

## Alerts

### SBA May Review Economic Uncertainty Certifications as Criticism Mounts Over PPP Loan Requests by Large Businesses with Adequate Sources of Liquidity and PPP Loan Forgiveness

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*Hinshaw Alert*

As part of the Paycheck Protection Program (PPP) loan application, an applicant must certify, among other things, that "current economic uncertainty makes this loan request necessary to support ongoing operations of the Applicant."

A number of businesses that secured PPP loans have received criticism for accepting loan proceeds from a program that was designed to help struggling and small businesses. These businesses include Shake Shack, Potbelly, and Ruth's Chris; Harvard University is also on that list. Shake Shack, Ruth's Chris, and Harvard have since suggested they will either return the proceeds or not accept them.

A new question, which may be viewed as a warning shot across the bow, was recently added to the [Small Business Administration and Treasury Department PPP FAQ](#) as follows:

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

The SBA answer cautions borrowers that they must make the economic uncertainty 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 detrimental to the business."

It next indicates that, for example, "it is unlikely that a public company with substantial market value and access to the capital markets will be able to make" this certification and should be prepared to demonstrate to the SBA, when requested, its basis for this certification.

It then states that a borrower who "applied for a PPP loan prior to the issuance of this guidance and **repays the loan in full by May 7, 2020** will be deemed by the SBA to have made the required certification in good faith (*emphasis added*)."

The answer also states that a lender may rely on the applicant's economic uncertainty certification.

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While this Q and A targets large businesses with adequate sources of liquidity, it does also raise the question of whether smaller, successful businesses might face similar scrutiny in the future.

## Loan Forgiveness Under the PPP

The PPP program allows borrowers to have some or all of the loan forgiven based upon the payment of certain expenses during the 8-week period following the disbursement of the loan proceeds to the borrower. The SBA and the Treasury have previously indicated that they intend to provide additional guidance on the loan forgiveness provisions.

Yesterday, [in an article in the \*Wall Street Journal\*](#), Ron Johnson, U.S. Senator from Wisconsin, expressed his concern about the loan forgiveness provisions in the PPP program. He indicated that in his view "it has become clear that access to forgivable loans hasn't been limited to those who truly need them." He noted that some businesses receiving these loans were not in financial distress and did not intend to lay off workers.

He stated that he is working on legislation that would limit loan forgiveness. Under his initial proposal, no portion of a PPP loan would be forgiven if the 2020 taxable income of the business exceeds that of 2019. A loan would only be forgiven in total if the gross receipts for a business for 2020 are less than 60% of its 2019 gross receipts. There would be a sliding scale for forgiveness for those companies whose gross receipts for 2020 were 60% to 90% of what they were in 2019.

Based on the additional question added to the FAQ on the economic uncertainty certification, the criticism of companies receiving PPP loans who might not need them and the stated goal of providing additional guidance for the loan forgiveness provisions, it would not be surprising if the additional guidance places further restrictions on the ability of a borrower to have some or all of the loan forgiven.