

PPP Updates: Safe Harbor, Audits & Employees Who Reject Rehire Offer May 8, 2020 - *Client Newsletter*

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In response to the outbreak of coronavirus disease 2019 (COVID-19), the U.S. Small Business Administration (SBA) launched a small business loan program of unprecedented size called the Paycheck Protection Program (PPP). Because of the speed of its implementation, the PPP has continued to evolve since its inception, as the SBA has continued to revise and supplement the requirements and specifications of the program. This has resulted in much confusion for PPP loan applicants and recipients and their professional advisors, as each has endeavored to mitigate compliance risks in response to the dynamic nature of the guidance and regulations issued to date. A copy of the FAQs issued by the SBA is available [here](#).

Safe Harbor and Audits of PPP Loans

An applicant for a PPP loan is required to make a good faith certification that current economic uncertainty makes its loan request necessary to support its ongoing operations. On April 23, 2020, the SBA issued supplemental guidance that called attention to this certification and warned loan recipients that, if their loans were repaid in full no later than May 7, 2020, later extended to May 14, the SBA would deem their certifications made in good faith.

The SBA suggested “a public company with substantial market value and access to capital markets” as an example of an applicant who could not make this certification in good faith. However, there is little to no guidance for smaller loan recipients to ascertain whether their certifications were made in good faith, except that recipients must “tak[e] into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.” (See FAQs # 31, 37, & 43)

The SBA supplemented this guidance in an interim final rule issued on April 24, 2020 and further guidance issued on April 29, 2020, which advised that the SBA would “review all loans in excess of \$2 million, in addition to other loans as appropriate” The SBA declined to elaborate further as to what this review would entail except to state that additional guidance would soon be issued. At this time, it is uncertain whether the SBA implemented this guidance and these regulations with public companies and private equity-backed companies in mind, or whether the SBA intended for their broader application. (See FAQ # 39)

In the meantime, it is incumbent on each individual loan recipient to determine whether to take advantage of the limited safe harbor. It is worth observation that an applicant is not required to be unable to obtain credit elsewhere, which is a requirement of other loans administered by the SBA. Likewise, there is no requirement for an applicant to be certain that the disaster would result in the closure or insolvency of the business—just that the current economic conditions renders the future of the business uncertain. Moreover, as the PPP is designed to accommodate loans of up to \$10 million, the size of the loan received is not in and of itself indicative of need or the lack thereof. Nevertheless, each loan recipient should review its cash reserves, access to capital, financial forecasts, and other measures of its financial position at the time of its application to evaluate its need for the loan.

Should a loan recipient nevertheless resolve to keep the funds, it is important for the business to make and keep a contemporaneous and meticulous record of its financial condition and financial projections, as well as its employment figures (e.g., number of employees and hours worked), both at the time of its application and for the duration of the loan. Furthermore, a loan recipient should document its compliance with all aspects of the PPP, such as the use of the funds and the controls implemented to ensure compliance. If the loan is audited, then, the recipient will be in a better position to demonstrate its need for the loan.

Recipients who elect to keep their loans should be aware of their potential exposure. The principal instrument of the federal government to combat fraud and abuse in programs such as the PPP is the False Claims Act (FCA), 31 U.S.C. 3729 to 3733, which imposes liability (including civil penalties, treble damages, and attorney’s fees) on any person who (a) knowingly presents a false or fraudulent claim for payment or approval or (b) knowingly makes or uses a false record or statement material to a false or fraudulent claim. The statute further permits “whistleblowers,” known as “relators,” to initiate an action on behalf of the federal government, or the federal government may initiate an action itself.

The elements of an FCA violation are, therefore, (1) that the recipient submitted a false claim, record, or statement; (2) that the recipient knew or should have known that the claim, record, or statement was false; and (3) that the false claim, record, or statement was material to the decision to pay the claim. Given the ambiguities of the PPP and the guidance and regulations issued to date, it is important for applicants and recipients to review and confirm the truth of the certifications and other information submitted in furtherance of their loans. Due to the streamlined nature of the application, applicants should expect that all information submitted in furtherance of their loans (or their requests for loan forgiveness) was material to the decision to approve the same.

Employees Who Decline the Offer to be Rehired

The SBA issued another important clarification about what happens when a borrower has laid off an employee and offered to rehire the same employee, but the employee has declined the offer. In the context of loan forgiveness, the amount of forgiveness is subject to reduction if a borrower fails to maintain its payroll. However, on May 3, the SBA clarified that, provided the borrower has made a good faith, written offer of rehire and has documented the employee's rejection of that offer, that would not affect the amount of forgiveness to which the borrower is entitled. Nevertheless, the SBA cautioned that employees who reject such offers may forfeit continued unemployment compensation. (See FAQ # 40)

Should you have any further questions about the PPP, the prospective audits of loans made under the PPP, the decision whether to return the funds you received on or before May 14, 2020, or the calculation of your loan forgiveness, please do not hesitate to contact us.