

PPP Money: Demonstrating You Meet the SBA Requirements

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

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) created the Paycheck Protection Program (PPP), authorizing certain businesses to apply for loans, a portion of which was eligible for forgiveness through the Small Business Administration (SBA).

One of the requirements to be eligible for PPP funds is the borrower makes a good faith certification that the uncertainty of current economic conditions makes the loan request “*necessary*” to support their ongoing operations and further acknowledging that the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments.

The SBA and Davis Brown are giving the following guidance regarding the certifications:

Q: What happens if PPP loan funds are misused?

A: If you use PPP funds for unauthorized purposes, the SBA will direct you to repay those amounts. If you knowingly make a material false statement in your PPP loan application or use the funds for unauthorized purposes and fail to pay them back at the SBA’s request, you could be subject to additional penalties such as federal criminal charges for bank or SBA fraud or false/fraudulent statements to the government.

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

A: 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, borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should have carefully reviewed the required certification that “**current 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 therefore should be prepared to demonstrate to the SBA, upon request, the basis for its certification.

Q: What if I applied for a PPP loan but now don’t think I qualify for meeting the requirement that the loan

request is necessary?

A: Any borrower that applied for a PPP loan before April 24, 2020, and repays the loan in full by May 14, 2020, will be deemed by SBA to have made the required certification in good faith. This is referred to as the safe harbor provision.

Q: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

A: 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.”

In guidance released on May 13, the SBA, in consultation with the Department of the Treasury, announced 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.

The 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.

The 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 the Borrower Application Form. If the 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, the 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 the SBA, it will not pursue administrative enforcement or referrals to other agencies (e.g., the Department of Justice) based on its determination with respect to the certification concerning the 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.

Bottom Line

Draft a memo and have your legal counsel review to document and analyze the rationale for your certification that your company meets (or met) the certification requirements to be eligible to obtain funds through the PPP. For example, if questioned by the SBA in an audit two years from now, the memo will be invaluable in helping you recall what you were thinking at the time you applied for PPP funding. Having the memo reviewed and approved by your legal counsel may provide additional protections for you as well.

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