PPP Certification – Uncertainty About the Meaning of 'Uncertainty'

COVID-19 Resource

Congress is poised to replenish the amounts available for its Paycheck Protection Program (PPP). The PPP provides forgivable loans to certain qualifying small businesses, and taxpayers quickly depleted the initial allocation of $349 billion. But, as noted in our prior articles available here, in addition to more money, we hoped that Congress would clarify some of the confusion created by the language in the CARES Act. Not surprisingly, with quick adoption of a massive program like PPP, the rules contain many confusing, and often contradictory, requirements. Unfortunately, the bill approved by the Senate and sent to the House for expected adoption on April 23 is devoid of any such clarifying guidance.

One issue that continues to be particularly confusing is the required borrower certification. Recent commentary by government officials does little to shed light on that issue and, in fact, maybe adding to borrowers’ confusion.

What Certification is Required By the CARES Act?

The enabling statute requires that a PPP loan applicant certify, in good faith, that “the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.”

The PPP loan application issued by the SBA phrased the certification slightly differently: “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Still, the
focus remains on the words “uncertainty” and “necessary” without any guidance on how much uncertainty or how to determine whether the funds are necessary, in part because we have no clue what the word “necessary” means in this context.

What is the Meaning of the Certification Language?

The public, which (fortunately) consists of many people who did not go to law school, might be inclined to take the words of the certification at face value. Maybe surprisingly, we lawyers agree that the plain meaning of sentences should govern. The rules of statutory construction require those subject to laws to rely upon the customary meaning of the words chosen, obviously taken in context. So let’s try to ascertain what level and type of uncertainty is required to make the certification.

On the one hand, just about every business faces uncertainty every day. A restaurant fears a bad review by a respected critic or a bad rating from the health department. The mall operator is worried about competition from across town and on the internet. An aircraft manufacturer might fear an FAA grounding or worse. We have all seen businesses compromised by the actions of a CEO who says inappropriate things on tape or does inappropriate things in the workplace. Indeed, in a world in which every employee is a representative of their company, we have seen how easy it is for the actions of a single employee to damage the reputation and market position of a large company. Presumably, those ambient uncertainties are insufficient to support a certification because they are not tied to “the uncertainty of current economic conditions” or the “current economic uncertainty,” and thus not necessary to support the current operations.

Clearly, the restaurant above is worried about when they will be able to restart dining services in the restaurant. Even if the restaurant has done an amazing job of shifting to delivery and takeout, current economic conditions still result in uncertainty – for example, COVID-19 outbreaks in meatpacking facilities create questions about food supply. Similarly, the manufacturer is worried about supply chain interruption and how they need to reconfigure their production line to maintain safe social distancing. Aren’t most businesses concerned about how they will cope if some of their employees (or their family members) contract COVID-19? Aren’t most businesses worried about their customers’ willingness to
return to their establishments even if the stay-at-home orders are lifted and whether the economic pressures on most of us will alter customer spending habits? Even businesses not worried about their customers are worried about demand by their customer’s customers. How many businesses aren’t worried more now about the ability of their customers to pay or pressure to lower their prices or offer better terms? Aren’t these concerns precisely the types of uncertainties that should allow a PPP borrower to make the required certification? The list of questions and concerns is endless, and they are unique to “current economic conditions” or “current economic uncertainty” resulting from the COVID-19 pandemic.

We know of few lawyers that wouldn’t agree that a business described in the prior paragraph can comfortably make the required certification based on the plain language of the certification (either as required by the statute or as revised by the SBA.)

**Are Different Interpretations of the Certification Language Appropriate?**

Undoubtedly, there will be abuse of PPP loans. For example, there will be businesses that intentionally provided false information to increase the PPP loan amount. And prosecutors should go after these businesses to the fullest extent of the law. However, in the past two days, after the first $349 billion of PPP loans have been issued (based on that certification), some government officials have questioned whether such uncertainty must be accompanied by something more, such as a lack of access to capital from other sources or a material drop in revenue or earnings.

