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What Small Businesses Need to Know Now: IRS and DOJ Raise Concerns Regarding PPP Loan Eligibility

Eligibility for Paycheck Protection Program (“PPP”) Loan:

- Very recent announcements from the Internal Revenue Service (“IRS”) and the U.S. Department of Justice (“DOJ”) emphasize that PPP borrowers and potential applicants should carefully review their eligibility for a PPP loan.
- The Small Business Administration (“SBA”) and IRS have provided multiple, but irregularly timed, updates on PPP loans through published Frequently Asked Questions (“FAQs”) (as of this writing, the latest update was on May 5, 2020), which may be relied upon by borrowers as SBA’s interpretation of the PPP.
- Questions 31, 37, and 43 of the FAQs (published on April 23, 2020, April 28, 2020, and May 5, 2020, respectively) provide the following clarifications regarding the borrower’s required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant”:
 - Borrowers must make this certification in good faith, taking 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.
 - Borrowers and potential applicants for the PPP loan must “assess their economic need for a PPP loan under the standard established by the

CARES Act and the PPP regulations at the time of the loan application.”

- “It is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.”
- There is a repayment safe harbor provision. The deadline to access the safe harbor was extended today from May 7, 2020 to May 14, 2020. “Any borrower that applied for a PPP loan prior to [April 23, 2020 for public companies/April 28, 2020 for private companies] and repays the loan in full by [May 14, 2020] will be deemed by SBA to have made the required certifications in good faith.”
- The foregoing also applies to private companies.
- Secretary of the Treasury Steven Mnuchin recently announced that SBA will be conducting a full review of any loan over \$2 million, in addition to other loans as appropriate, following the lender’s submission of the borrower’s loan forgiveness application. His announcement was substantiated by Question 39 added to the FAQs.
- Reports yesterday state that DOJ’s Fraud Section’s Market Integrity and Major Fraud Unit is currently conducting a criminal review of PPP loan applications for evidence of material misrepresentations or fraud in borrowers’ PPP loan applications.
- The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) created the Office of Special Inspector General for Pandemic Recovery within the U.S. Department of Treasury to “conduct, supervise, and coordinate audits and investigations” of fraudulent activity related to the CARES Act programs. President Trump’s nominee to administer this well-funded oversight program testified before the U.S. Senate Banking Committee today.

Eligibility for Forgiveness of PPP Loan Repayment:

- Borrowers may only use the PPP loan proceeds for the following permissible purposes: payroll costs, rent, utilities, and payments on mortgage interest during the 8 weeks from the date of disbursement of the loan.
- Borrowers will be required to provide documentation to their lenders regarding how they used the PPP loan proceeds.
- Bloomberg Law reports that SBA was to issue guidance and regulations regarding loan forgiveness not later than April 26, 2020. That guidance has not yet been provided.

Borrowers and potential applicants should carefully consider these requirements, appropriately document their good faith determination of need, and be ready to demonstrate to a federal auditor the qualifying basis for applying for their PPP loans and use of the loan proceeds.

If you have concerns about PPP loan application certification or your eligibility for a PPP loan and repayment forgiveness, we recommend that you consult your attorney and your CPA, accountant, or other tax advisor. Please feel free to contact us if you have any questions or if we can otherwise be of assistance.

We wish you good health and continued success with your business.

We are here to help,

Jim, May, and Shama

Index of Our Prior COVID-19 Updates:

- March 30, 2020 – [What Small Businesses Need to Know Now: Just Released – Small Business Owner's Guide to CARES Act Programs/New Effective Date for Family Leave Requirements.](#)
- March 27, 2020 – [What You Need to Know Now: Just Announced SBA Low-Interest Working Capital Loans for Small Businesses.](#)
- March 20, 2020 – [What Small Businesses Need to Know Now – New Paid and Unpaid Leave Requirements for Coronavirus Absences.](#)

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