



PPP and Good Faith Certification

Over the past few days, there has been much publicity and questions raised in connection with the SBA's requirement that in applying for PPP loans, borrowers must have made a good faith certification that "the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient" and whether some borrowers who are not certain if they meet this requirement should repay the PPP loans in full by May 14, 2020 to avoid possible adverse consequences.

Yesterday, the SBA announced that a safe harbor will apply to SBA's review of PPP loans with respect to this issue: any borrower that, together with its affiliates, received PPP loans with an original principal amount *of less than \$2 million will be deemed* to have made the required certification concerning the necessity of the loan request in good faith.

The SBA indicated that borrowers with PPP loans greater than \$2 million may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance, but must be prepared to demonstrate compliance with this and other PPP program requirements. SBA also indicated that if it determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and, if the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request.

The latter suggests that if a borrower is not entirely confident that it had adequate basis for this certification, perhaps there is no significant benefit in returning the PPP loan funds by May 14, 2020, and it may be feasible to wait to repay the PPP loan until after the completion of the SBA audit (which presumably will allow the borrowers to make their case and, possibly, have certain appeal rights). Of course, if the borrower believes there may be other issues with the PPP loan application or compliance with other PPP loan program requirements, legal counsel should be sought.

Also, even with the safe harbor applicable to PPP loans of less than \$2 million, we recommend that all borrowers maintain documentation that confirms that the applicable certifications were made in good faith, and that the borrower complies with other PPP program requirements.

GMH – Attorneys & Counselors