



Insights: Alerts

Paycheck Protection Program Update: More Funds but More Clarity on Economic Uncertainty-Make Sure Your Certification is Accurate

April 29, 2020

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

UPDATED MAY 13, 2020: The FAQs were just [updated](#) to include a new FAQ #46 regarding the good faith 'economic necessity' certification. This should give many borrowers more comfort in moving forward with their loans.

Highlights of FAQ #46:

- A new black and white safe harbor: Any borrower that, together with its affiliates, received loans with a principal amount of less than \$2 million will be deemed to have made the certification in good faith. There are no other apparent requirements to qualify for the safe harbor, so this effectively takes the certification issue off the table for loans under \$2 million.
- SBA will focus its audit efforts on larger loans (\$2 million and up).
- Borrowers with loans of \$2 million and up may still have an adequate basis for making the good faith certification. However, uncertainty remains for these borrowers as to whether access to other means of liquidity might cause the certification to be deemed to be not made in good faith.
- If the SBA determines that a borrower lacked an adequate basis for the loan certification, SBA will seek repayment of the loan and will disallow forgiveness of the loan. However, if the borrower repays the loan after receiving notification from SBA, the SBA will not pursue enforcement or referrals to other agencies. This effectively walks back last weeks' comments from Secretary Mnuchin indicating that those failing to make a good faith certification could face criminal charges.

Applications for the Paycheck Protection Program (PPP) are once again being accepted by lenders after Congress authorized another \$310 billion in forgivable, 1% interest loans. Eligible small businesses that missed out on the first round applications should submit their applications as soon as possible. In the haste to complete the applications however, companies should make sure they satisfy the eligibility requirements. We've covered

these requirements at length in previous alerts including what qualifies as a “small business” but recent news of large businesses using “loopholes” to get PPP funds has put a spotlight on what's known as the “economic uncertainty” requirement. Companies should be familiar with this requirement before applying for PPP loans and companies that already received funds need to evaluate whether recent clarifications on this requirement warrant returning funds.

Applicants for a PPP loan are required to make a certification that “current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.” The Small Business Administration (SBA) issued an updated FAQs explaining that “[b]orrowers 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.” Put differently, applicants cannot blindly make the economic uncertainty certification but rather must consider how their business is doing now and whether they have other sources of funding.

This clarification is likely driven by recent negative press of large companies receiving PPP funds in the first round. The SBA's FAQs explains that public companies with “substantial market value” and “access to capital markets” will likely not be able to satisfy the economic uncertainty requirement and should be prepared to demonstrate the basis of their certifications.

The SBA's clarifications on economic uncertainty were issued on April 23, 2020. Recognizing that some applicants may have made this certification and received funds without the benefit of these clarifications, the SBA has provided a safe harbor. Any recipient of PPP funds before April 23, 2020, can repay the loan in full by May 7, 2020, and SBA will consider the applicant to “have made the required [economic uncertainty] certification in good faith.”

U.S. Treasury Secretary Steven Mnuchin also recently stated that the SBA will audit PPP loans above \$2 million, and warned about potential “criminal liability” for false certifications.

Many PPP lenders have also recently issued e-mail statements reminding PPP borrowers that PPP lenders are authorized to rely on borrower certifications without independent review or confirmation. Therefore, PPP lenders are further clarifying that the acceptance of a PPP application and the funding of a PPP loan is not to be implied as a conclusion by the lender that PPP loan proceeds are necessary for ongoing operations of the borrower or that the borrower has otherwise met the applicable PPP eligibility requirements.

In light of this recent guidance, new PPP applicants as well as those who have already received PPP funds should conduct a good faith analysis of their need for a PPP loan. If it is determined that a PPP loan is needed, we would suggest internally documenting the analysis and justifications for the PPP loan. Such a contemporaneous explanation could be helpful in the event of a future audit of a PPP loan.

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