



COVID-19 UPDATE: SBA CLARIFIES THAT CERTIFICATIONS FOR PPP LOANS LESS THAN \$2M ARE PRESUMED IN GOOD FAITH

By Darryl J. Horowitz

The CARES Act authorized the issuance of Payroll Protection Program (“PPP”) loans through the SBA. Under the PPP, a qualified borrower was required to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” When it came to light that certain publicly traded companies and large companies with access to capital received PPP loans in excess of \$2 million, the SBA realized that more guidance was needed.

The SBA responded by issuing interim revised FAQs. FAQ 31, issued in late April, reminded companies with access to capital that if they now believed their certification might have been in error, they could return the loan proceeds by May 7th and, if they did so, their certification would be deemed to have been made in good faith. Certain borrowers who received funds in excess of the \$2 million threshold returned the funds. Others wanted more time. In response, the SBA has extended the date to return funds to May 18th, and have also indicated that if a borrower requested more time from the SBA to return the funds, the SBA would consider such requests. (See FAQ 47.)

Businesses who received a PPP loan less than \$2 million, or sought to apply for such a loan, might run afoul of the certification. For example, if these businesses had access to a line of credit, had some funds in their account they could use (even if the cash on hand might quickly run out if they were used for salaries), could furlough employees instead of using PPP funds and still get by, it might run afoul even though the express intention of Act was to keep employees employed instead of layoff or furlough. They worried that if they took the money, used the proceeds as contemplated, and the loan was forgiven, the SBA might still audit their loan and, if it determined in hindsight that the certification was not in good faith, they would have to pay back their loans. This caused many deserving businesses to consider either returning the funds they received, or not applying for the much needed financing in the first place.

Fortunately, the SBA has issued guidance for companies who received a PPP loan less than \$2 million. In FAQ 46, the SBA confirmed 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.” In coming to this conclusion, the SBA determined that businesses with such loans are less likely to have access to capital or other sources of liquidity. It also determined that making this decision will promote economic certainty and the SBA would not have the resources to conduct audits for companies receiving less than \$2 million given the volume of PPP loans made for less than \$2 million.

This is good news for small businesses. If you received a PPP loan of less than \$2 million, or seek such a loan, you can breathe a bit easier. If you were wondering whether to apply for a PPP loan for less than \$2 million, you can go ahead knowing the SBA will presume that your certification was made in good faith.

For a copy of the SBA FAQs see: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

As further information is disclosed that may affect you and your business, we will provide updates. If you have any questions in the meantime, please contact the author at (559) 248-4820, ext. 111 or dhorowitt@ch-law.com.



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