

SBA Issues New Standards for Companies Receiving PPP Loans

In a new FAQ published April 23, 2020, the Small Business Administration (SBA) provided guidance relevant to determining a company's eligibility for a PPP loan based upon its economic need. In a FAQ ostensibly targeting large companies with adequate sources of liquidity, the SBA provided new considerations to be taken into account in determining whether a PPP loan is "necessary" as required under the PPP loan application.

The PPP loan application requires companies to make the following certification in good faith: "*Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.*" The new FAQ explains the SBA's interpretation of that certification.

Businesses that applied for and received PPP loans should consider carefully whether their prior certification that the loan was "necessary" remains accurate in light of the new guidance. Notably, the FAQ indicates that borrowers can avoid questions about whether they were eligible to receive the loan, under this narrowed standard of necessity, if they repay their PPP loan in full by May 7, 2020.

Applying the rationale of the new FAQ to borrowers generally suggests the following:

- In making the certification, while the CARES act suspends the ordinary requirement that borrowers be unable to obtain credit elsewhere, the applicant must nevertheless take into account its ability to access other sources of liquidity that are sufficient to support ongoing operations in a manner that is not significantly detrimental to its business.
 - The FAQ requires public companies to consider liquidity available through access to capital markets.
 - Private companies will also need to assess their available liquidity sources, such as lines of credit. However, although the FAQ makes clear that other sources of liquidity should be considered, it does not fully re-instate the SBA's "credit elsewhere" test that was waived under the CARES Act. Therefore, the FAQ does not appear to suggest, for example, that a private company must take into account the liquidity resources of all of its owners.

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- The FAQ also focuses the determination of economic necessity on the applicant's "current business activity," which may suggest that mere uncertainty about the potential future impact of COVID-19 on the applicant's business may be insufficient. If an applicant's operating results have remained at or near pre-COVID-19 levels, that applicant should carefully consider whether it can make the certification in its SBA application.

Some PPP applicants will want to re-assess their original borrowing decision in light of this new guidance. The FAQ states that any borrower that obtained a PPP loan prior to April 23, 2020, and repays the loan by May 7, 2020, will be deemed to have made the required certification in good faith. Borrowers that are concerned about whether their certification, in light of the new guidance, was supported by a sufficient level of "necessity," should consider repaying the loan by that date. Companies that do not repay the loan by May 7, 2020, and are later determined to have violated the "good faith" certification standard, will be at risk of having to repay the loan as well as exposure for more severe penalties under the False Claims Act.

If you have any questions about your business's PPP eligibility, please contact your Reinhart attorney.

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