

**PROTECTION ON PPP:  
SHOULD I RETURN LOANS?  
WHAT ARE THE REGULATORY RISKS IF KEPT?**

Presented by Chuck James to the *Virginia Trial Lawyers Association, Virginia Association of Defense Attorneys & DC Trial Lawyers Association*

**WILLIAMS MULLEN**

## PAYCHECK PROTECTION PROGRAM (PPP)

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- > **PPP** was hastily drafted and rolled out with several unanswered questions. On April 23<sup>rd</sup>, the **Small Business Administration (SBA)** issued one of many updates to their guidance and in turn created additional questions about “uncertainty.” As a result of updates to the FAQ and various statements from Treasury Secretary Mnuchin and others, business owners/clients are worried about civil and criminal liability for having accepted and retained PPP funds.

*Please note: This presentation contains general, condensed summaries of actual legal matters, statutes and opinions for informational purposes. It is not meant to be and should not be construed as legal advice. Individuals with particular needs on specific issues should retain the services of competent counsel.*

## PAYCHECK PROTECTION PROGRAM (PPP)



- > **Treasury** and the **SBA** have created an [FAQ on the PPP](#)\* and have updated it nearly a dozen times. Additional edits are anticipated and could materially alter the client's risk and our advice.

\* <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

- > Key concern is whether the loan is “necessary” to support ongoing operations and when and how that determination must be made.
- > FAQ #31 “Attachment B” seeks to provide guidance for borrowers, especially those with large companies, about the certification they made regarding the necessity of the loan.

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- > 31. **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.

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### Treasury Created Uncertainty & Offered a Safe Harbor Provision

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 31 issued on **April 23, 2020**

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## Treasury Realizes They Have a Problem

- > 43. Question: FAQ #31 reminded borrowers to review carefully the required certification on the Borrower Application Form that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA guidance and regulations provide that any borrower who applied for a PPP loan prior to April 24, 2020 and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith. Is it possible for a borrower to obtain an extension of the May 7, 2020 repayment date?
- > Answer: **SBA is extending the repayment date for this safe harbor to May 14, 2020. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA’s interim final rule providing the safe harbor. SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.**

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- > Determining whether a client has committed a crime or a civil violation is a difficult if not impossible task under even the best of circumstances. A detailed and fact specific analysis of the client's application and the law is required.
- > Avoid the temptation to provide a "legal opinion" regarding the propriety of seeking or retaining PPP funds. There are too many variables and when advising clients we know we don't always get all relevant facts and even if we did, we can't stress test them.
- > Better to defer to subject matter experts who deal in government investigations and compliance and even then we are typically helping clients identify facts that empower them to make the appropriate business decision.

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- > I typically will walk the client through the things Treasury and Department of Justice (DOJ) are likely to consider in making a later determination regarding eligibility and fraud, provide guidance on facts that will increase or mitigate their risk and propose concrete steps to prepare for an inquiry should they retain PPP funds.
- > Offer general guidance in terms of what records or items the business might have considered in making decision, such as: employee records, wage records, leave records, cashflow records, economic / market forecasts, new orders vs cancelled orders, supplier issues, etc.



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- > Questions about eligibility and use of PPP funds are not the same as questions about risks of False Claims, repayment, audits and enforcement actions.
- > We've compiled a list of things for our clients to consider in reaching a decision, as well as a list of things they should do if they plan to retain any PPP funds already received.

# PAYCHECK PROTECTION PROGRAM (PPP)



## High Level Gameplan

- > Provide as much PPP background as the client might need.
- > Direct them to the myriad of client alerts on the PPP and to the appropriate authors/Subject Matter Experts (SME). <https://www.williamsmullen.com/news/covid-19-grouped>
- > Make clear we are addressing the factors that inform their decision on whether to keep or return funds, without providing an opinion that one course of action is appropriate.
- > Offer general guidance in terms of what records or items the business might have considered in making a decision, such as: employee records, wage records, leave records, cashflow records, economic / market forecasts, new orders vs cancelled orders, supplier issues, etc.
- > Describe steps they can take now to prepare for a potential inquiry.
- > Leave the client to make the final determination based on their specific needs and based on the latest (evolving) Treasury/SBA guidance.
- > Provide them with a checklist they can undertake.

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# QUESTIONS & ANSWERS



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