



## Alerts

### Borrowers Beware: Audits of PPP Loans in Excess of \$2 Million and Economic Uncertainty Certification

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*Hinshaw Alert*

#### Audits of PPP Loans in Excess of \$2 Million

On April 28, 2020, U.S. Secretary of Treasury Steven Mnuchin announced that all Paycheck Protection Program (PPP) loans over \$2 million are subject to audits.

Yesterday, question #39—titled "*Will SBA review individual PPP loan files?*"—was added to the Treasury and Small Business Administration's (SBA) PPP FAQ.

In its answer, the SBA indicated that "to further ensure that PPP loans are limited to borrowers in need, the SBA has decided, in consultation with the Department of Treasury, that it will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application."

The SBA also noted that its review of the files will not affect its guarantee of any loan for which "the lender complied with the lender obligations set forth in paragraphs III.3.b(i)-(iii) of the Paycheck Program Rule."

These rules require the lender to (i) confirm receipt of the borrower certifications in the Paycheck Protection Application form; (ii) confirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020; (iii) confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing payroll documentation submitted with the borrower's application; and (iv) follow applicable SBA requirements.

The SBA also stated that additional guidance for implementing this procedure is forthcoming.

#### Economic Uncertainty Certification – Public Companies

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

#### Attorneys

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A number of businesses that have secured PPP loans—including Shake Shack, Potbelly, and Ruth's Chris, as well as Harvard—have been criticized for accepting loan proceeds from a program designed to help struggling businesses. At this point in time, Shake Shack, Ruth's Chris, and Harvard have indicated they are either going to return the proceeds or not accept them.

Question #31, which may be viewed as a warning shot across the bow, was added on April 23, 2020 to the 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 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.

The answer then goes on to say 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)."

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

## Economic Uncertainty Certification – Private Companies

While #31 targets large businesses with adequate sources of liquidity, it also raises the question of whether smaller, successful businesses might face similar scrutiny in the future.

This concern was addressed on April 28 when the PPP FAQ was updated to include Question #37: *"Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?"*

The response was "See response to FAQ #31." Thus, private companies need to consider the implications of #31 and #37. Additionally, they must consider whether they should repay their PPP loans in full by May 7, 2020.

The Treasury and SBA are signaling with #31, #37, and #39 that they will conduct investigations of the applications filed by PPP borrowers who have borrowed over \$2 million, whether a public or private company, and how loan proceeds were spent.

## PPP Loan Forgiveness

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

In a recent *Wall Street Journal* article, Ron Johnson, a Senator from Wisconsin, expressed his concern about the loan forgiveness provisions in the PPP program. He indicated that "it has become clear that access to forgivable loans hasn't been limited to those who truly need them." Additionally, he noted that some businesses receiving these loans were not in financial distress and did not intend to lay off workers.

Johnson 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 regarding 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 increases restrictions on a borrower's ability to have some or all of the loan forgiven.