

RESOURCES

SBA Updates Guidance on PPP Loan Good Faith Certification

The Small Business Administration (SBA) has just released new guidance on how it will review the good faith certification that all Paycheck Protection Program (PPP) borrowers must make when they submit their applications for PPP loans. Under the PPP, 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.” The SBA previously threatened audits and potential civil and criminal penalties for borrowers who are determined to have made the certification in bad faith. While the new guidance does not extend the general May 14, 2020 safe harbor deadline to return PPP funds, this update will still be good news for many businesses that took PPP loans.

Safe harbor for loans under \$2 million. The SBA has announced a safe harbor for all borrowers that, together with their affiliates, received PPP loans of less than \$2 million. Any such borrower will be automatically deemed to have made its certification concerning the necessity of the loan in good faith.

Loans over \$2 million. As the SBA previously announced, all borrowers who received PPP loans in excess of \$2 million will be subject to automatic review by the SBA for compliance with PPP requirements, including the good faith certification. Importantly, the SBA has clarified that if it determines that a borrower did not make the certification in good faith, the SBA will demand full repayment of the loan and instruct the lender that the borrower is not eligible for forgiveness. The good news is that as long as the borrower repays the loan in full after receiving notice from the SBA, the SBA will not seek penalties against the borrower or refer the borrower to other agencies for prosecution.

Unfortunately, the SBA did not provide any additional guidance on how it will evaluate the good faith certification made by these large borrowers. Some borrowers may face significant hardship if they are asked to pay back the entire principal, plus interest, in a lump sum after a finding by the SBA of bad faith certification. If a borrower cannot repay the loan following notice from the SBA, they may be subject to civil and criminal penalties.

Conclusion. This announcement by the SBA is welcome news for many PPP borrowers who may have had concerns about their compliance with the good faith certification. However, some borrowers who received more than \$2 million had hoped for more objective guidance and may be concerned that their ability to make sound current business decisions is compromised by not knowing whether or not their loans ultimately will be forgiven. Also, bear in mind that this new guidance does not alter the requirements small businesses will have to meet to receive loan forgiveness. It remains critical for all PPP borrowers to accurately and fully document their use of the loans in order to ensure forgiveness.