

Publications

PPP Guidance Update: SBA Tells Borrowers that They May Have to Give Their Loan Money Back

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The Small Business Administration (SBA) and the Treasury updated the Paycheck Protection Program (PPP) Frequently Asked Questions on April 23 and suggested that certain businesses that have already obtained PPP loans should repay their loan in full by May 7 if they cannot demonstrate that as of the date of application, the loan was necessary to support their ongoing operations due to the current state of the economy.

In this update, the SBA notes that at the time of application a borrower must assess its economic need for a PPP loan under the CARES Act and the current PPP regulations. While the CARES Act suspends the SBA's customary requirement that an applicant is not able to obtain credit elsewhere, a borrower must still make a good faith certification that the PPP loan is necessary to support its ongoing operations due to current economic uncertainty. The guidance says that while making this certification, a borrower must take into account its current business activity, as well as its ability to access other sources of liquidity that would be sufficient to support its ongoing operations in a way that would not be "significantly detrimental" to the business. Specifically, the FAQ states that it is unlikely that a public company with substantial market value and access to capital markets would be able to make this certification in good faith, and such a company should be prepared to demonstrate to the SBA, upon request, the basis for its certification.

Since clarifying this certification, the SBA states that any borrower that previously applied for a PPP before this guidance was released on April 23 and repays the loan in full by May 7 will be deemed by the SBA to have made the certification in good faith. This clarification should be a reminder that certifications made to the SBA as part of the loan process under the CARES Act could potentially expose the applicant to liability under the False Claims Act (FCA). The Department of Justice has previously taken the position that false information provided as part of an SBA-guaranteed loan could serve as the predicate for FCA liability. As the Attorney General has already issued direction to United States Attorneys across the country prioritizing the detection and prosecution of claims related to the COVID-19 pandemic, applicants

should ensure they are providing accurate information as part of the application process, because FCA liability can include statutory penalties and treble damages.

As with all of the borrower's certifications on a PPP loan application, a lender may rely on the borrower certifying to the necessity of the requested loan. Additionally, PPP borrowers and lenders may rely on the guidance within the most current FAQs as the SBA's interpretation of the PPP rules. If you have any questions about the PPP program or this latest guidance, please call Drew Parobek, Marty Gates, Cauley Simmons, or your Vorys attorney today.

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Vorys COVID-19 Task Force

Vorys has established a comprehensive COVID-19 Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).