

“Safe Harbor” for Loans Under \$2 Million Part of New PPP “Necessity” Guidance – May 13

New guidance issued on May 13 by the Small Business Administration (“SBA”) and U.S. Department of the Treasury (“Treasury”) provides smaller borrowers with greater certainty as to the “necessity” certification for their Paycheck Protection Program (“PPP”) loans.

After thousands of small businesses applied for and received a forgivable loan under the PPP program -- adopted in the Coronavirus Aid Relief and Economic Security Act (“CARES Act”) -- regulators and commentators began to question whether some borrowers had legitimately certified as to the “necessity” of the loan.

Subsequently, the SBA and Treasury indicated that loans over \$2 million will receive scrutiny as to the “necessity” test. The new May 13 guidance, however, provides comfort to those with loans under the \$2 million threshold.

The SBA and Treasury in their “Frequently Asked Questions” (“FAQs”) state that “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.”

The FAQs further state: “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.”

Therefore, **borrowers with less than \$2 million of PPP original principal will not undergo scrutiny of the “necessity” certification.**

For borrowers with more than \$2 million in original principal, the guidance also provides some additional information:

- Borrowers of more than \$2 million may still satisfy the “necessity” certification “based on their individual circumstances in light of the language of the certification and SBA guidance.”
- “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.”

In other words, **the primary sanction for a bad-faith “necessity” certification is loss of forgiveness.** Borrowers will be asked to repay the principal immediately and will lose eligibility for forgiveness. If repayment is made, it appears that no other sanctions will result.

Moreover, before any determination of a bad-faith “necessity” certification is made, the borrower will have the opportunity to present the “individual circumstances” that would justify the certification.

In light of the guidance, for the great majority of borrowers the “necessity” certification will be a non-issue despite the media attention.