



Certification About the Uncertainty of Current Economic Conditions

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Background for PPP Loan

- Provides relief in the form of the federal government paying certain costs (Covered Costs) of a small business over an eight-week period beginning after the bank makes first disbursement
- PPP loan equals to 2.5 time average monthly payroll costs for 2019
- Only 25 percent of the forgivable amount can be for Covered Costs other than payroll costs
- Reductions in employee headcount or salary may reduce forgiveness

Uncertainty Certification

CARES Act

- Requires PPP loan applicant to 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”

SBA PPP Loan Application

- Phrased slightly differently: “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant”

Initial General Understanding of the Certification

- Borrowers needed new and additional risks related to COVID-19, not just normal “ambient” business risks
- Easiest case for making the certification was COVID-19 triggered uncertainty that could reasonably cause employers to reduce their pre-COVID staffing or salaries
- PPP was designed to incentivize employers not to terminate or furlough employees, or reduce their salaries in response to current economic conditions
- Although nobody seems to notice, the concept mimics payroll support programs successfully employed in Europe

Bad Facts Made Bad Law

- Congress made policy decision to make PPP loans available to large hotel and restaurant chains
- Negative press for some public companies operating restaurants who received PPP loans (Ruth's Chris, Potbelly, Shake Shack)
- Government acted with "surprise" that these companies invited to apply actually did

FAQ 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.

[Emphasis added.]

May 7 date extended to May 14 and extended again until **May 18**

FAQ 37

Question: Do businesses **owned by private companies with adequate sources of liquidity to support the business's ongoing operations** qualify for a PPP loan?

Answer: See response to FAQ #31.

Overall Message of FAQ 31 and FAQ 37

- 1. Take the Uncertainty Certification Seriously:** Businesses should undertake the due diligence generally required for any significant transaction. This means identifying the uncertainty, analyzing it, and memorializing these steps.
- 2. Assess the Business's Current Activity and Other Sources of Liquidity:** Businesses should consider current activity and other revenue sources. This does not mean that they must use these sources to the exclusion of a PPP loan. In fact, as the FAQs explain, a business should only use a liquidity source if it "is not significantly detrimental to the business."

Am I Really Covered by FAQs 31 and 37?

- Unclear. The question in FAQ 31 is directed at borrowers owned by public companies; the question in FAQ 37 is directed at borrowers owned by well-resourced private companies
- But the answers to both questions seems to be directed at **all** borrowers

Why Are the FAQs So Cryptic?

- Treasury is clearly struggling with the balancing act between not giving PPP funds to borrowers that **could** continue to support their employees with their own balance sheets and borrowing capacity, and the recognition that **even though such companies could do so, they might choose not to do so**
- Hobson's choice: avoiding greater unemployment vs. the bad press that will follow if well-resourced companies receive PPP funds
- Treasury promised further guidance by May 14 when it extended the "amnesty" period from May 7 to May 14 -- but it is now May 11 and we have not seen any clarification

New Standard—At Least Until SBA Tells Us Otherwise

- All borrowers must take 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
- The references to the lack of a detrimental impact, substantial market value and access to capital markets indicate that a closely-held business having a pre-existing line of credit or access to a few wealthy owners does not necessarily prevent a business from making the certification
- On the other hand, all borrowers should address this consideration, especially borrowers owned by large or well-resourced companies

