

# Increased scrutiny of Paycheck Protection Program loans coming

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The Paycheck Protection Program created by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) has proven to be very popular with businesses and nonprofit organizations throughout the United States, so much so that Congress had to replenish the initial funding of \$349 billion with an additional \$310 billion through the Paycheck Protection Program and Health Care Enhancement Act.

The popularity of the program is due in no small part to the potential for the loan to be fully forgiven if expended in accordance with program requirements. The program's intent is to provide funds for payroll and certain other approved expenditures for borrowers that have determined, in good faith, that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." However, some applicants have applied that may not meet the U.S. Treasury's or Small Business Administration's evolved idea of "need." On April 23, which was 20 days after applications could first be submitted for PPP loans, the Treasury and SBA provided their first guidance on the "need" issue in the form of Frequently Asked Question 31 (FAQ 31), which states:

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.

Although FAQ 31 particularly addressed publicly traded companies that may have access to other forms of financing, on April 28 Treasury issued FAQ 37 which confirmed that the guidance in FAQ 31 applies equally to private companies. Also on April 28, Treasury Secretary Steven Mnuchin announced that the SBA would conduct a "full review" of every PPP loan of \$2,000,000 or more to determine whether the borrower met the requirements for participation in the program prior to loan forgiveness.

We encourage all borrowers under the PPP, regardless of loan size, to review their determinations of whether the loan was necessary to support ongoing operations. For any borrowers that determine, in retrospect, that the loan may not have been necessary, the SBA and Treasury are allowing the borrower to return the loan funds on or before May 14, 2020. For those borrowers that return funds by May 14, 2020, the SBA and Treasury will deem the certification regarding "need" to have been made in good faith. SBA intends to provide additional guidance on how it will review the certification prior to May 14.

The Safe Harbor date of May 14 to return the funds may also provide borrowers with a second opportunity to further evaluate all of their bases for eligibility, including the application of SBA's affiliation rules if a full analysis of those rules was not conducted during the initial application process. While SBA's recent guidance does not specifically reference any eligibility certifications outside of "necessity" for the loan, a borrower that knows it has a potential eligibility issue should seek counsel about addressing that issue before May 14.

If the SBA determines any certification was not made in good faith, the borrower may be subject to non-forgiveness of the loan or civil or criminal liability.

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