

SBA Issues New Guidance on “Necessity” Certification in PPP Loan Application

Related People:
Howard M. Berkower

Coronavirus Legal Advisory

04.24.2020

On April 23, 2020, the Small Business Administration (“SBA”) issued further guidance on the Paycheck Protection Program (“PPP”) by supplementing its [Frequently Asked Questions](#) (“FAQ”).

The supplement addresses one new important issue: whether businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan. The FAQ speaks in terms of necessity and cites the certification that states “[c]urrent economic uncertainty makes this loan **necessary to support the ongoing operations** of the Applicant” as the critical factors in determining an Applicant’s eligibility and good faith (“Necessity Certification”). Applicants should plan to be able to explain to the SBA the basis for the Necessity Certification. We recommend that applicants document the process by which it determined to seek a PPP loan and satisfied the Necessity Certification. In particular, materials provided to the board of directors, a fulsome summary of the board’s deliberations, and a cash flow analysis of the business for the next few months will be very helpful in this regard.

The FAQ goes on to state that before submitting this Necessity Certification in good faith the Applicants will need to assess their “**other sources of liquidity** sufficient to support their ongoing operations in a manner that is **not significantly detrimental to the business**” [emphasis added]. Accordingly, Applicants should evaluate their cash flow from operations projections and ability, if any, to access timely other financing sources on reasonable terms, including debt sources with low to medium interest rates and appropriate terms and equity sources with reasonable valuations, in each case that would not be deemed significantly detrimental to their business.

The FAQ goes on to state that public companies with the ability to access public markets will be challenged in making a Necessity Certification in good faith. Since no quantitative analysis is presented it is difficult to understand how the SBA reached this conclusion. During these most difficult times it is not at all clear that any public company can access the necessary liquidity required to support its ongoing operations. Moreover, the FAQ does not address whether venture-backed companies may be challenged in meeting this new high bar. This necessity requirement is still largely open to interpretation and the FAQ does

not contain quantitative metrics. As a result this FAQ does not change the [advice](#) we have been providing to our venture-backed clients.

The FAQ goes on to introduce a “no fault” return policy by stating that “[a]ny 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 to have made the required certification in good faith if the loan is repaid in fully by May 7, 2020.” Borrowers who are concerned regarding the validity and good faith of their Necessity Certifications should make efforts to repay the PPP loan by May 7, 2020.

McCarter & English, LLP can assist you with PPP loan application and advise on the proper use of PPP funds and maximizing loan forgiveness.