Factors to Consider and Memorialize

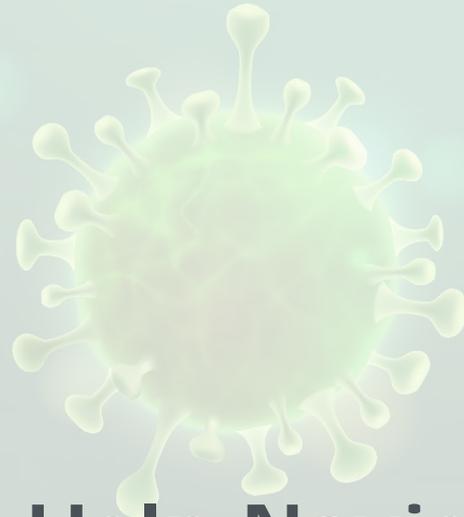
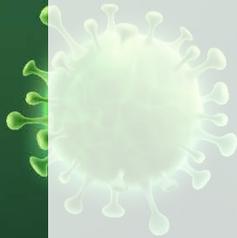
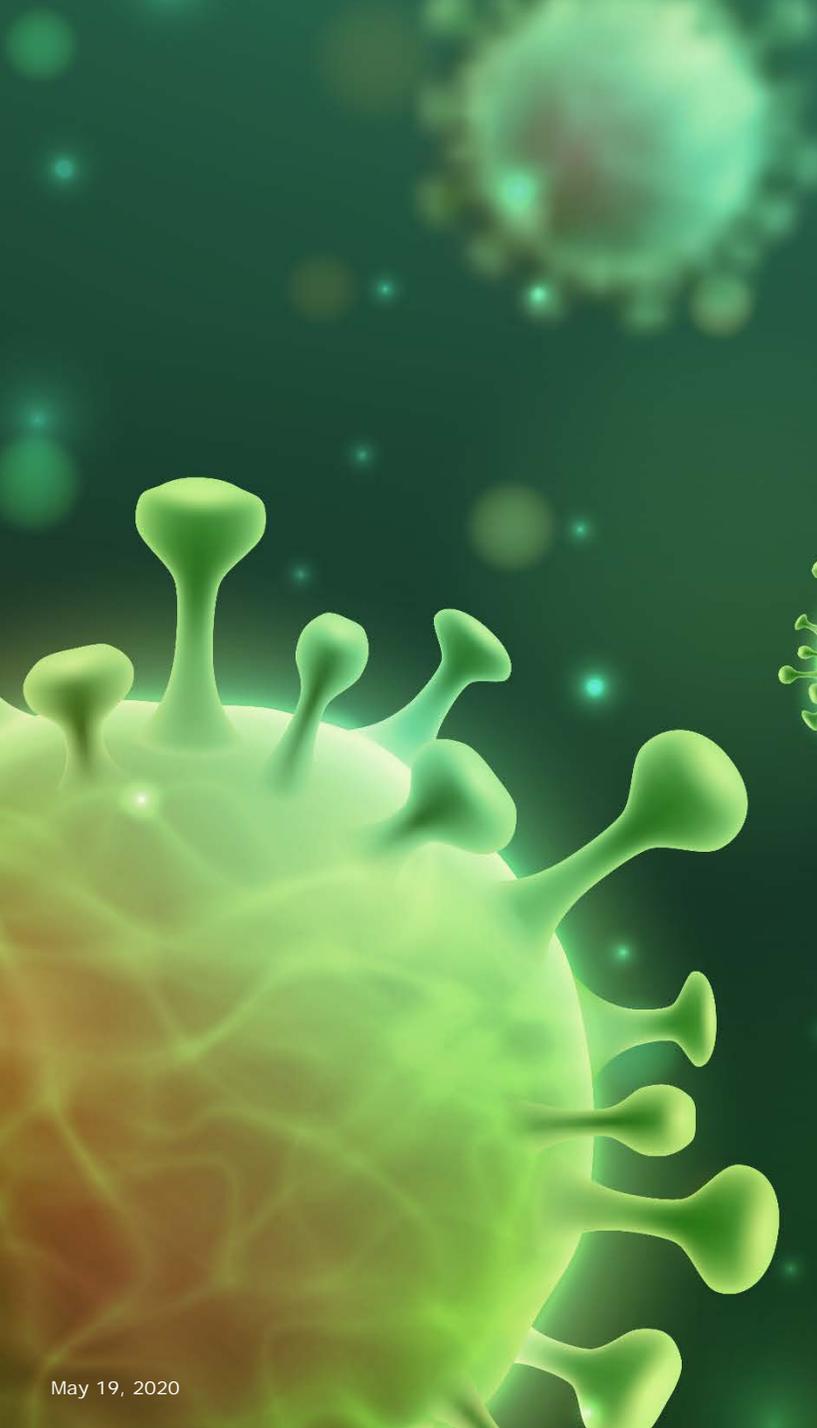
1. Uncertainties business faces from COVID-19
2. Requests already received to reduce charges to or work for customers, or actions like delayed payments, increased write-downs of charges
3. Any limitations on ability to use working capital
4. Any inability to borrow additional funds
5. Significant business risks to using existing working capital or taking on new debt to fund current operations
6. A plan for reducing staff and payroll costs and the extent to which such plan is put on hold because of the expectation of forgiveness
7. A current threat assessment to business in light of current situation
8. Market trends that suggest disruption in business is likely or possible
9. How you are *currently* impacted
10. Other steps you are taking to reduce risk or preserve capital
11. Cutbacks and other reductions undertaken by other businesses in industry

New Relief from FAQ 46

- The SBA issues FAQ 46 on May 13
- Safe harbor for loans under \$2 million: “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.”
- No questions asked return policy for loan of \$2 million or more: “If 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 necessity of the loan request.”



QUESTIONS?



Need Help Navigating COVID-19?

ACCESS OUR RESOURCE CENTER

lanepowell.com/COVID-19ResourceCenter

Download our [PPP Spreadsheet](#)
to calculate estimated loan forgiveness



THANK YOU



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