

Economic Uncertainty Rule

When you submitted your PPP application, you certified that your company was undergoing “Economic Uncertainty” due to the Covid-19 pandemic. Meeting that test is a requirement for receiving loan proceeds under the program. The US Treasury has stated that if after receiving a PPP loan, you determine that you do not meet the economic uncertainty test, you have until May 14, 2020 to repay your loan proceeds with no consequences.

The following is a portion of a newsletter published by the accounting firm Clifton, Larson and Allen on this topic. Please consult with your own accounting firm if you have any questions regarding this issue.

As PPP funding ran short and public opinion shifted, important new developments have emerged.

- On April 23, the Treasury issued [FAQ #31](#), which states: “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. ... 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.” FAQ 31 further states, “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 [now May 14 per FAQ #43 below] will be deemed by SBA to have made the required certification in good faith.”
- On April 28, [Treasury Secretary Mnuchin announced](#) that the SBA “will review all loans in excess of \$2 million, in addition to other loans as appropriate ...”
- On April 28, Treasury issued [FAQ #37](#), which makes it clear that the above-quoted statements in [FAQ #31](#) apply to all organizations.
- On May 5, the Treasury issued [FAQ #43](#), extending the repayment date for the safe harbor discussed in FAQ #31 from May 7, 2020 to May 14, 2020. Borrowers do not need to apply for the extension. The SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.

Based on these developments, you may have concerns about PPP eligibility, forgiveness, and government scrutiny.

Where are these concerns coming from?

The [PPP loan application](#) includes two critical certifications that the authorized representative of the loan applicant must make. Specifically, the representative of the applicant is required to certify that:

- “*Current economic uncertainty* makes this loan request necessary to support the ongoing operations of the Applicant.”
- “The funds will be *used to retain workers and maintain payroll* or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.”
Source: [PPP loan application](#), page 2 (emphasis added)

As the application states, the risk of making an inaccurate certification includes potential criminal liability for fraud.

Unfortunately, current guidance does not provide clear direction on the conditions for eligibility and forgiveness. This poses a big challenge as borrowers hear threats of SBA audits, fraud charges, and bad publicity, but lack clear rules to aid decisions.

What should you do now?

Although we don't know much, we do know that documentation of the rationale for the loan is likely to be critical. The newly issued guidance indicates the authorized representative of the borrower should be able to assert, in good faith, that the PPP loan was needed after considering at least these factors:

1. The borrower's current activity;
2. The borrower's access to other sources of liquidity sufficient to support its ongoing operations; and
3. An evaluation of whether these other options, if any, could be implemented in a way that was not significantly detrimental to the borrower's business.

Ideally, borrowers will want to have documentation that shows they considered each factor.

Keep in mind that your loan may be subject to review. The U.S. Treasury Secretary has announced that all PPP loans of more than \$2 million will be reviewed, and spot checks will be made of PPP loans for lesser amounts. The loan reviewer will have the benefit of hindsight, so be thoughtful in your needs assessment. If you have concerns about the loan application certifications and your eligibility to receive a PPP loan, you should consult an attorney to help you evaluate your options and the corresponding legal implications. Under the direction of your attorney, CLA can assist you and your attorney with assembling documents and data in support of the certifications that you made in the loan application.

Don't delay taking action, as the May 14, 2020 date to make a decision as to whether to keep or return the funds will be here before you know it.