For example, Senator Marco Rubio (R-FL), tweeted on April 20 that the PPP loan certification is “real and enforceable…That is why any company (of any size) that hasn’t been harmed by the current economic conditions & nevertheless applies for & receives a #PPP has a big problem. They made a false certification to the federal government.”

It’s giant leap to go from the language Sen. Rubio voted on, “current economic uncertainty makes this loan request necessary to support the ongoing operations…..” to his later interpretation that requires a showing of economic harm from the pandemic. The first is a subjective test based at a time when application for the loan is made – a time when nobody knows how long or how deep the recession will be. Sen. Rubio’s new
“harm” test is an objective test based on a retroactive examination of something (revenue? earnings? prospects?) over an uncertain period of time (harm from prior quarter? year over year? compared to budget?). Congress knows how to state a harm test and did so in connection with another provision of the CARES Act (see, e.g., eligibility for employers with over 100 employees who claim the employee retention credit), but it did not do so in the context of the PPP. Consequently, Sen. Rubio’s version could inject even more unwelcome uncertainty.

And on April 21, U.S. Treasury Secretary Mnuchin gave an interview where he responded to a question about “manipulation” of the PPP by saying, “We [presumably the Treasury Department] will put up very clear guidance so that people understand what the certification means….” That guidance will no doubt be helpful for future borrowers – but it is of no help to borrowers of $349 billion worth of PPP loans who made their certifications based on the plain meaning of the statute and SBA rewording thereof.

The Secretary went on to suggest that those who obtained the loan subject to that certification would be fine if they simply repaid the loan in accordance with its terms. That assurance, however, makes no sense because the certification is related to obtaining the loan; there is no corresponding certification required for forgiveness, which is addressed in a completely different section of the CARES Act.

Secretary Mnuchin continued by suggesting that the PPP loan was not intended for borrowers that had access to other capital. But there is absolutely no such limitation even suggested, let alone explicit, in the statute. Indeed the statute expressly overrides the normal SBA lending rules that a borrower must demonstrate, stating that it doesn’t have access to capital from other sources.

When pressed further by the reporter, Secretary Mnuchin advised that if there is any confusion, the reporter (or is it borrowers?) should “look at the certifications, they are quite significant.” What?

But we should not simply dismiss Secretary Mnuchin’s comments during the press conference, because CARES Act section 1109(d) gives the Treasury Secretary fairly wide latitude to adjust the program terms. In
other words, remember the golden rule: he who has the gold makes the rules.

**Wasn’t the PPP Designed to Help Small Businesses Survive the Pandemic Rather Than Help Everyone?**

The CARES Act, together with the FFCRA that came shortly before it, contains a variety of stimuli designed to help much of America in these difficult times. Different programs were designed for individuals, sole proprietors, small employers, large employers, and even special extra benefits for certain industries. Employers are treated differently depending on a threshold number of employees (50, 100, 500, 10,000), determined at various points in time and testing periods, depending on the provision. Some of the benefits are exclusive, and some can be tapped in conjunction with others. Some of the stimuli programs are intended to help those in most need, some to encourage employers to retain their payrolls (or to reduce pressure on state unemployment funds), some to soften the impact of the economic crisis and some to expressly favor some industries (e.g., airlines, agriculture, hotels and restaurants) over others (retail, manufacturing), regardless of whether one industry was harder hit than another by COVID-19. Some provisions reflect a targeted effort to aid a particular group, some represent good old-fashioned Keynesian economic pump priming. All of the stimuli benefits are formulaic in some way or another, and formulaic distributions invariably favor some over others.

In the context of these various stimuli, it is hard to say that any particular provision shouldn’t be interpreted consistent with its plain meaning. The PPP loan was designed to encourage all businesses satisfying an employee limit (generally, not more than 500 employees) to maintain their payroll. Some employers would have done so anyway, either because they had money saved or ready access to capital, were able to pivot their business plan to take advantage of the changed economy (making sanitizer instead of vodka, ventilators instead of cars), or just got desperate (home delivery of take out foods). Congress regularly incentivizes activities that would be conducted anyway (drilling for oil, conserving energy) or should be done anyway by a conscientious business (reducing pollution, providing opportunities for employees). In this case, Congress made PPP loans available to any business under the employment threshold that believed (reasonably? subjectively?) they
needed the loan to support their business in light of the uncertainty created by the COVID-19 pandemic.

