

Can I Keep PPP Money? Should I? SBA Clarifies

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This content was published prior to the combination of Dentons Davis Brown. Learn more about Dentons Davis Brown.

On May 13, the Small Business Administration (SBA) issued additional guidance concerning its implementation of the Paycheck Protection Program (PPP), specifically, the required certification that loan recipients have a true need for the funds.

Economic necessity certification

Following the close of the initial application window (April 24, 2020), the SBA issued guidance reminding borrowers of the economic need requirement for a PPP loan under standards established by the CARES Act and the PPP regulations in effect at the time of the loan application.

Specifically, the SBA encouraged all borrowers to carefully review the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the [company].”

SBA clarified that the certification should be made by borrowers, “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.” If a borrower applied for a PPP loan before April 24, 2020, and later determined that they could not make the required certification that the loan was necessary, the borrower could repay the loan in full by May 7, 2020, and be deemed by SBA to have made the required certification in good faith. The May 7 repayment deadline was subsequently extended to May 14.

Good faith assumed for borrowers under \$2 million

Under the SBA's May 13 guidance, 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. This new guidance is based on the SBA's determination that borrowers with loans below the \$2 million 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.

SBA review

As under previous guidance, all PPP loans in excess of \$2 million, and other PPP loans as appropriate, remain subject to review by SBA for compliance with program requirements. If an SBA review determines that a borrower

lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA may 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. Any adverse determination concerning a borrower's certification will also not affect SBA's loan guarantee.

Bottom line

SBA's new guidance is intended to provide a higher degree of economic certainty for borrowers with loans below the \$2 million threshold, allowing these smaller companies to more confidently focus on their efforts to retain or rehire employees.

Davis Brown continues to monitor the SBA's PPP guidance and regulations. If you are PPP borrower and have questions concerning the SBA's latest guidance, please contact your attorney.

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