

Understanding the SBA's New PPP Certification Guidance

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On April 24, 2020, President Trump signed into law the Paycheck Protection Program and Health Care Enhancement Act. In relevant part, this Act increases by \$310 billion the funds appropriated for the PPP established on March 27, 2020, by the CARES Act. The [Small Business Administration](#) (SBA) has announced that new loans under this second tranche of PPP appropriations will commence April 27, 2020. As the PPP has evolved since its inception on March 27, so too have SBA and the [U.S. Department of Treasury's](#)

articulation of its requirements. One of the agencies' primary mechanisms for conveying these requirements to borrowers has been through a regularly updated list of Frequently Asked Questions, many of which the SBA then formalizes through interim final rules that it publishes in the [Federal Register](#).

PPP applicants are required to make a number of certifications in connection with their applications, for example concerning their eligibility and the purposes for which they will use the loans. Attention to these certifications is extremely important, given the severe penalties that are possible for submitting false or misleading certifications to the government. One such certification that has drawn particular scrutiny is the certification that the "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Many applicants have noted that this certification is vague and have sought guidance on it.

On April 23, 2020, SBA and Treasury added the following new FAQ concerning this certification, reproduced below in full:

31. Question: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act),



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borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, 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." Borrowers 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.** For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

Lenders may rely on a borrower's certification regarding the necessity of the loan request. **Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020, will be deemed by SBA to have made the required certification in good faith.**

The required certification was in place before. While the FAQ does not change the legal standard, it makes clear that the Treasury Department and SBA are increasingly focused on ensuring that borrowers have a demonstrated need for PPP funds.

There are four key takeaways from this new guidance:

1. Borrowers must have considered "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." This is the first time that SBA or Treasury has suggested the need to consider alternative liquidity.
2. This requirement is *retroactive* to certifications that pre-dated the guidance (and, indeed, loans already issued).
3. In light of the requirement's retroactivity, the SBA has announced a safe harbor until May 7, 2020, for borrowers to return loans if any of the SBA's subsequent guidance has changed the validity of their application certifications. On April 24, 2020, the SBA incorporated this safe harbor provision into the new interim final rule.
4. The new guidance suggests that publicly traded companies, in particular, will have to carefully consider their alternate sources of liquidity. The FAQ's discussion of public companies appears to be a reaction to the media backlash over the receipt of PPP loans by various public companies.

The new guidance reinforces that borrowers should carefully analyze and be prepared to demonstrate to the SBA the need for a PPP loan. Borrowers should carefully document their process for determining the need for the PPP loan in board minutes and other materials. These should include cash flow projections, balance sheet and other relevant financial statements, and the availability of alternative financing (including terms, timing and other factors with respect to any such financing).

While the need for certification will depend on the facts and circumstances of each borrower, best practice would be a record demonstrating that a PPP loan would save the jobs of employees who are soon to be terminated or furloughed, as this would be

aligned with the congressional intent of the PPP. Borrowers should be prepared to have their determinations of need scrutinized by the SBA -- both at the time of loan origination and upon application for loan forgiveness.

Borrowers that fail to make their certifications in good faith may be subject to civil and criminal penalties, including liability under the False Claims Act. Violations of the False Claims Act could lead to treble damages and per-claim penalties in excess of \$21,000. Borrowers should note that the False Claims Act does not require specific intent to defraud the government. Recklessly disregarding the rules can give rise to liability.

The SBA and the Treasury Department have indicated that they will continue to provide updated guidance on the PPP. Weston Hurd attorneys are available to assist your business in analyzing eligibility for participation in the program.

About the Author



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