

## Should Companies Return Their PPP Loans?

By **Amanda Kramer** and **Daniel Suleiman**

(May 5, 2020, 7:20 PM EDT) - The Paycheck Protection Program, implemented as part of the Coronavirus Aid, Relief, and Economic Security, or CARES, Act to prevent pandemic-related layoffs and give relief to smaller businesses, began accepting applications on April 3.

Within two weeks, the initial \$349 billion had been snapped up by nearly 1.7 million businesses. Many ailing borrowers were left out in the cold.

As news emerged that numerous public companies and other rich borrowers received PPP loans, and another \$310 billion was being authorized for the program, the U.S. Department of the Treasury shifted course. Treasury Secretary Steven Mnuchin promised last week that any borrower who received over \$2 million and seeks loan forgiveness will be audited, and he has threatened criminal liability for any business that falsely certified that its loan was necessary.

But these threats have come with an escape hatch: Return your loan by May 14, and you won't face liability. So, many loan recipients are asking themselves an important question this week: Should I give my PPP loan back?

When the Small Business Administration began accepting loan applications, the agency had not issued guidance on what it meant for businesses to certify that the current economic uncertainty made their loans necessary. It was only on April 23, after the initial funds had been depleted, that the SBA issued the following more detailed explanation in the FAQs available on its website:

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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Critically, the SBA provided that any borrower that applied for a PPP loan prior to the issuance of this new guidance and repaid the loan in full by May 14, "will be deemed by SBA to have made the required certification in good faith." Several days later, the SBA extended this guidance, which had only referenced public company borrowers, to "private companies with adequate sources of liquidity to support the business's ongoing operations."

Whether to return a PPP loan by the May 14 deadline is a fraught question. Many businesses that relied on the rules as they existed when the SBA began receiving loan applications undoubtedly felt they were making their original certification in good faith.

But that does not end the inquiry. Deciding whether or not to return a PPP loan requires close consideration of the Treasury's evolving guidance, changing public sentiment over the loan program, and the intangible costs of keeping the funds. We see four principal questions borrowers should be asking themselves right now:

### **Can I demonstrate the basis for my certification?**

With the Treasury promising to audit every borrower who received over \$2 million and seeks loan forgiveness, borrowers should expect to provide documents, and be interviewed, on the basis for their certification.

Did you need the money to sustain ongoing operations? Were you at risk of laying off employees had you not received the PPP loan? Did you have access to other capital on reasonable loan terms? You should be prepared to demonstrate your answers to these questions with reference to documents and testimony.

### **Am I prepared to face the prospect of an investigation at some point in the next 10 years?**

In the context of these loans, the statute of limitations for criminal fraud may be as long as 10 years. Borrowers should be aware, therefore, that long after they repay their loan, investigators could probe the basis for the certification they made in April. As an illustration, the Office of the Special Inspector General for the Troubled Asset Relief Program, which Congress established in 2008 in the wake of the financial crisis, is still investigating cases.

### **Is the rest of my house in order?**

While the impetus for an investigation may be the specific PPP loan certification, once an investigator begins to examine a company, there is little limit on their ability to pursue wholly unrelated leads. For example, SIGTARP investigated General Motors Co., a TARP recipient, for concealing from consumers an alleged defect in its ignition switches.

### **Does the cost of returning my loan outweigh the cost of an investigation and the potential public backlash?**

Borrowers that reasonably believed they were entitled to PPP loans when the program was announced may nevertheless be investigated. It is important to consider in this context whether your need for the funds outweighs this potential risk, which could come in the form of investigation costs, public outcry, and potential criminal or civil liability.

As the economic costs of the coronavirus pandemic pile up, these questions may become even harder to answer. And as the Treasury's evolving views have shown, investigators may change how they evaluate borrowers who received loans and failed to return them. Therefore, even borrowers who made their original certification with the best of intentions may find themselves on the wrong end of a costly, disruptive investigation in years to come.

If the additional \$310 billion currently being made available for PPP loans under Congress's supplemental funding for the program fails to meet the needs of small businesses on the verge of failure, public scrutiny of borrowers will only increase, and the stakes will be higher for companies that received PPP loans and elected not to return them by May 14.

In this changing environment, one thing is certain: Considering whether to return a PPP loan is a question that should not be taken lightly.

*Update: This article has been updated to reflect the SBA's extension of the deadline for companies to return their PPP loans from May 7 to May 14.*

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