



Important Guidance Issued Relative to Paycheck Protection Program

Client Advisories

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The Small Business Administration (SBA), in consultation with the Department of Treasury, issued supplemental guidance on the Paycheck Protection Program (PPP) in the form of additional “frequently asked questions.” This guidance addresses certifications required to be submitted in furtherance of a PPP application. Although it does not directly conflict with the CARES Act language eliminating the SBA’s traditional funding of last resort requirement, it provides significant insight into the SBA’s views on economic need and ongoing liquidity, and may require some applicants to reevaluate certifications previously submitted to their lending institutions in furtherance of a PPP loan.

The most recent FAQ discusses a borrower’s assessment of economic need under PPP. Borrowers are required to certify - in good faith - that a PPP loan is necessary given economic circumstances. A required certification states that, “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” The SBA has provided additional clarity saying that, “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.”

In light of the above, applicants to and borrowers under the PPP should evaluate whether current economic factors necessitate the receipt of loan proceeds and whether alternative sources of funding may be available to fund operations in a manner that will not cause harm to business operations. Borrowers that have applied for a PPP prior to the issuance of this guidance and determine that the certification cannot be provided in light of this guidance may repay the loan in full by May 7, 2020 and still be deemed to have made the required certification in good faith.

Clients who receive PPP loan proceeds should consider taking special care to document their decision-making as it relates to economic uncertainty and the businesses’ need for the funds. Such documentation may include noting any government orders in place at the time of application which impact ongoing operations, contemporaneous conversations with existing clients about amendments to contractual terms or reduced

business relationships, sales projections at the time of the loan application and similar considerations. Recipients may also want to document other options that were explored to maintain liquidity and - if available - the terms associated therewith.

The guidance provided by the SBA indicates that loan recipients may be required, upon request, to demonstrate the basis upon which a certification was executed. Applicants should be mindful that the federal government has a myriad of enforcement and penalty options at its disposal. The CARES Act authorizes criminal penalties for fraud or other misconduct related to federal COVID-19 recovery programs and provides significant funding to the Office of the Inspector General to conduct audits and investigations. Additionally the federal government has long-standing powers to bring criminal and civil penalties against individuals and entities who provide false information or defraud the government. Applicants to the PPP should consult an attorney if they have any questions regarding these potential enforcement actions or the good-faith requirements of the PPP's certifications.

Archer will continue to update clients as additional regulations and guidance are promulgated by federal agencies and authorities. Should you have any questions, please reach out to any of the attorneys on Archer's COVID-19 Task Force. A copy of the relevant FAQ is provided below for review.

FAQ #31 - Published April 23, 2020

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.

Please reach out to your Archer contact or any member of **Archer's COVID-19 Task Force** with any questions you may have.



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