



An Update to PPP Certification

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Foster Swift Legal Update E-blast

May 13, 2020

Since the publication of this article, please note that the deadline to return PPP Loan proceeds has been updated from Thursday, May 14, to Monday, May 18.

This morning, the Small Business Administration (SBA), in consultation with the U.S. Department of Treasury issued updated guidance regarding the Paycheck Protection Program (PPP) loan certification that “current economic uncertainty makes [the] loan request necessary to support ongoing operations of the Applicant” (the “**Certification**”). The SBA and the Treasury previously stated that borrowers who return PPP loan proceeds by May 14th would not be penalized for incorrectly making the Certification. Unless altered, the deadline to return loan proceeds within the Treasury’s safe harbor remains tomorrow, May 14th.

The updated guidance (FAQ 46, available [here](#)) states that if a PPP borrower and its affiliates (as determined under applicable SBA affiliation rules) received PPP loans with an aggregate principal balance of less than \$2 million, then the borrower and its affiliates will be deemed to have made the Certification in good faith.

As for borrowers over \$2 million, the updated guidance does not clarify how the Certification should be interpreted. However, if the borrower did not have an adequate basis for making the Certification and retained the loan proceeds, the SBA instructs that it will only seek repayment and prohibit the borrower from obtaining loan forgiveness. If the borrower repays the loan, the SBA states that it will not pursue administrative enforcement or referrals to other agencies based on the Certification.

We continue to recommend that all PPP borrowers with loans greater than \$2 million closely consider their ability to make the Certification, and if they choose to retain the loan, document their certification decision in case it is challenged in the future, taking into account how the business’s economic uncertainty, liquidity, and ability to operate makes the PPP loan necessary. It may also be advisable for borrowers

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with loans of less than \$2 million to document the decision in order to protect against the possibility that the Certification standard is clarified once again.

Please contact us with any questions regarding the Certification:

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While the information in this article is accurate at time of publication, the laws and regulations surrounding COVID-19 are constantly evolving. Please consult your attorney or advisor to make sure you have the most up to date information before taking action.

