

Good Faith PPP Loan Certification

As focus increased in the last several weeks on the recipients of loans under the Paycheck Protection Program (“PPP”) of the CARES Act, many small businesses became concerned whether their certification to receive the loan was made in “good faith” and whether they should return the money. Specifically, the following certification caused considerable angst: “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.”

Background

In response to criticism about certain entities approved for PPP loans in the initial round of financing, the Treasury Department issued a series of ominous and seemingly broad FAQ’s. The first stated that borrowers must make the certification regarding need for the loan “in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support the ongoing operations in a manner that is not significantly detrimental to the business.” (FAQ 31, issued April 23, 2020). The FAQ created a safe harbor that if an entity returned the funds by May 7th (later extended to May 14th), the entity would be deemed to have made the certification in good faith. Almost a week later, an FAQ appeared with the question “Do businesses owned by private companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?” The answer was simply “See response to FAQ #31.” (FAQ 37). A day later, Treasury indicated it would “review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender’s submission of the forgiveness application.” (FAQ 39). The ultimate hammer for compliance was the threat of not allowing loan forgiveness or even bringing criminal charges against the borrower.

Treasury FAQ 46

Most small businesses can once again breathe easy. Treasury issued a new FAQ midday today specifically stating 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.

For borrowers with a loan of more than \$2 million, the FAQ provides the following guidance:

- Those borrowers can return the money by tomorrow, May 14, to take advantage of the safe harbor.
- Those borrowers who keep the funds are subject to review by the SBA and can still demonstrate the certification was made in good faith.
- Those entities failing to demonstrate good faith will be told to repay the loan and will not be eligible for loan forgiveness.
- Entities that repay the loan at the request of the SBA will not be subject to enforcement actions or referred to other agencies. In other words, they will not be referred to agencies for criminal prosecution.