations based on a payroll report by a recognized third-party payroll processor would be reasonable. By contrast, if payroll costs are not documented with such recognized sources,

more extensive review of calculations and data would be appropriate. The borrower shall not receive forgiveness without submitting all required documentation to the lender.

As the First Interim Final Rule⁸ indicates, lenders may rely on borrower representations. If the lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue. As stated in paragraph III.3.c of the First Interim Final Rule, the lender does not need to independently verify the borrower's reported information if the borrower submits documentation supporting its request for loan forgiveness and attests that it accurately verified the payments for eligible costs.

Part III.2.b. is revised to read as follows:

b. What is the timeline for the lender's decision on a loan forgiveness application?

The lender must issue a decision to SBA on a loan forgiveness application not later than 60 days after receipt of a complete loan forgiveness application from the borrower. That decision may take the form of an 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 for which forgiveness is sought. In the case of a denial without prejudice, the borrower may subsequently request that the lender reconsider its application for loan forgiveness, unless SBA has determined that the borrower is ineligible for a PPP loan. The Administrator has determined that this process appropriately balances the need for efficient processing of loan

⁸ 85 FR 20811, 20815-20816 (April 15, 2020).

forgiveness applications with considerations of program integrity, including affording SBA the opportunity to ensure that borrower representations and certifications (including concerning eligibility for a PPP loan) were accurate.

When the lender issues its decision to SBA approving the application (in whole or in part), it must include the following:

- i. For applications submitted using the SBA Form 3508 or lender's equivalent form:
 - (1) the PPP Loan Forgiveness Calculation Form;
 - (2) PPP Schedule A; and
 - (3) the (optional) PPP Borrower Demographic Information Form (if submitted to the lender).
- ii. For applications submitted using the SBA Form 3508EZ or lender's equivalent form:
 - (1) the SBA Form 3508EZ or lender's equivalent form; and
 - (2) the (optional) Borrower Demographic Information Form (if submitted to the lender).

The lender must confirm that the information provided by the lender to SBA accurately reflects lender's records for the loan, and that the lender has made its decision in accordance with the requirements set forth in 2.a. If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the lender must request payment from SBA at the time the lender issues its decision to SBA. SBA will, subject to any SBA review of the loan or loan application, remit the

appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA. If applicable, SBA will deduct EIDL Advance Amounts from the forgiveness amount remitted to the Lender as required by section 1110(e)(6) of the CARES Act. The lender is responsible for notifying the borrower of remittance by SBA of the loan forgiveness amount (or that SBA determined that no amount of the loan is eligible for forgiveness) and the date on which the borrower's first payment is due, if applicable.

When the lender issues its decision to SBA determining that the borrower is not entitled to forgiveness in any amount, the lender must provide SBA with the reason for its denial, together with the following:

- i. For applications submitted using the SBA Form 3508 or lender's equivalent form:
 - (1) the PPP Loan Forgiveness Calculation Form;
 - (2) PPP Schedule A; and
 - (3) the (optional) PPP Borrower Demographic Information Form (if submitted to the lender).

- iii. For applications submitted using the SBA Form 3508EZ or lender's equivalent form:
 - (1) the SBA Form 3508EZ or lender's equivalent form; and
 - (2) the (optional) Borrower Demographic Information Form (if submitted to the lender).

The lender must confirm that the information provided by the lender to SBA accurately reflects lender's records for the loan, and that the lender has made its decision in accordance with the requirements set forth in 2.a. The lender must also notify the borrower in writing that the lender has issued a decision to SBA denying the loan forgiveness application. SBA reserves the right to review the lender's decision in its sole discretion. Within 30 days of notice from the lender, a borrower may notify the lender that it is requesting that SBA review the lender's decision by reviewing the loan in accordance with 2.c. below. Within 5 days of receipt, the lender must notify SBA of the borrower's request for review. SBA will notify the lender if SBA declines a request for review. If the borrower does not request SBA review or SBA declines the request for review, the lender is responsible for notifying the borrower of the date on which the borrower's first payment is due. If SBA accepts a borrower's request for review, SBA will notify the borrower and the lender of the results of the review. If SBA denies forgiveness in whole or in part, the lender is responsible for notifying the borrower of the date on which the borrower's first payment is due.

Enabling SBA to use the statutory 90-day period to review the PPP loan and forgiveness documentation is an appropriate procedural protection to prevent fraud or misuse of PPP funds, ensure that recipients of PPP loans are within the scope of entities that the CARES Act is intended to assist, and confirm compliance with the PPP requirements set forth in the statute, rules, and guidance. This protection is also important in light of the large number and diverse types of PPP lenders, many of which were not previously SBA participating lenders and

which were approved rapidly in order to enable financial assistance to be provided as rapidly as feasible to millions of small businesses. SBA will use the 90-day period to help ensure that applicable legal requirements have been satisfied.

Part III.2.c.ii. is revised to read as follows:

- ii. The Loan Forgiveness Application (SBA Form 3508, 3508EZ, or lender's equivalent form), and all supporting documentation provided by the borrower (if the lender has received such application). If the lender receives such application after it receives notice that SBA has commenced a loan review, the lender shall transmit electronic copies of the application and all supporting documentation provided by the borrower to SBA within five business days of receipt.

The lender must also request that the borrower provide the lender with the applicable documentation that the instructions to the Loan Forgiveness Application Form (SBA Form 3508, 3508EZ, or lender's equivalent) instruct the borrower to maintain but not submit (documentation listed under "Documents that Each Borrower Must Maintain but is Not Required to Submit"). The lender must submit documents received from the borrower to SBA within five business days of receipt from the borrower.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices which will be posted on SBA's website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance with Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612).

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D), based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA and Treasury have drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA and Treasury have determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA and Treasury have determined that this rule modifies existing information collection. The amendments to the PPP made by the Flexibility Act and implemented in this interim final rule require conforming revisions to the Paycheck Protection Program – Loan Forgiveness

Application (SBA Form 3508), for use in collecting the information required to determine whether a borrower is eligible for loan forgiveness. In addition, SBA has developed a streamlined Paycheck Protection Program – PPP Loan Forgiveness Application Form 3508EZ (SBA Form 3508 EZ), which is available for borrowers meeting criteria described in the instructions accompanying the form. SBA has obtained OMB approval of the modification to the existing information collection, which is currently approved as an emergency request under OMB Control Number 3245-0407 until October 31, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the Federal Register. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the Federal

Register at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA’s waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the Federal Register at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA and Treasury are not required to conduct a regulatory flexibility analysis.

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