

Insights

UPDATED - Paycheck Protection Program: Confirm the Necessity or Return the Funds

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UPDATED - The Small Business Administration issued guidance on May 5th that extends until May 14, 2020 the safe harbor for returning the PPP loan proceeds. Our alert first published on April 30, 2020 has been updated to reflect this and to add some other guidance on the issue of "necessity."

Participants in the Paycheck Protection Program ("PPP") established by the CARES Act face an upcoming fork in the road. Those that have received funding under the PPP may be half-way through the eight week period to expend funds that will be eligible for forgiveness. But recent guidance calls for each borrower to reconfirm that it was eligible to receive those funds and, if not, to return the funds by May 14th. This alert describes in Q&A format some key considerations for PPP borrowers given recent guidance.

What has the SBA said about accountability for obtaining funds under the PPP?

The SBA's guidance has made clear from the beginning that those who misuse the PPP funds may be subject to sanctions. These sanctions include the potential for fines and other criminal sanctions. Efforts have been reported seeking to establish an ombudsman that would guard against fraud and abuse in the PPP. The SBA has also indicated that any borrower who received more than \$2,000,000 will be audited to confirm their eligibility. The SBA also has authority to audit those who borrowed less than \$2,000,000.

What has spurred the recent guidance?

National headlines reported that many public and private companies with access to significant resources had applied for and received PPP proceeds. The SBA seems to be confirming its earlier guidance in light of the desire to avoid fraud and abuse in the PPP.

What is the standard of eligibility regarding whether I needed the PPP funds?

The PPP application requires that you certify in good faith that the current economic uncertainty makes the loan request necessary to support the ongoing operations of the business.

What has the SBA said about returning PPP proceeds?

Through guidance and media interviews, the SBA has indicated that borrowers who reconsider whether or not they were eligible, determine they were not and return the funds by May 14, 2020 will be presumed to have met the "good faith" requirement of the application process.

How long do I have to make a decision?

You will need to act promptly in order to return the funds to qualify for the safe harbor. The funds must be returned by May 14, 2020.

What sources of liquidity do I need to consider? Do cash resources or lines of credit constitute sources of liquidity?

The guidance has not listed specific types of sources of liquidity that a borrower should consider. One example that was given was a large public company with access to the capital markets. But even non-public companies will have sources of liquidity that will need to be considered. A recent FAQ from the SBA confirmed that its guidance applies to private companies as well. If your company has significant cash reserves or has a line of credit available to tap into, consider if, taking those sources of liquidity into account, the PPP loan was necessary to support the business in the context of the current economic uncertainty.

What actions should I consider taking to make my decision to keep or return my funds?

Borrowers should review their decision process to confirm their need to borrow under the PPP at the time of the application. Confirm all of the variables that you considered at the time. Also, make sure you have documented your decision process at the time of the application when determining the funds were necessary and the process you went through to confirm that determination. This can include the upcoming challenges you have identified, your key assumptions about the risks that your business will face, the likely timeframe over which you believe those risks will extend and the financial resources that will be needed.

What are some appropriate variables that I can take into account?

This will be made on a business by business basis. The guidance indicates that each borrower should assess the impact on its business and whether they can access liquidity in a manner that "is not significantly detrimental to the business." (FAQ #31) Consider if the loan helped you keep people employed and helped avoid wage reductions. Consider how long you estimated the uncertainty would last and your need for other sources of liquidity if the disruption continues. Consider the availability of those resources over the course of the timeframe of need. Consider how difficult, lengthy and certain the process of accessing other sources of liquidity might be. Consider



the likely demands on your cash and lines as the business continues for new areas of need, such as revised employment and safety measures, new equipment and new infrastructure support as the business transitions into the post-pandemic normal. These are examples and are not exhaustive of all the considerations that might be relevant to your business.

Can I take into account changes in my business since the date of my application?

The certification of need must be made on the date of the application. Though no specific guidance has been given about the impact of hindsight, changes in circumstances, whether positive or negative, seem unrelated to determining if the borrower could make the certification of need in good faith on the date of the application.

If I decide to return the funds, what do I do?

Since this is a loan with your lender, you should coordinate with them. The loan can be prepaid at any time. You will want to get a payoff amount from your lender and arrange for repayment prior to May 14th.

If I decide to keep the funds, what do I do?

Under the guidance published so far, you do not need to do anything. You may want to confirm with your lender what it may require. In a few weeks, you will likely be asking the lender what it needs for the loan to be forgiven. Having a conversation about this now will likely make things smoother when you get ready to seek loan forgiveness.

Krieg DeVault is committed to helping you and your business during these unprecedented times. With your needs in mind, we have established a **COVID-19 Resource Center** to assist you through this process.

If you have any further questions, comments or concerns, please feel free to contact **Robert A. Greising, Corben A. Lee** or a member of our **Business, Acquisitions & Securities team**.