

# Small Business Administration (Finally) Clarifies Paycheck Protection Program Necessity Certification

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Recent statements by Small Business Administration (SBA) and Treasury Department officials have confused many Paycheck Protection Program (PPP) borrowers and led many to return PPP funds or consider doing so. Finally, the SBA has issued FAQ 46, which should assuage many borrowers' concerns.

Previously, the [SBA notified borrowers through a number of pronouncements](#) that they must consider "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 determining whether their certification was made in good faith. This was a surprise as the certification in the PPP loan application that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant" did not appear problematic during the COVID-19 pandemic. This guidance, along with statements by Treasury officials (including Secretary Steven Mnuchin), led many employers to have serious reservations about their use of PPP funds.

The SBA's [FAQ 46](#) provides clear and welcome relief to PPP borrowers. The SBA has created a safe harbor for PPP borrowers of less than \$2 million:

SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: 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.

SBA stated the safe harbor was appropriate because:

- Such borrowers are generally less likely to have had access to adequate sources of liquidity;
- It will promote economic certainty as PPP borrowers endeavor to retain and rehire employees; and

- It will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Larger borrowers also got welcome relief, at least regarding the prospect of administrative enforcement. PPP borrowers of \$2 million or more will need to demonstrate they had an “adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance.” However, if a borrower lacked an adequate basis for the required certification about the necessity of the loan request, SBA will seek no relief beyond the repayment of the outstanding PPP loan balance with no loan forgiveness. Significantly, FAQ 46 provides, “[I]f the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning the necessity of the loan request.” This comes as a big relief with many borrowers concerned with civil (and possibly criminal) sanctions under the False Claims Act and other federal laws.

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