



COVID-19: Insights and Guidance

An ABC webinar series featuring industry experts to answer your questions about the legal, safety and economic impacts of COVID-19.



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TO RETURN OR KEEP LOAN FUNDS BEFORE MAY 7 DEADLINE UNDERSTANDING PPP LOAN BORROWER RISKS

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PPP QUESTIONS / IRS RESPONSE

- **QUESTION:** Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?
 - **ANSWER:** 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. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” 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. For 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. Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.
- **QUESTION:** Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?
 - **ANSWER:** See above.





As you may know, government guidance regarding the Paycheck Protection Program continues to evolve daily and we want to make sure we continue to keep you updated. In particular, we want to call your attention to recent public statements and official program guidance that retroactively update the required borrower certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

In an April 22 press briefing, Secretary Mnuchin advised of then pending guidance restricting the acceptable basis for a PPP loan borrower’s necessity certification and warned of “severe consequences” for borrowers who obtain a PPP loan based on a misunderstanding of the necessity certification. And in an April 28 media appearance, Secretary Mnuchin stated that every PPP loan of \$2 million or more will be audited for program compliance prior to determination of the forgiveness amount of the loan, with an apparent focus on any other liquidity available to a PPP borrower. He also reminded borrowers that they could face “criminal liability” if their necessity certification is determined to be untrue.



The government has restated Secretary Mnuchin's April 22 public statements as official guidance, providing that notwithstanding anything in the CARES Act to the contrary, all PPP loan borrowers are required to take into account their current business activity and their ability to access other sources of liquidity in reassessing whether they have or can make the necessity certification in good faith. Secretary Mnuchin and the guidance have identified public companies and companies owned by public companies as a subject of particular government concern regarding the validity of their necessity certifications, but have also expressly excluded from eligibility for the program hedge funds and private equity firms. The new rules also instruct portfolio companies of private equity firms to apply any applicable affiliation rules and carefully review the necessity certification.

The new necessity certification guidance applies retroactively to all PPP loans. Government guidance provides that any PPP loan borrower that returns all of its PPP loan funds no later than May 7, 2020, will be deemed to have made its necessity certification in good faith, and thus avoid any consequences for the prior certification made due to a misunderstanding or misapplication of the recently articulated necessity certification requirements.

Lenders are expressly authorized to rely on such a certification by a PPP loan borrower without review or confirmation. As such, we feel compelled to advise you that Truist's acceptance of your PPP loan application and/or funding of your PPP loan does not constitute, and cannot be relied upon as implying, a conclusion or affirmation by Truist that such PPP loan proceeds are necessary for ongoing operations of your business or that the borrower has otherwise met applicable eligibility requirements for PPP loan participation. We also advise you that this notice may be furnished to the government in response to any inquiry regarding your loan.

We do not wish any of our clients to suffer criminal liability or other “severe consequences” for certifying that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations” of your business, and so we urge you to reconsider whether you remain comfortable with that certification in light of FAQ #31, the announced audit of PPP loans of \$2 million or more and the availability of the limited safe harbor for those who return PPP loan funds by May 7, 2020. Please contact your legal counsel or other advisors to determine how you wish to proceed.

In view of this guidance, some borrowers have repaid PPP loans or are planning to do so before the May 7, 2020 deadline. If you have questions about the process or if you already received funding from Truist for a PPP loan and wish to repay your loan in full, please contact us at PPPFunds@Truist.com and a Truist teammate will respond as soon as possible to help you with your request.

Your Truist Team



IRS RESPONSE EXPENSES PAID / FORGIVEN LOANS

Expenses Paid with Forgiven PPP Loans are Nondeductible

- The IRS Released Notice 2020-32 that clarifies that no deduction is allowed for an expense that is otherwise deductible if the payment of the expenses results in forgiveness of the loan that would be nontaxable to the taxpayer.
- The IRS stated “Businesses that use the loans for otherwise deductible costs can’t use those expenses to offset their taxes, the Internal Revenue Service said (Notice 2020-32). The forgiven loan funds aren’t included in businesses’ gross incomes”.



FROM CAPITOL HILL INSIDER...

- A top House Democrat will push legislation to ensure that businesses don't get taxed on forgiven federal loans they've received due to the coronavirus pandemic.
- Ways and Means Committee Chairman [Richard Neal \[cd.politicopro.com\]](https://cd.politicopro.com) (D-Mass.) plans "to fix this in the next legislation" Congress puts together to bolster the economy, his spokesperson, Erin Hatch, said in an email.
- Neal's plan is in response to [IRS guidelines issued Thursday \[irs.gov\]](https://irs.gov) that would prevent companies from taking tax deductions for business expenses that they normally claim – wages, rent, certain interest and utilities – if the spending comes from loans under the Paycheck Protection Program.
- Because those costs are tied to getting a PPP loan forgiven, the IRS rule effectively makes the forgiven loan taxable income. That counters lawmakers' intent for the program and loan forgiveness, said Senate Finance Committee Chairman [Chuck Grassley \[cd.politicopro.com\]](https://cd.politicopro.com) (R-Iowa), in a statement.
- "I'm disappointed by the IRS' determination that these business expenses are not deductible, especially since this issue was discussed during the development of the Paycheck Protection Program," he said. "The intent was to maximize small businesses' ability to maintain liquidity, retain their employees and recover from this health crisis as quickly as possible."
- But Grassley had no announcement yet on any next steps he'd take, his spokesperson, Michael Zona, said in an email.
- The IRS rule cited numerous court cases, as well as a tax code section, to support its position that disallowing such deductions "prevents a double tax benefit."





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