

# Treasury Provides New Safe Harbor for Recipients of PPP Loans Less than \$2 Million

On May 13, 2020, the Treasury Department issued much-needed guidance for borrowers still considering whether they should return loan funds received under the Paycheck Protection Program (PPP). In recent FAQs, the Department raised concerns for borrowers by challenging whether they had in good faith certified that their current “economic uncertainty” made PPP loans necessary to support ongoing operations. Most notably, the Department stated that borrowers, with access to sources of liquidity sufficient to support ongoing operations in a manner that would not be significantly detrimental to their operations, might not be able to make the necessary certification in good faith. For example, the Department stated that public companies with substantial market value and access to capital markets would be unlikely to meet this certification. Borrowers are provided a safe harbor until May 14 to repay any PPP loan amounts without penalty if they determine that they failed to meet the certification requirements referenced above.

However, in just published FAQ 46, the Department responded to the uncertainty created by its prior guidance. **The Department clarified that PPP borrowers who, together with its affiliates, received loans in the original principal amount of less than \$2 million, will be deemed to have made the PPP certification concerning the necessity of the loan request in good faith.** The Department explained that borrowers with loans less than the \$2 million threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans.

The Department reiterated that borrowers with loans greater than \$2 million will be subject to audit and review by the Small Business Administration (SBA) for compliance with program requirements, including the required certification concerning the necessity of the loan request. The Department believes that the new safe harbor is also necessary to conserve the SBA’s limited audit resources and allow it to focus on larger loans.

For those borrowers with loans greater than \$2 million, if the SBA ultimately determines that such PPP loans did not satisfy the required good faith certification, the SBA will seek repayment of the outstanding PPP loan balance and inform borrowers that they are not eligible for loan forgiveness. Importantly, the SBA clarified that if a borrower receives a notification of ineligibility but repays the loan amount thereafter, the SBA will not pursue administrative enforcement or referrals to other agencies based on the determination with respect to certification concerning the necessity of the loan request.

Unfortunately, for parties who received PPP loans in excess of \$2 million, there remains uncertainty as to the underlying standards that govern the bases upon which the certification be made. In such cases, borrowers should proceed cautiously and review their certification rationale.

*Our Chambliss team continues to monitor legal developments in connection with the COVID-19 pandemic. Please contact [Jim Catanzaro](#), [Mark Cunningham](#), [Justin Furrow](#), or your relationship attorney if you have questions or need additional information.*

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