



ALERTS

Business Considerations To Certify The Necessity Of PPP Funds For Ongoing Operations

April 27, 2020

Recent public outcries about publicly traded companies receiving Paycheck Protection Program (PPP) loans have pressured the Small Business Administration (SBA) into issuing [an FAQ](#) that stresses how important it is for a borrower to certify that the loan is truly needed and that its “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

This further guidance, issued on April 24, provided borrowers who don’t want to or should not keep the loan with a safe harbor to repay by May 7, 2020, “PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certificate standard.”

Some public companies have returned loan proceeds received under the PPP in response to potential negative public perception. In addition to the public relations risks, there are penalties for misrepresentation on the PPP loan application under the False Claims Act and other regulations.

Given the recent scrutiny, businesses should carefully analyze the certification they previously made or their current ability to make the good faith certification. There is no bright-line test to determine whether – given the global pandemic – the loan would be necessary to support ongoing operations. Every business has different needs and will face unique circumstances. In making this decision, business owners, officers and directors should consider the following with respect to their business conditions:

- Adverse impacts to business – The borrower should be able to identify specific adverse impacts to the business as a result of the global pandemic. If the business is facing

RELATED PEOPLE



Mary E. Comazzi

Partner
Southeast Michigan, Grand Rapids

P 734-489-8019
F 734-489-8002
Mary.Comazzi@btlaw.com



Ryan J. Barncastle

Partner
Los Angeles

P 310-284-3822
F 310-284-3894
ryan.barncastle@btlaw.com



Mari Yamamoto Regnier

Partner
Chicago

P 312-214-8335
F 312-759-5646
mari.regnier@btlaw.com



Chihiro Maeda

Of Counsel
Chicago

P 312-214-2107
F 312-759-5646
chihiro.maeda@btlaw.com

uncertainty regarding future operations, the borrower should identify the specific uncertainties causing the concerns and document the reasons for the certification.

- Cash-flow situation – The borrower should consider whether it has sufficient cash and receivables to continue to meet operating expenses, particularly the ability to pay employee wages and benefits.
- Liquidity and access to capital – Businesses should consider whether they have quick access to sources of liquidity. The primary purpose of the PPP is to allow employers to continue to pay employees during the months of government stay-at-home orders; if the borrower cannot quickly access capital, that supports being able to make the good-faith certification as to necessity.
- Location – Some states are likely to open for business before others. For example, Georgia has announced a limited reopening starting the week of April 27. Other states, such as Michigan and Virginia, have hinted at longer stay-at-home orders. The longer a business is likely to be shut down, the more likely it will be in a position to make the good-faith certification.
- Industry – Some industries have been impacted more than others. For example, the hospitality industry has been devastated by the stay-at-home orders and government-mandated shutdowns. Others, such as the grocery industry, have flourished as a result of COVID-19. The more an entity's industry has been adversely impacted, the more likely it will be in a position to make the good-faith certification.
- Workforce – Some businesses are facing situations in which their workforce is unable or unwilling to return to work. As such, the borrower may face uncertainty with respect to ramp-up production.
- Risk tolerance – The FAQs and additional guidance, together with [public statements](#) made by Treasury Secretary Steven Mnuchin, have made it clear that PPP loans will be subject to legal scrutiny, but the initial risk faced by borrowers has been from the public reaction. If a business is questioning whether it can make the good-faith certification, it should consider the possibility of a public opinion backlash. Companies that have already returned PPP funds should serve as examples of how to handle public relations and reputation damage as a result of receiving PPP funds.

The decision to make the good-faith certification will depend on the specific circumstances of the borrower. Further, the decision to apply for a

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PPP loan or to repay the proceeds should not be taken lightly and deserves careful consideration.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, or Jason Myers at 214-258-4157 or jason.myers@btlaw.com, Jeremy Reidy at 260-425-4662 or jeremy.reidy@btlaw.com, Jenni Tauzel at 214-258-4145 or jtauzel@btlaw.com, Mary Comazzi at 947-215-1319 or mary.comazzi@btlaw.com, or Ryan Barncastle at 310-284-3822 or ryan.barncastle@btlaw.com.

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