

## Business Law Alert

# Guidance Brings Clarification on PPP Loan Certification Requirements

**O**n May 13, 2020, the Treasury Department, on behalf of the Small Business Administration (SBA), issued guidance applicable to the “good faith” certification concerning the necessity of a PPP loan required to be made by all applicants for PPP loans. Specifically, FAQ #46 creates a safe harbor for any borrower that, together with its affiliates, received PPP loan proceeds in an aggregate original principal amount of less than \$2 million. Each such borrower (and its affiliates) will be deemed by the SBA to have made its required certification concerning the need for a PPP loan in good faith.

This brought relief to many borrowers who had become concerned that the SBA would challenge such borrower’s eligibility for a PPP loan (and perhaps assert penalties) based upon comments from the Treasury in an earlier Q&A. However Q&A #46 favorably resolves such concerns and associated ambiguities.

The new Q&A also brought some much needed clarity and comfort to borrowers that may have received loan proceeds (including affiliates) of \$2 million or more. Under the new guidance provided by Q&A #46, the SBA will not pursue administrative enforcement or referrals to other agencies with regard to such borrowers if, following notification from the SBA that the SBA has determined that such borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, the PPP loan received by such Borrower is repaid. The new guidance does not say how quickly the loan must be repaid, but presumably repayment must be made promptly following receipt of the SBA notice.

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The new FAQ reads as follows:

**“46. Question:** How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?

**Answer:** 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.” SBA, in consultation with the Department of the Treasury, has determined 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.

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. 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 in the Borrower Application Form. 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. SBA’s determination concerning the certification regarding the necessity of the loan request will not affect SBA’s loan guarantee.”

*Do not hesitate to contact the [Aronberg Goldgehn attorney](#) with whom you have contact for further information or assistance.*