

SBA Part Ten: Should We Keep Our PPP Loan Proceeds? The Safe Harbor Period Expires

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In response to Treasury FAQ 31 and 37, released on April 23 and April 28, 2020, Taft's SBA Task Force has put together a list of factors we believe will be prudent in a borrower's consideration and analysis of whether or not their Paycheck Protection Program (PPP) loan was taken in good faith. A PPP borrower has until May 7, 2020, to voluntarily terminate or repay its PPP loan funds under the safe harbor provision. This decision is ultimately an extremely fact sensitive business decision made by each borrower under its individual circumstances. We know that all PPP loans of \$2 million or more will be audited and that other PPP loans will be randomly audited. Please see the SBA Part Six, Part Eight and Part Nine within Taft's COVID-19 Toolkit for additional information on this program and enforcement risks. Note that the standards a borrower can be held to are intentionality to commit fraud or, under a False Claims Act claim, reckless disregard.

As a reminder, Treasury PPP FAQ 31 and 37 are applicable to private and public companies and both state:

"In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers 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. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in Section 3(h) of the Small Business Act), borrowers still *must certify in good faith* that their PPP loan request is necessary... 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."

We advise each borrower to file its documents in the event the necessity of the loan is called into question and keep such documents (digital and hard copy) for 10 years. Additionally, it is our recommendation that all businesses document their PPP loan eligibility. The factors outlined by our task force should be helpful in analyzing if the borrower meets the necessity requirement in good faith.

The SBA has "moved the goalposts" on the original goals and intentions of the PPP and therefore, even if companies with significant liquidity and ready access to capital who can demonstrate by documented evidence that they WOULD NOT have used that capital to retain its workforce and would have laid people off BUT FOR the PPP loan, there is still uncertainty.

If a borrower determines they want to prepay their PPP loan funds and they have not yet received them, we encourage them to contact their bank immediately, withdraw their application and request that the loan documents be shredded. If a borrower has received loan funds, we recommend the borrower write a letter explaining why they want to repay funds and wire the funds to the bank. ***This decision must be made and the funds returned on or before May 7, 2020.*** That is the end of the safe harbor period. Contact a member of the SBA Task Force at SBATaskForce@taftlaw.com to assist you with this analysis, as guidance changes daily.

Please visit our COVID-19 Toolkit for all of Taft's updates on the coronavirus.

Additional Resources

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