



## Heightened Scrutiny for PPP Loans and Safe Harbor to Return PPP Funds

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The Small Business Administration and U.S. Treasury Department responded to recent Congressional and media attention to businesses that received Paycheck Protection Program (PPP) loans. In public statements of Secretary Mnuchin and SBA's updated Frequently Asked Questions (FAQ) effective as of April 29, 2020, the government clarified its approach when auditing PPP loans. A loan audit will include the government evaluating the accuracy of the required borrower certifications regarding eligibility (as determined under existing SBA affiliation and eligible business rules) and, importantly, the certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." This economic necessity certification does not have an analog in existing SBA rules and is largely subjective based on business analysis of the facts and circumstances at the time of application and funding.

There are two particularly notable developments in the FAQ. First, the SBA created a safe harbor for return of loan funds by borrowers who, armed with the clarifications in the FAQ, determine they may now not be eligible for a PPP loan. Second, SBA states that it will audit all businesses receiving more than \$2 million in PPP loans. The FAQ further states that PPP loans of less than \$2 million are subject to review "as appropriate" following the submission of a loan forgiveness application.

The SBA application form identifies some of the criminal statutes that are violated by the provision of false information: 18 U.S.C. § 1001 (false statements to federal officials), 15 U.S.C. § 645 (misrepresentation of size status) and 18 U.S.C. § 1014 (false statements to a lending institution). In addition, enforcement will also occur through other federal anti-fraud statutes including the civil False Claims Act, 31 U.S.C. § 3729 et seq. (FCA), a principal method to recover damages from fraud. Violation of the FCA can result in treble damages and per claim penalties.

*Safe Harbor.* Any borrower that applied for a PPP loan prior to the updated FAQ and repays the loan in full by May 14, 2020 will be deemed by SBA to have made the required certifications in good faith. Borrowers should consider the facts underlying their decision to apply for a PPP loan in light of the FAQ and the risks and costs of responding to an audit, confronting adverse publicity or defending an enforcement action and determine whether it makes sense to return PPP funding or withdraw an unfunded loan or application.

*Recordkeeping for Audit and Loan Forgiveness.* If a business determines to keep or pursue a PPP loan, it is critical to now document facts that the business considered at the time of applying and accepting the loan. Write down and retain minutes, financial data, industry guidance, news articles, local and State orders, timelines and other documentation of the facts and circumstances that underpin the business analysis and the determination that the loan is necessary to support ongoing operations.

If a business determines to keep its PPP funding, it must now turn to the tasks of applying for loan forgiveness and accurately documenting expenditures of PPP funds. SBA is expected to issue guidance on forgiveness in the near future. Businesses can expect at a minimum to document their forgiveness application with the following:

- documentation verifying the number and pay rates of full time equivalent employees including payroll tax filings reported to the IRS and State income, payroll and unemployment insurance filings;
- documentation, in the form of cancelled checks, payment receipts, account transcripts or other documents, evidencing payments of mortgage interest, lease payments and utility payments eligible for forgiveness; and
- a certification by a representative of the borrower that documentation provided is true and correct and the amount for which forgiveness is requested was used to retain employee and make payments eligible for forgiveness.

Businesses who have received PPP funds must prepare a loan forgiveness application in the near future. At the same time, PPP recipients should prepare to have their use of PPP funds audited, particularly if they received more than \$2 million. Any audit is likely to include an inquiry as to how the funds were spent to ensure that at least 75% were spent on payroll expenses. Audits will likely include an inquiry as to the number of employees retained by a recipient. Given the FAQ, audits will likely include an inquiry as to the necessity of the PPP loan for the recipient's business operations.

Maintaining clear, contemporaneous and complete records of business circumstances and use of PPP funds will be critical for PPP recipients as they apply for loan forgiveness and respond to government oversight. Our attorneys are available to answer your questions about the PPP and other relief programs.

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