

April 29, 2020

Paycheck Protection Program Pitfalls: Will Your PPP Loan Really Be Forgiven?

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The Paycheck Protection Program (“PPP”) is one of the more highly-visible parts of the Federal Government’s COVID-19 economic relief package. As background, the PPP is operated by the Small Business Administration (“SBA”) and facilitates low-interest, non-recourse loans to small businesses so that those businesses can keep workers employed. Of course, there is a considerable amount of media controversy right now over how the money ran out so quickly, and whether the businesses that received it are actually “small.” But another controversy is lurking in the shadows behind the headlines, and it has everything to do with the government’s promise of loan forgiveness.

For loan recipients, the best part of getting a PPP loan is that up to the entire amount of the loan can be forgiven, and never repaid, so long as the money is used to retain employees, pay payroll expenses, and meet other SBA requirements. Indeed, this was one of the key political selling points of the PPP, and perhaps why it is so popular.

The problem is that some PPP loan documents -- particularly the promissory note defining the repayment and forgiveness terms -- may not say that. In the rush to get loans documented, some PPP promissory notes are worryingly vague. According to counsel for one loan recipient, their client’s PPP promissory note says only that “the requirements for [loan] forgiveness are currently being finalized by the SBA and may change from time to time.” Another example was more verbose, but no more helpful:

Lender makes no representation or promise to Borrower with respect to governmental forgiveness of any amount of the loan or related interest. Borrower understands that [the

PPP] currently contains conditions under which forgiveness may apply and agrees to understand and comply with such conditions as they exist and may change over time.

While we all hope the Federal Government will provide PPP loan forgiveness on at least the same terms that have already been announced, that is not certain. Moreover, whatever the “final” terms are for loan forgiveness, there will certainly be disputes over what expenses qualify. Indeed, in heated collection litigation, a lender might argue that this kind of “agreement to agree” language gives the borrower no right to forgiveness at all.

We likely will not see any judicial determination of these questions for months or years, as PPP loans will not start coming due until 2022. But uncertainty about forgiveness raises immediate headaches for PPP loan recipients that want to maximize their chances to qualify. In the face of this uncertainty, small business recipients will have to do their best to comply with the spirit of the law and hope that, in two years, what they did also fits the letter.

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