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PPP Loan Certification Guidance – Should I Give the Money Back?

Over the past week, many clients who have received Paycheck Protection Program ("PPP") loans have inquired about whether (a) they satisfy the PPP loan certification requirements following provision of additional guidance from the Small Business Administration ("SBA") and/or (b) they should return their loans now. This client alert addresses key aspects of the recent SBA guidance and provides guidance for businesses who are evaluating these issues. When reviewing the information below, it is important to note that the current situation is fluid, and the guidance provided by the SBA is changing on a daily basis.

Borrowers Must Certify that the PPP Loan Is "Necessary"

The PPP loan application requires applicants to make the following certification: "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Under the SBA's continually updated FAQ Guidance, this certification must be made in good faith and take into account the applicant's "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." (See FAQ 31). The SBA has advised that borrowers who repay their loan in full by May 14, 2020 will be deemed to have made the certification in good faith. (See FAQ 43).

It is important to note that FAQ 43 also states that the SBA intends to provide additional guidance on the certification prior to May 14, so please be aware that the future guidance may affect the following discussion.

Is a PPP Loan Necessary?

The key question appears to be whether the loan is "necessary" to support the ongoing operations of the applicant. The word "necessary" is not defined, nor is the period during which the support of the ongoing operations of the applicant is to be considered. Given the ambiguity, some commentators have asserted that the required certification may be unconstitutional because it is vague and/or ambiguous. (See this Forbes article for additional discussion).

Nevertheless, the documented fact that a business was going to eliminate jobs (or reduce salaries) but was able to avoid doing so because of receipt of the PPP loan seems to be among the best kind of evidence that the loan was necessary to support operations. It is at the core of what the PPP was intended to achieve.

In trying to assess the applicable timeframe of the certification, limiting the relevant period of "support of ongoing operations" to the eight-week period following funding of the loan (the measuring period for loan forgiveness purposes) seems unreasonable. Businesses often project cash needs on a rolling near term basis, built out to six- to 12-month projections of revenues, expenses, and capital needs.

The medium and longer term economic impacts of COVID-19 (over the next three to 12 months) on a business are unknown. The negative economic impacts will gradually occur in due course with unpredictable follow-on effects. Business customers may go out of business; they may delay payment or refuse payment; banks may face a liquidity crisis; the virus may reemerge and reenergize with the reduction of social distancing; the economy may need to shut down again after current capital reserves and government funding have been used; etc., etc. Some commentators go as far as suggesting that there is a material chance of the world economy entering a depression affecting all businesses.

Based on (a) the SBA's failure to provide adequate guidance at the time certification was made by most businesses, (b) the current profound macro-economic uncertainty, and (c) the further uncertainty of whether a business will have (i) adequate continuing revenues or (ii) reasonable access to other capital resources to support its ongoing operations when needed, it will be difficult for the SBA to prove as a legal matter that a business provided the above certification in bad faith and is thus subject to potential criminal liability (unless of course, there is contemporaneous evidence that the business really did not believe the certification it was making at the time made).

SBA to Review Loans Over $2 Million

The FAQs also provide that "[t]o further ensure PPP loans are limited to eligible borrowers in need, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of $2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application. Additional guidance implementing this procedure will be forthcoming." (See FAQ 39).

Note that the "review" of loans in excess of $2 million is to occur following submission of the loan forgiveness application. As discussed above, businesses will presumably know more in the next 60 days about what is to come after. Therefore, for many clients, it will make sense to keep the money for now. If a company determines over the next 60 days that (a) the company's operating and financial performance and prospects are much better than projected and (b) the company is uncomfortable applying for loan forgiveness, the company may determine not to apply for forgiveness and to instead pay the money back.

Reputational Considerations

The fact that a company applied for a large loan is already a matter of public record. Giving the money back now might be portrayed by the press or a competitor as a public admission that the company wrongly applied for a loan. Absent special facts, it is likely desirable for a company to evaluate how its business and the economy is doing in the next 60 days and to make a more informed decision about whether to apply for loan forgiveness this summer. The business risk in participating in the PPP for the great majority of businesses is reputational, not audit or criminal.

The SBA has written almost 4 million loans totaling over $500 billion to deserving borrowers large and small without financial underwriting, subject to a general and undefined borrower certification, and based on the fact that at the time the PPP was enacted, the government shut down the economy for health reasons in an unprecedented fashion creating primary economic uncertainty for a very broad cross section of American businesses.

Documenting Necessity

To minimize risk exposure with respect to the certification and to support more informed decision-making, we recommend that businesses document the analysis used in determining whether to provide the required certification.

In preparing such documentation, businesses should contemplate all risks that apply to the operations of the business as a result of COVID-19, including any uncertainties related to (a) the business's ability to provide its products or services in the wake of "stay-at-home" orders, (b) decreased customer demand or ability to afford the products or services of the business, (c) access to additional capital, (d) the business's ability to pay and retain employees, and (e) the business's supply chain.

These are just a handful of the potential uncertainties that a business may now be facing due to COVID-19. Each PPP applicant and recipient should carefully conduct a review of projected revenue, production, and operating expenses to determine the risks and uncertainties that are specific to it.

If you have any questions regarding the PPP loan certification requirements, contact your primary Tonkon attorney.

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