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## Did Economic Uncertainty Make My PPP Loan Necessary?

The United States Department of the Treasury (Treasury) and the Small Business Administration (SBA) continue to issue information and guidance with respect to the Paycheck Protection Program (PPP) and the loans made available under it by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). One of the most recent items of note is the SBA's [updated PPP Loan FAQs](#), which in particular added FAQ 31 and FAQ 37. The answers to these two questions purport to provide guidance, retroactively, on one of the particular certifications that applicants were required to make in the PPP loan application process. This guidance, not coincidentally, came on the heels of negative press regarding the fact that larger companies (notwithstanding the CARES Act's waiver of affiliation rules and employee sizes that made them otherwise eligible) were some of the recipients of funds appropriated to the PPP loan program.

So, what are the borrowers in the PPP to make of this? ***Below is an outline that may be helpful to a borrower that is evaluating next steps in light of this new "guidance" and how it plays into the certification initially made at loan application time.***

### Good Faith Certification

The PPP loan documents required the applicant to certify in good faith to several items. One of those certifications (Loan Necessity Certification) provided that: ***"Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant?"*** Without having the commentary now available in the PPP Loan FAQs, early borrowers understood that the CARES Act did not require that the business had no other means of obtaining credit. That certainty and clarity was provided by the CARES Act itself, which provided that the requirement that an applicant be unable to obtain credit elsewhere was not applicable to the PPP loans. However, no other guidance or definitions were provided with respect to the Loan Necessity Certification.

### Guidance

The SBA's updated version of its PPP Loan FAQs includes, in pertinent part, the following new items:

**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.

**37. Question:** Do businesses owned by private companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?

**Answer:** See response to FAQ #31.

These new FAQs, in effect, modify the Loan Necessity Certification such that additional factors are now part of that certification. Whether these new factors are applicable to all borrowers, or just the “businesses owned by large companies”, is unclear. However, the answers seem to indicate that all ***borrowers should assess their economic need for the loans with these other factors in mind: (a) their current business activity, and (b) their ability to access other sources of liquidity to support their ongoing operations in a manner that is not significantly detrimental to the business.***

#### **Suggested Steps and Response**

So, what should a borrower do in light of these new factors, and apparent change or at least qualifier thrown in midstream?

Unless or until additional information or guidance is provided, ***we suggest that a borrower revisit the certification that it initially made***, and do so with additional attention to the facts and circumstances existing as of the date of the Loan Necessity Certification. If those facts and circumstances have changed since that date to the positive for the borrower and its economic position, then it might be prudent to evaluate the Loan Necessity Certification at two additional points in time: (a) the time it received the loan proceeds, and (b) the date of the newest guidance.

***If a borrower revisits its Loan Necessity Certification, and does not feel good about the initial certification, the government is allowing a borrower to return the PPP loan proceeds on or before May 7, 2020, and that borrower will be deemed to have made the Loan Necessity Certification in good faith.*** This means that the borrower will avoid the possibility of civil or criminal enforcement with respect to that certification. Although we believe testing of the good faith certification should be as of the date it was made, the recent developments and problematic guidance make it unclear whether other points in time might have bearing on the evaluation of a borrower’s Loan Necessity Certification. That is the reason for the mention of testing at additional points of time.

To assist in revisiting the initial Loan Necessity Certification, a borrower should consider working backwards to the point of time in question, and ***borrower should reduce to writing***

***the consideration and analysis of the economic uncertainty and its needs for the PPP loan.*** Issues or factors that might be useful in the analysis include:

- The current and projected impact of COVID-19 to the business, and the uncertainties surrounding those projections, including any communications from customers or clients regarding their level of business with the borrower and their respective economic conditions;
- Recent history of the business and its performance in the wake of other economic downturns;
- Existing levels of cash reserves or cash equivalents, and the borrower's ability to access other sources of capital and what the terms and conditions of such sources of capital might be;
- Current or projected plans for retention or reduction of workforce or payroll costs of such workforce, and the ability of borrower to reinstate such workforce to pre-COVID-19 levels;
- Reaction and measures taken by competitors to COVID-19;
- Actions or measures that borrower is considering, or has already taken, to address the economic uncertainty outside of workforce or payroll reduction.

For the borrower that revisits the Loan Necessity Certification and determines that it did make the certification in good faith, ***the written work product should be saved in case that part of a borrower's PPP loan is questioned in the future. In that regard, the Treasury has advised that borrowers receiving \$2 million or more of PPP loan proceeds will be audited.*** The audit will likely focus on the Loan Necessity Certification, as well as other aspects of the loan and loan process, including (i) number of employees, (ii) the determination of the size of the loan, and (iii) use of the loan proceeds.

If the consideration and analysis of the Loan Necessity Certification makes a borrower uncomfortable, then it should consult its advisors and maybe also consider returning the amount of any loan proceeds by May 7<sup>th</sup>.

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**If you have questions about the Paycheck Protection Program, please contact a member of Hill Ward Henderson's [COVID-19 Attorney Response Team](#) below.**

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