

SBA Revises Certification Rules: Safe Harbor for Loans Under \$2 Million, Larger Loans Still Subject to Audit

Update

May 13, 2020 | 2 minute read

The Small Business Administration has issued new guidance regarding the certification of necessity under the Paycheck Protection Program. Now, borrowers who received loans for less than \$2 million — roughly 98% of PPP loans to date — will automatically “be deemed to have made the required certification concerning the necessity of the loan in good faith.” In contrast, loans over \$2 million are still subject to audit by the SBA for compliance. However, if the SBA determines a borrower did not make the certification of necessity in good faith, the borrower may be able to avoid liability by simply repaying the loan.

The SBA previously announced that it would audit all PPP loans over \$2 million, and those under \$2 million as appropriate, to determine whether borrowers certified in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” That guidance threatened potential civil and criminal enforcement for those who were found to have not certified in good faith.

The newest guidance clarifies that only loans over \$2 million will be subject to audit regarding the certification of necessity, and that the consequences for borrowers who received loans over \$2 million, but lacked an adequate basis for the necessity certification, could be less severe.

If the SBA determines that a borrower lacked an adequate basis for the certification, the SBA will seek repayment of the loan and the borrower will be ineligible for forgiveness. The SBA will notify the borrower of its determination, and if the borrower repays the loan after receiving the notification, the SBA now says it will not pursue an enforcement action or refer the matter to other agencies for enforcement with respect to the necessity certification.

Nevertheless, borrowers with loans greater than \$2 million should still take steps to ensure that the good faith basis for their necessity certification is

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properly documented and be prepared to respond in the event of an SBA review.

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