# PPP loans: return the funds or seek forgiveness?

May 12, 2020



The information provided here is of a general nature and is not intended to address the specific circumstances of any individual or entity. In specific circumstances, the services of a professional should be solving that are information. If any, communication was not intended or written to be used by any person for the purpose of avoiding penalties, nor should use thinformation, be construed as an opinion upon which any person may rely. The intended recipients of this communication and any attachments are not subject to any limitation on the disclosure of the tax treatment or tax structure of any transaction or matter that is the subject of this communication and any attachments. Baker Tilly Vichow Krause, LLP trading as Baker Tilly is a member of the global network of Baker Tilly international Link the members of which are separate and independent legal entities. © 2020 Baker Tilly Vichow Krause, LLP trading as Baker Tilly is a member of the

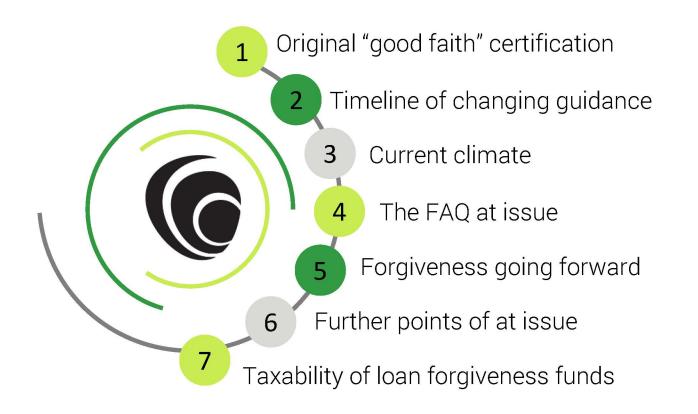


### Notice

Baker Tilly is providing updated information as it becomes available. Due to the nature of the emerging and rapidly evolving information from government and non-government relief programs, some requirements and offerings may change at any time. Please consult with your loan officer for the most current details.



### Today's agenda





## Original "good faith" certification

- The original good faith certification per the first interim rule **only** consisted of:
  - The applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes, or paid independent contractors, as reported on a Form 1099-MISC.
  - Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.
  - The funds will be used to retain workers and maintain payroll, or make mortgage interest payments, lease payments, and utility payments.
- FAQ 17: "Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application."



#### BEYOND PAYCHECK PROTECTION PROGRAM

### Timeline of changing guidance

11th: WHO declares pandemic

13th: Pres. Trump declares national emergency

18th: FFCRA signed into law

25th: States issue "Stay at Home" order

27th: CARES Act signed into law

2nd: SBA First interim Guidance–last minute changes prior to application

3rd: PPP applications begin Many Baker Tilly clients apply here

#### Week of 13th: PPP out of funds

14th: SBA Second Interim Guidance

- 15th: SBA guidance hits Federal Register AND updates guidance
- 20th: New SBA guidance hits Federal Register—blowback from large companies

#### April

- 23rd: SBA and Treasury guidance comes out regarding entities returning PPP funds—FAQ 31 and 37
- 27th: SBA guidance
- 28th: More SBA Federal Register information
- 28th: SBA guidance regarding corporate affiliated entities
- May 5th: IRS updates guidance, SBA releases more FAQs

Throughout: changes on IRS and SBA FAQs between these listed dates



#### BEYOND PAYCHECK PROTECTION PROGRAM Current climate

- Scrutiny mounts over some recipients of PPP loans
- Treas. Sec. Mnuchin sets triggering event of \$2 million for audit before PPP loan forgiveness
  - Unknown exactly what this entails as of now
- Treasury set date of May 14th, 2020 for return of PPP funds
- FAQs are updated to show the intention of the Treasury and the SBA
- Focus shifts to FAQs 31, 37, and 39



### The FAQ at issue

- FAQ 31: Do businesses owned by large companies (private companies—FAQ 37) with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?
  - 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." This is a "good faith" certification 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.
  - FAQ 37 refers borrowers to the answer to FAQ 31 (above).
- FAQ 39: Will SBA review individual PPP loan files?
  - Yes, 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 loan forgiveness application. Additional guidance implementing this procedure will be forthcoming.



## Forgiveness going forward

- The PPP loan requires a "good faith" certification that the economic uncertainty makes the request for the loan necessary.
- Vagueness of "adequate liquidity" to support ongoing operations is leaving business owners with doubt.
- CARES Act waived requirement that liquid businesses contribute capital alongside SBA loan.
- Credit elsewhere was also waived by the CARES Act.



### Further points of at issue

- Ron Johnson's sliding scale for forgiveness proposal
  - Compares profits from 2020 to 2019
- Can only apply for the PPP loan once.
- Once on the E-Tran for the PPP, you will remain.
- AICPA released a "Best Practices" guide on April 28, which argues for the ability to choose when to begin your 8-week payroll period.
  - This is because the simple date of receipt of funds does not take into account the business, and therefore the "Sense of the Senate".



## Taxability of loan forgiveness funds

- IRS notice 2020-32 put forward expenses that qualify businesses for forgiveness of loans under the Paycheck Protection Program won't generate federal tax deductions.
  - In essence, makes the grant taxable.
- However, as of May 6, top lawmakers on the Senate Finance Committee and the House Ways and Means Committee ask the Treasury Department and Internal Revenue Service to reverse their decision.
  - "We believe the position taken in the Notice ignores the overarching intent of the PPP, as well as the specific intent of Congress to allow deductions in the case of PPP loan recipients."



#### BEYOND PAYCHECK PROTECTION PROGRAM Next steps

- Be in contact with your attorney.
- Hold a shareholder meeting.
- Document your minutes—address the issues.
- Prepare memo of Considerations for Application and Forgiveness of CARES Act Paycheck Protection Loan program.
- Retain records for no less than 7 years.
- "The primary focus for criminal prosecutions will be on outright fraud, not incorrect but genuine misunderstandings of the PPP. Prosecutors frequently pass on cases when companies had competent counsel advising them during the process."
- Visit bakertilly.com/specialties/paycheck-protection-program-ppp-solutions for additional tools and insights!



#### Disclosure

The information provided here is of a general nature and is not intended to address the specific circumstances of any individual or entity. In specific circumstances, the services of a professional should be sought. Tax information, if any, contained in this communication was not intended or written to be used by any person for the purpose of avoiding penalties, nor should such information be construed as an opinion upon which any person may rely. The intended recipients of this communication and any attachments are not subject to any limitation on the disclosure of the tax treatment or tax structure of any transaction or matter that is the subject of this communication and any attachments. Baker Tilly Virchow Krause, LLP trading as Baker Tilly is a member of the global network of Baker Tilly International Ltd., the members of which are separate and independent legal entities. © 2020 Baker Tilly Virchow Krause, LLP