

# CARES Act: New SBA Guidance on Paycheck Protection Program Certification

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## INTRODUCTION

Congress created the Paycheck Protection Program (PPP) as a key avenue for economic relief under the Coronavirus Aid, Relief and Economic Security (CARES) Act. Small businesses quickly drew down the \$350 billion that Congress set aside for the program, and Congress is in the process of authorizing an additional \$310 billion for the program. Yet, some larger, well-financed borrowers were able to access loans while smaller, less liquid businesses were squeezed out. The SBA has now issued guidance that may materially alter potential borrowers' qualification for the PPP loans.

## BACKGROUND

Congress adopted, and the President signed, the CARES Act on March 27, 2020. The linchpin of the CARES Act is the PPP—a program designed to rapidly infuse cash into the U.S. economy through forgivable Small Business Administration (SBA) loans targeted to paying employee expenses. On April 2, 2020, the SBA released an Interim Final Rule governing the PPP, which clarified certain ambiguities in the statutory language and resolved many of the questions that had troubled lenders and borrowers alike. Since then, the SBA has issued two additional Interim Final Rules informing interpretation and administration of PPP loans.

In addition, the SBA—in consultation with the Department of the Treasury—has provided guidance to address borrower and lender questions concerning the implementation of the PPP through the issuance of “Frequently Asked Questions,” which it has updated continuously since the PPP became effective.

## NEW GUIDANCE ON CERTIFICATION

Potential borrowers are able to apply for PPP loans by submitting an SBA Form 2483, Paycheck Protection Program Borrower Application Form, which requires applicants to certify as follows:

*“Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”*

Given the rapid decline of the economy, applicants were able to readily make this certification, even if the businesses had not directly felt the effects of the downturn.

On the morning of April 23, 2020, the SBA published its most recent FAQ, No. 31, which provides guidance as to the meaning of the certification as to the necessity of the borrowing. Although addressed directly to larger borrowers, its provisions likely apply to all applicants:

FAQ 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.

Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

This new provision is a marked departure from prior guidance from the SBA. In general, the ability to access capital elsewhere typically disqualifies borrowers from SBA loans. The CARES Act, both with the EIDL and the PPP loans, did not require borrowers to certify they could not obtain capital elsewhere. This new FAQ states, however, **"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."**

The SBA has made clear that it is applying this new guidance retroactively. Thus, businesses that obtained PPP loans prior to April 23, 2020, must reevaluate whether their good faith certifications of need are accurate in light of the SBA's new guidance. Should a borrower determine that it may no longer certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations," the SBA will permit any borrower that applied for a PPP loan prior to the issuance of this guidance, and who repays the loan in full by May 7, 2020, to be deemed by the SBA to have made the original certification in good faith.

This substantial change in the initial guidance was given in connection with questions about large companies' eligibility for PPP Loans, and the answer appeared to be targeted at large, public companies. Since then, in a subsequent FAQ issued on April 28, 2020, the SBA and Treasury Department confirmed that the provisions of FAQ 31 apply to privately-held companies, as well.

If you have questions about the CARES Act, please contact your Lawrence Kamin attorney.

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