

Publication

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PPP Loan Repayment and Safe Harbor Checklist

As discussed in our previous client alerts, the SBA has released additional guidance on its review of the certification regarding the necessity of a PPP loan and extended the safe harbor to repay PPP loans to May 18, 2020.

To the extent a borrower's board of directors (or other relevant governing body) has not thoroughly analyzed and documented its consideration with respect to applying for the PPP loan, it should do so now in connection with considering whether to repay the PPP loan by the safe harbor expiration date. This consideration and the underlying analysis should be carefully documented – including detailed written analysis evidencing the factors the board of directors considered (such as available funds, ongoing costs, expenses, revenues, etc.) and backup confirming the eligibility for the loan and all statements made in the application. Even if this was done initially, borrowers may want to consider reconfirming their eligibility and the accuracy of the certifications and information included in their application and related documents.

The following is a short checklist of certain items to consider and document in connection with re-evaluating your PPP loan:

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1. Confirm the borrower is not in an ineligible line of business.
2. Confirm under 500 total employees (or other specific industry code size requirement) – includes worldwide employees (by total count, not by full time equivalent), including affiliates (and confirm affiliation rules applied properly).
3. Confirm corporate group does not have over 20 million in PPP loans in the aggregate.
4. Confirm the amount of the PPP loan was properly calculated.
5. Confirm the certification that "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant" is correct. A borrower 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. A borrower should consider factors such as available funds, ongoing costs and expense and revenues etc...
6. Confirm all other information in the Application and other materials provided in connection with the Application are true and correct.
7. Confirm all authorizations and approvals under organizational documents (including any shareholder or investor rights agreements) have been obtained.

8. Confirm that any consents, approvals or notices required under existing indebtedness or other agreements have been obtained.
9. Consider any negative public relations from receiving the loan or other issues related specifically to the borrower's business.
10. Consider risks of any other governmental entities bringing claims with respect to the certification regarding need and other information in the Application (including district attorneys or state attorney generals) and the risks of False Claim Act claims with respect to the application and use of the proceeds.
11. Consider any impact on future potential transactions, including potential disclosure, representations and warranties, and escrows or holdbacks in connection with subsequent financings, equity issuances or sale transactions.

If you have questions about this guidance or any other matters related to the PPP program, please contact Chadwick Hoyt, Michael Gray, Robert Gerber, David Milligan, Bruce Fox, Tom Wolford, Rudy Radasevich or your personal Neal Gerber Eisenberg attorney.

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