

Key Factors for Companies to Consider When Certifying Their PPP Need

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Holland & Knight Alert

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Highlights

- The U.S. Small Business Administration (SBA) has released new guidance cautioning prospective borrowers that they need to certify that loans under the Paycheck Protection Program (PPP) are indeed necessary to support ongoing operations.
- The SBA is providing those companies that already have received PPP loan proceeds but wish to reconsider their certifications the opportunity to return the proceeds by May 7, 2020 — no questions asked.
- Businesses that are prospective borrowers under phase 2 of the PPP, as well as those who have already closed PPP loans, should take the time to think through the necessity analysis with counsel. This Holland & Knight alert highlights a number of important items for companies to consider with their boards and management.

The original intent of Congress was that the Paycheck Protection Program (PPP) would serve to disburse federal funds into the hands of many of the nation's employees who were either furloughed or soon-to-be furloughed as a way to help people afford basic necessities such as food and shelter while they aided the country's battle against the COVID-19 virus by staying at home. Congress wanted a simple program designed to work quickly and efficiently. As crafted, however, many find the PPP to be anything but clear and it was engineered somewhat piecemeal. Employers who had access to counsel found themselves asking lots of questions about whether they were eligible to apply for a PPP loan and how much they could borrow attracted by the program's promise to forgive loans used for proper purposes, including payroll costs. But underlying the PPP is Congress' desire that an applicant certifies that the uncertainty of current economic conditions makes it necessary to apply for the PPP loan to support its ongoing operations.

Although certification isn't new, the U.S. Small Business Administration (SBA) released FAQ 31 on April 23, 2020, cautioning prospective borrowers that they need to certify that the loan is indeed necessary to support ongoing operations and providing those who have received PPP loan proceeds already who wish to reconsider their certifications the opportunity to return the proceeds by May 7, 2020 — no questions asked.

SBA released the FAQ in response to public outcry about some companies who have access to other forms of capital getting in line ahead of other companies commonly recognized as small businesses for PPP loans. Granted, the CARES Act told potential borrowers that they were eligible even if they had access to other forms of capital, something which would otherwise have disqualified them from SBA 7(a) loans. The SBA's FAQ focuses on publicly traded companies, but the warning applies equally to non-listed companies too — especially if they are sponsor-backed or have access to substantial liquidity from family offices, revolving lines of credit or otherwise.

The question is: What should companies do now? Boards and management of prospective borrowers under phase 2 of the PPP, as well as those who have already closed PPP loans, should take the time to think through the necessity analysis with counsel. There is no bright-line test, and every company's situation is different. Just because a company might be listed on the New York Stock Exchange does not in and of itself disqualify it under the necessity test. Whether

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a company needs the funds to support ongoing operations requires a facts-and-circumstances analysis that must take into account the totality of the circumstances present at the time of submitting the application.

The question is critical because the SBA has a history of vigorous enforcement and because the public outcry about the competitive race to the banks that the PPP created will only heighten SBA's enforcement interest in companies who might not have had a true necessity at the time of application. No one will want to face a moment where, in a flurry of public outcry, they must decide to return PPP funds.

Key Considerations for Companies

It is impossible to provide an exhaustive list of factors that might disqualify a company's need within the scope of this alert, but some important items to consider with management or your board include:

- **Your ability to access liquidity quickly:** The analysis here must factor on not just the ability to obtain additional capital, but also the ability to get it quickly and to be able to use it to pay workers' wages and benefits. Not all capital is the same. Capital often comes with strings, and capital can take a while to raise. Having availability under a revolving line of credit is not beneficial if it can't be accessed because of a default that has arisen. The point of the PPP was to continue to cut paychecks for people during, hopefully, the few months where most of the country is under stay-at-home orders. Even if you can access capital, a capital markets transaction may not be feasible if you lack a shelf registration which you can pull down quickly. As a result, access to capital alone may not disqualify a company.
- **Your revenue and EBITDA projections:** Not every industry is suffering now. If you're a large chain of grocery stores benefiting from individuals cooking more at home, you might project revenue and earnings before interest, taxes, depreciation and amortization (EBITDA) growth, and you may actually need to hire more employees rather than think hard about whether to furlough workers. However, if you are in the hospitality industry and your paid occupancy rate has fallen to near zero and you project it will stay that way for the near future, you may be an ideal candidate even if your stock trades publicly and you have access to a sizable revolving credit facility.
- **Your balance sheet:** If you have healthy cash reserves that can permit you to pay employees even if your revenue and EBITDA have fallen, perhaps even dramatically, you may lack the current need for ongoing operations support. In contrast, even if you have cash on the balance sheet, if it is restricted cash and not available to pay employees or if you reasonably project that you would exhaust your resources to a dangerous level, you may indeed have current need despite what a snapshot might indicate.
- **Your location:** Some states may try to reopen their economies more quickly than others. If a material portion of your revenue and EBITDA come from states that might reopen sooner, then that could weigh against current economic necessity. In contrast, if a substantial amount of your customers come from states that are projected to remain closed longer, you may indeed have the requisite necessity.
- **Your tolerance for public scrutiny:** Culture can vary from company to company. Some companies may conclude that their stock prices might drop if the press were to scrutinize their applications; other companies may have a policy of flying under the radar whenever possible; and some companies might view public scrutiny as a positive in the circumstances.
- **Your views on the materiality of the loan amount:** You might generate sizable EBITDA from a low employee headcount, but because your team cannot interact with the population during the COVID-19 crisis, your business suffers. The loan amount is based on payroll costs. You may find that the loan is immaterial to your ability to stay in business because stay-at-home orders would nevertheless prohibit your employees from generating sales. You may conclude that the risk of public scrutiny or SBA enforcement outweighs keeping employees on the payroll. In contrast, service companies with employees working from home might find \$10 million quite material when

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considering that, if used properly, the loan could convert to a grant.

- **Your employee acquisition costs and lead time:** You may find it very challenging to hire qualified employees. You view your employees not as an expense on the income statement but as an asset on the balance sheet. You may think that the PPP loan is necessary to keep your assets in place rather than jumping to your competitors. Ongoing operations might suffer materially if you had to spend valuable time and money recruiting new employees when business resumes.

Again, this is not an exhaustive list. Your company's situation will certainly be different than anyone else's. Our team of Holland & Knight attorneys is well versed in the PPP and stands ready now to assist you, your management team and your board in making critical decisions about your company's specific situation during this uncertain time.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.



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