**Can I Make the Certification?**

We believe borrowers should be able to follow the plain meaning of the certification language. Borrowers should not be dissuaded from applying for a PPP so long as they have a good-faith concern that the current economic uncertainty makes the loan request necessary to support their ongoing operations. While this means more than sleepless nights, it doesn’t mean businesses would have closed their doors or terminate employees for the PPP. It means that borrowers should be able to articulate why they feared the current uncertainty could adversely impact their business more than the usual vagaries of business risks. It should not mean that a borrower becomes ineligible for a PPP because the borrower was prescient enough to save some money for a rainy day or arrange a line of credit or position their business to take advantage of changing needs/demands/interests of their customers. Nor should it mean that a borrower has to demonstrate objective harm resulting from COVID-19.

**Is it Immoral to Borrow if I Can Survive Without PPP Funds?**

Ethics and politics make strange bedfellows. If Congress provides a tax deduction for home mortgage interest, donating to charities, or having children, then we think our clients should claim those tax deductions even if they would have bought a home, donated to charities or procreated without regard to the tax incentives. The fact that the PPP is designed as a forgivable loan instead of a tax credit seems indistinguishable to us; the impact on government finances is equally indistinguishable.

On the other hand, Congress does often create perverse incentives that seem to undermine the public good (e.g., support for activities that destroy the environment or destroy jobs), or waste money that we think could be better spent elsewhere (we all have our own examples). We are all free to ignore those incentives (buy clean energy instead of subsidized fossil fuels or invest only in certain businesses), where doing so aligns better with our personal value systems. But we should be wary of criticizing those in our community who avail themselves of benefits sanctioned by our elected officials.
Given All the Chaos Surrounding the Rush to Secure a PPP Loan, Shouldn’t I Just Make the Certification Now and Worry About it Later?

No. First of all, you were hopefully raised not to lie, so don’t start now. Second, the more you have to think about whether you are comfortable with the certification, the more you should consider consulting legal counsel and documenting your uncertainty and why the funds are necessary to support your business. Such documentation is not a difficult burden, given that the test is probably whether your uncertainty is reasonable in light of the great unknown of a global pandemic, particularly with conflicting information about how long it will last, how badly the economy will tumble, how hard it might be to replace certain workers that are now on unemployment, etc. Third, your application could crowd out other eligible, and possibly needy, borrowers if the PPP again runs short of funds. Fourth, unlike tax returns, SBA loan applications are probably subject to Freedom of Information Act (FOIA) requests -- so borrowers might have to justify their position before skeptical press and watch dog groups. Finally, signing a false certification subjects the signer to exposure under the False Claims Act for submitting a false claim, or knowingly making, using or causing to be made or used a false record or statement in connection with a claim for payment under 31 U.S.C. Section 3729(a)(1), as summarized well by another reputable firm here.

The bottom line? If you have a good faith belief that a PPP loan is necessary to support your business during this unprecedented and uncertain economic crisis, then by all means certify away; this program is for you. We think most business’ leaders probably fall comfortably within this category because they don’t know what will happen to their business if their employees, customers, supply chains experience COVID-related problems. But if your certification is at strained or has more than a flavor of bad faith, then think before you sign or seek the guidance of an independent advisor.

This Legal Update was completed on April 22. On the morning of April 23, Treasury and SBA updated their FAQs to add new Q&A 31, which provides:
31. Question: Do businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, 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. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should carefully review 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. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower’s certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7 will be deemed by SBA to have made the required certification in good faith.

1 If there are ambiguities in the language, courts will look to the legislative history in an effort to ascertain a drafter’s intent. Let’s be perfectly clear here: there is absolutely no legislative history to the CARES Act. Not only were there no hearings or committee reports, it is clear that only a handful of congressional representatives even saw the language of the statute they were approving.