

PPP Loan: To Keep or Not to Keep

- **Uncertainty**
- **Repayment**
- **Safe Harbor Disclosure**



Featuring



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NOTE:

Any member of the Press or media wishing to write about any of this material should contact Shana Armstrong at armstrong@aalu.org.

PPP: A History

- **March 12, 2020**
Early Mention of the Concept/ Rubio Press Release
- **March 27, 2020**
CARE Act becomes Law, creates PPP
- **April 3, 2020**
PPP starts making loans
- **April 10, 2020**
PPP starts lending to ICs, Stat W2, Sole Proprietors

- Through May 6, 2020 made ~ 4.1 million loans worth ~ \$526 billion!
- By one estimate, total = more than 20 times the largest year in SBA history in 33 days
- Participating Lenders increased tenfold

Purpose & Legislative Intent



Extend liquidity for small businesses and support their payrolls during the induced economic coma designed to control the COVID-19 healthcare crisis.

Certifications

In order to qualify for a PPP loan, the applicant had to certify in:

"good faith that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

(Certification questions here).

Recommendation:

Document for yourself the specific considerations that led to your conclusion of economic necessity, especially as relates to maintaining your employees' payroll – the key purpose of the program.

Moving Goal Posts?

- Since the **CARES Act** became law SBA and Treasury have published nine interim final rules and 45 Frequently Asked Questions released in 16 separate batches.
- These are intended to provide clarifying guidance to borrowers and lenders who are participating in the program
 - Some guidance has led to substantial confusion



Return **Safe Harbor**

- On 5/5/2020 – the safe harbor to return PPP funds or terminate applications was extended through **May 14, 2020**.
- According to one press report - in response to updated guidance publicly traded companies have returned 48 loans worth more than \$350 million.
- Application of all these standards is highly dependent on the individual facts and circumstances of a particular applicant.



FAQ #31 & 37

Question 31, released on April 23, examines whether:

“businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?”

Answer:

“...all borrowers must assess their economic need for a PPP loan...”

“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 ...”

FAQ #31 & 37

The answer elaborates with an example:

- “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.”
- In further guidance released on April 31, Treasury extends the analysis provided in Question #31 to businesses owned by private companies “with adequate sources of liquidity to support the business’s ongoing operations.” (Question #37)

NOTE: the answer reaffirms that PPP rules do not require applicants to exhaust other credit markets.

Disclosure: Sunshine

All PPP borrowers should expect their acceptance of PPP funding to be disclosed publicly.

- Senator Marco Rubio (R-FL), an architect of the PPP, and the Chair of the Senate Small Business Committee and the Treasury Department have both announced a desire to make lists of all businesses who accept the PPP program a matter of



Timing = **TBD**

Expect a **searchable database**

Disclosure: **FINRA**

Paycheck Protection Program Loans

Question:

The Paycheck Protection Program (PPP) allows eligible individuals and small businesses to obtain loans that can be used during the COVID-19 crisis. A PPP loan is eligible for forgiveness, provided the terms of the loan forgiveness are satisfied. If a registered person or a business they control obtains a PPP loan and the loan or part of the loan is forgiven, will the registered person be required to report that forgiveness in response to Question 14K on their Form U4 as a “compromise with a creditor?”



Disclosure:

FINRA

Answer:

- No, provided the PPP loan or part of the loan is forgiven consistent with the original terms of the loan.
- For purposes of Form U4 Question 14K, a compromise with one or more creditors:
 - “generally involves an agreement between a borrower and a creditor in which a creditor agrees to accept less than the full amount owed in full satisfaction of an outstanding debt, unless such an agreement is included in the original terms of the loan.”

Because a PPP loan contemplates forgiveness of some or all of the loan as part of the original terms of the loan, such forgiveness will not involve a new agreement by the creditor but will be an event consistent with the loan’s original terms.

In those circumstances, the forgiveness of a PPP loan will not be a “compromise with creditors” for purposes of Form U4 Question 14K. Any forgiveness beyond the original terms of the loan would be considered a “compromise with creditors.”

Disclosure:

SEC-ADV

Question:

I am a small advisory firm that meets the requirements of the Paycheck Protection Program (PPP) established by the U.S. Small Business Administration in connection with COVID-19. If I receive or have received a PPP loan, what are my regulatory reporting obligations under the Investment Advisers Act of 1940 to my firm's clients?



Disclosure:

SEC-ADV

Answer:

- As a fiduciary under federal law, you must make full and fair disclosure to your clients of all material facts relating to the advisory relationship. If the circumstances leading you to seek a PPP loan or other type of financial assistance constitute material facts relating to your advisory relationship with clients, it is the staff's view that your firm should provide disclosure of, for example, the nature, amounts and effects of such assistance.
- If, for instance, you require such assistance to pay the salaries of your employees who are primarily responsible for performing advisory functions for your clients, it is the staff's view that you would need to disclose this fact. In addition, if your firm is experiencing conditions that are reasonably likely to impair its ability to meet contractual commitments to its clients, you may be required to disclose this financial condition in response to Item 18 (Financial Information) of Part 2A of Form ADV (brochure), or as part of Part 2A, Appendix 1 of Form ADV (wrap fee program brochure). (Posted April 27, 2020)

Does Necessary = Material?

- Facts and Circumstances
- Registered Investment Advisor (firm) v. Investment Advisory Representative (individual)

Considerations

- Legal
- Reputational
- Contemporaneous Statements
- Honor the intent of the program
- Document: Keep good records

Safe Harbor - May 14, 2020

- For return of funds by borrowers who should not have received them
- Seriously consider your determination of 'necessity'
- Document the specific factors that led to your determination of 'necessity'
- All PPP Borrowers will ultimately be disclosed

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