
SBA Provides Additional Guidance on Good-Faith Certification of Necessity for PPP Loan

Posted on May 13, 2020

Today, the Small Business Administration (“SBA”) and the Department of Treasury updated their Frequently Asked Questions (“FAQ”) related to the Paycheck Protection Program (“PPP”) to address what information the federal government would consider when determining whether a small business made an appropriate good-faith certification about the need for a PPP loan as a result of the economic uncertainty arising from the ongoing COVID-19 pandemic. The FAQ details a new safe harbor rule for loans under \$2 million and provides additional guidance for businesses that received loans in excess of \$2 million.

The PPP loan program was created by Congress in the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) in order to provide low-interest forgivable loans to small-businesses in order to cover eight (8) weeks of payroll expenses during the ongoing COVID-19 outbreak and certain other permitted costs. After the initial round of funding for the program was exhausted, concerns began to emerge that larger, publicly-owned companies were crowding out smaller businesses attempting to apply for PPP loans. In response, the Treasury Department and the SBA issued additional guidance for businesses to consider when determining whether a PPP loan was necessary to support its operations, stating that **“borrowers should review carefully the required certification that current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”** The Treasury Department also announced that it would have a safe harbor period until May 14, 2020 for small businesses to return a PPP loan if the business subsequently determined that it could not certify, or had certified in error, that it had an economic necessity for the loan. The lack of any concrete guidance as to how a business should make such a determination left many small businesses unclear about how to proceed.

SBA’s Safe Harbor for PPP Loans Less than \$2 Million

In response to the question “How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request,” the SBA announced a safe harbor for “any borrower that, together its affiliates, received PPP loans with an original principal amount of less than \$2 million.” Any small business that falls into that category **“will be deemed to have made the required certification concerning the necessity of the loan request in good faith.”** In explaining its decision to implement this safe harbor threshold, the SBA noted that “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” and by creating the safe harbor threshold the SBA will be able to “conserve its finite audit resources and focus its reviews on larger loans.”

Guidance for Small Businesses with PPP Loans Larger than \$2 Million

The FAQ additionally stresses that “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.” While those loans “will be subject to review by SBA for compliance,” the guidance states that “[i]f 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.” Importantly, if such a business “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.”

Impact of the New FAQ and Additional Best Practices

As a result of SBA’s additional guidance, it appears less likely that the federal government will be criminally prosecuting businesses who mistakenly certified that they had an economic necessity for receiving a PPP loan without first providing such businesses an opportunity to return the funds. Given SBA’s public statements indicating that it will be auditing loans over \$2 million, businesses should begin preparing for that possibility now. Importantly, businesses that received loans in excess of \$2 million should strongly consider documenting the basis for their determination that the loan was an economic necessity now. This can be done by preparing an internal memorandum that includes the following types of information:

- How the business currently views the economic uncertainty of current economic conditions in the wake of the ongoing pandemic;
- How the business’ ongoing operations have been impacted, or how they are expected to be impacted in the near term such as layoffs or expected layoffs, reductions in operations, or expected slow-downs in supply chain lines;
- Whether the businesses has other sources of liquidity, including the planned uses for those sources and an explanation as to why the additional support from the PPP loan funds is necessary to avoid significant damage to the business; and
- The unavailability of other sources of liquidity on reasonable terms.

Businesses should considering preparing such a document now, in order to provide contemporaneous documentation to the SBA, if requested, as to their decision making processes at the time of applying for, and receiving, a PPP loan.

Should you have any questions about the new SBA guidance or about the PPP loan program generally, please contact Nathan Duggins at nduggins@tuggleduggins.com or (336) 271-5246, Ross Hamilton at atrhamilton@tuggleduggins.com or (336) 271-5279, Scott Gayle at sgayle@tuggleduggins.com or (336) 271-5232, or Daniel Stratton at atstratton@tuggleduggins.com or (336) 271-5240. Please also follow our Twitter account @TuggleDuggins at <https://twitter.com/TuggleDuggins> for continuing, up-to-date information related to navigating the law during the COVID-19 outbreak.

© 2020 Tuggle Duggins P.A. All Rights Reserved. The purpose of this bulletin is to provide a general summary of significant legal developments. It is not intended to constitute legal advice or a recommended course of action in any given situation. It is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature. Moreover, information contained in this bulletin may have changed subsequent to its publication. This bulletin does not create an attorney-client relationship between Tuggle Duggins P.A. and the recipient. Therefore,

100 North Greene St. Suite 600
Greensboro, NC 27401

P.O. Box 2888
Greensboro, NC 27402

Phone: 336.378.1431
Fax: 336.274.6590