

SBA Guidance Issued on “Borrower Need” Certification for Paycheck Protection Program

May 13, 2020

On May 13, 2020, the Small Business Administration (SBA) issued guidance on how it will review the “borrower need” certification requirement for loans under the Paycheck Protection Program (PPP).

Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, and as stated in the PPP loan application, in order for a borrower to be eligible for a PPP loan, the borrower must certify in good faith that “current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant, 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.” Based on this language, many borrowers felt comfortable applying for a PPP loan given the negative impact that the coronavirus (COVID-19) pandemic has had on the economy in general and their business activity in particular.

However, SBA threw a wrinkle into the program when, on April 23, 2020, it issued FAQ 31 which stated “Borrowers must make this [borrower need] 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.” The requirement that borrowers consider “other sources of liquidity” caused confusion and concern among businesses that had received, or that were considering applying for, a PPP loan, especially considering that the CARES Act specifically removed the normal SBA requirement that a borrower show that it is not able to obtain “credit elsewhere.”

Authors

Thomas W. Antonucci
Partner
202.719.7558
tantonucci@wiley.law

Jessica N. Rosenthal
Partner
202.719.7478
jrosenthal@wiley.law

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Nevertheless, SBA instructed borrowers and applicants that could not meet the certification requirement to return funds or withdraw applications by May 14, 2020. SBA said that it would issue further guidance on the certification requirement prior to the deadline, and it did that on May 13, 2020.

Safe Harbor for PPP Loans of \$2 Million or Less

In FAQ 46, SBA provided for a safe harbor for all PPP loans of \$2 million or less – meaning that, those borrowers “will be deemed to have made the required certification concerning the necessity of the loan request in good faith.” In calculating the PPP loan amount for purposes of this safe harbor, a borrower must also include the amount of any PPP loans received by the borrower’s “affiliates” (as determined in accordance with the SBA’s affiliation rules).

Loans Over \$2 Million

For PPP loans over \$2 million, the certification can still be satisfied. SBA did not provide any objective metrics or other clarification as to how the certification will be analyzed, and they reiterated that all loans over \$2 million will be audited. However, significantly, SBA stated that the consequence for failing to meet the certification requirement would be that the borrower would be obligated to repay the loan and would not be eligible for forgiveness. In other words, if the borrower repays the loan following notification from the SBA, the borrower would not be subject to administrative penalties or civil or criminal enforcement referrals solely on account of failing to meet the certification requirement. The relevant excerpt from FAQ 46 is below:

“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.”

Other SBA/Treasury Guidance to be Forthcoming

In addition to the announcement of the May 13, 2020 FAQ, the SBA’s Office of Inspector General recently issued a Flash Report on the PPP on May 8, 2020, and recommended that the SBA issue additional guidance regarding various aspects of the program. We expect continued guidance being issued regarding the program from the SBA and Treasury to provide more clarity for borrowers and lenders.

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