

# CARES Act: Small Business Loan Program Update

Insights

April 23, 2020

## **SBA and Treasury Provide Additional Guidance on Necessity Certification for Paycheck Protection Program (PPP)**

On April 23, 2020, the U.S. Small Business Administration (SBA), in consultation with the Department of the Treasury, issued new guidance on the certification required of all PPP borrowers that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

This is the first formal guidance to expand upon the necessity certification. It explains that borrowers must make the necessity 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 board of directors of a company applying for a PPP loan should document the company’s lack of access to other sources of liquidity in connection with its deliberations on the necessity of the company’s PPP application.

The guidance specifically cautioned public companies applying for PPP loans to be prepared to demonstrate the necessity of the loans to the SBA upon request. The SBA is not requiring lenders to investigate a borrower’s need as part of the application process, allowing the lenders instead to rely on a borrower’s certification.

The SBA is providing an opportunity for companies that applied for PPP loans prior to the release of this new guidance to repay the loan in full by May 7, 2020, in which case the SBA will deem the necessity certification to have been made in good faith.

Clients that have already applied for or received a PPP loan should contact their Gunderson Dettmer attorneys.

The following is the full text of the guidance set forth in Question 31 of the SBA's Frequently Asked Questions (available [here](#) and below):

**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), 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.

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