



Clarification of Good Faith Certification Under the Paycheck Protection Program (PPP)

In the weeks since the Coronavirus Aid, Relief and Economic Security Act (the CARES Act) was signed into law, the Payroll Protection Program (PPP) has provided hundreds of billions of dollars of low interest loans to eligible small businesses to pay certain payroll and operating costs. All borrowers are hoping for forgiveness of all or large portions of the loans.

An issue on the minds of many borrowers has been the requirement that the borrower must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Earlier today, the United States Treasury Department published some much-needed clarification in the form of an answer to the question of how the SBA will review borrowers’ required good-faith certification concerning the necessity of their loan request.

The answer is good (great!) news for many borrowers and provides some certainty for borrowers moving forward. The Treasury Department’s response was as follows:

- When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: **Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.**
- SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.
- Importantly, **borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance.** SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA’s determination concerning the certification regarding the necessity of the loan request will not affect SBA’s loan guarantee.

There are still funds left for eligible small businesses under the program - it

isn't too late to apply! If you determined not to make application for a PPP loan based on the lack of clarity regarding the certification, or for any other reason, we encourage you to contact us at 215-887-0200 to discuss submitting an application.

Our attorneys are familiar with the CARES Act and the PPP and are here to assist you in determining your eligibility for a loan, reviewing loan documents, maximizing forgiveness and making an application for forgiveness after the covered period.

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