

Recent Guidance Presents Unforeseen Challenges with PPP Forgiveness

Like thousands of other businesses across the country, many of you reading this article have applied for and received (or will hopefully soon be receiving) assistance funds through the Small Business Association's (SBA) Paycheck Protection Program (PPP). In addition to the other health care-specific forms of relief available for providers and facilities ([see Provider Relief article](#)), the PPP funding was intended to be a lifeline for small businesses, including medical practices and related health care ventures facing the critical challenges related to COVID-19. What made the PPP funding attractive to many businesses was the promise of "forgivable" loan proceeds. As long as the funds were spent on certain qualified expenses (rent, payroll, pre-existing mortgage debt, utilities), the obligation to repay these amounts would be forgiven ([see PPP alert](#)).

While this remains the case, recent guidance from both the SBA and IRS place the following conditions on the forgiveness aspects of the PPP loans that could significantly alter how these amounts are applied by recipients and the resulting tax benefits associated with the use of such funds:

Certification Requirements

In recent guidance ([see FAQ 37](#)), the SBA has clarified that private businesses receiving PPP funding will have to certify as part of their forgiveness application that such request is necessary given the current "economic uncertainty" and "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 detrimental to the business." This guidance is a follow-up to earlier guidance imposing the same obligations on public companies ([see FAQ 31](#)). This certification raises the stakes for both public and private companies and could result in having to "prove" financial need as a pre-condition to seeking forgiveness under the PPP – a requirement that was not foreseen at the time of the initial application and which presents challenges to those recipients who had access to other sources of liquidity. In particular, this raises interesting questions for health care providers that also have received Provider Relief funding from HHS. Could receipt of these funds cast into question the ability of such providers to also seek forgiveness under the PPP? There is no official guidance speaking to this issue at the moment, and we would argue that this interpretation cuts against the intended purpose of the two programs. However, it is a viable question, and we will continue to monitor given the importance to our clients. It is important to note that for those companies that have concerns about making this new certification, the SBA is providing a window of until May 7, 2020, for recipients to return their PPP funding without having to address the certification requirement.

Update May 6, 2020: [Per FAQ 43](#), the SBA has extended the repayment window through May 14, 2020, for purposes of satisfying the safe harbor certification requirement. The SBA has indicated that additional guidance on the certification requirements should be forthcoming in advance of the May 14 deadline.

Audit Requirements

In a confirmation of previous statements made by Treasury Secretary Steven Mnuchin, the SBA also clarified that those businesses seeking forgiveness of more than \$2 million will be subject to audit by the agency with additional detail to be forthcoming ([see FAQ 39](#)). As you might imagine, this further raises the stakes for those providers

receiving significant assistance amounts given the expectation that the audits will likely revisit the underlying assumptions on which the original PPP applications were filed.

Elimination of Tax Deductions

In [Notice 2020-32](#), the IRS clarified that expenses paid using forgiven PPP amounts will not be eligible for the resulting tax deduction that would otherwise be available if paid using non-forgivable amounts. This has the potential to result in a higher tax burden for many clients as outlined in [No Deduction for Expenses Paid with Forgiven Loan Proceeds Under the Paycheck Protection Program](#).

We are keeping a close eye on each of these recent developments given the significant impact to your businesses and will continue to provide updates as more information becomes available and the guidance evolves. Please contact [Doug Griswold](#) or any member of our [Chambliss Health Care team](#) if you have any questions.

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