

# Consider Reconvening Your Board Before May 7 if You Received or Are In Process on SBA Loans Under PPP

By **Ed Zimmerman**, **Kathleen A. McGee**, and **Raymond P. Thek**

*Certain provisions of the coronavirus/COVID-19 economic stimulus legislation are subject to the issuance of government regulations and other government action; thus, certain details regarding the legislation may be clarified or added.*

To view this message online and access the referenced articles, please click [here](#).

Today SBA provided an **Interim Final Rule** (IFR) and yesterday (Thursday), Treasury again updated its Paycheck Protection Program (PPP) **FAQ sheet** adding FAQ #31. The new FAQ #31 is an after-the-fact reset of the certification of need every borrower must make when applying for a PPP loan. In FAQ #31, Treasury seeks to retroactively apply a new interpretation of the certification of need and calls upon borrowers to reassess whether they meet the standard. Treasury further indicates that borrowers who do not meet the newly announced but retroactively applicable standard should **repay the loan in full on or before May 7**. Some have questioned whether this FAQ applies solely to public companies or solely to large companies, but the FAQ (reproduced in full below) very clearly says “all borrowers must assess” economic need.

**Guidance:** Each borrower and applicant should (1) **consider reconvening a board meeting PRIOR to MAY 7<sup>th</sup>** to evaluate whether its business meets the newly articulated standard for the certification of need and (2) ensure that it has appropriate documentation to support why and

how the borrower meets that standard. Note that Treasury's new FAQ #31 offers a “Limited Safe Harbor” to those who fully repay the loans on or before May 7, but that path also carries some risk. We learned this afternoon (Friday) that SBA will recommence funding on Monday, so time is of the essence. We elaborate below and recommend discussing with counsel the implications.

[Twitter thread on the April 23 FAQs](#)  
[Twitter Thread on Today's IFR](#)

MORE DETAIL:

SBA's IFR provides a “**Limited** Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request” (so, by its terms, it covers that specific certification of need) for those who repay loans in full by that deadline. Accordingly, those limitations require further consideration:

“Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.”

That Limited Safe Harbor applies ONLY to the certification of need and does not necessarily apply to other aspects of that loan or to loans taken by affiliates of that Borrower. That limitation leaves unanswered questions as to the protection afforded. See, e.g., our [Lowenstein Sandler Alert on Freedom of Information Act](#).

Elsewhere, the IFR specifically declares PE Firms ineligible: "private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan." This has implications for the firms and the companies they "control," as the IFR's next subsection says that portfolio companies may be eligible but should focus on the affiliation rules and "should carefully review the required certification" of need. (IFR Section 2).

Because "The Small Business Administration will resume taking Paycheck Protection Program loans via its E-Tran platform on Monday morning at 10:30 a.m. EDT" ([according to ABA Banking Journal](#)), applicants who wish to pull a loan application, may want to do so prior to that time.

The text of new FAQ31 follows (we added emphasis):

31. Question: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, **all borrowers** should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must make this 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 significantly detrimental to the business**. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely

on a borrower's certification regarding the necessity of the loan request. **Any borrower that 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 SBA to have made the required certification in good faith.**

In attempting to retroactively clarify the standard for PPP applicants, Treasury effectively requires applicants to evaluate impact on their business of not getting the loan, taking into account "their current business activity" as well as "their ability to access other sources of liquidity" (for instance, access to venture funds).

Treasury has also injected additional confusion by adding the phrase "significantly detrimental." Because FAQ #31 was NOT in effect or announced prior to yesterday, it would have been impossible for a borrower to know at the time of a prior board meeting that the board should have evaluated whether, in light of current business activity and access to other sources of liquidity, the borrower could – without the PPP Loan – **"support their ongoing operations in a manner that is not significantly detrimental to the business."** In addition, the term "significantly detrimental" does not have the same tested legal meaning as, for example, "material adverse" would, and so requires careful consideration.

Based on this new guidance, it is not enough for an applicant to determine that, at present, the business needs PPP funds to support current operations. As previously advised, borrowers must use PPP Loan proceeds solely to fund "Qualified Expenses," which are (generally) payroll of existing employees, payment of rent, payment of mortgage interest, and essential utilities. More info on the finer points of what constitutes a "Qualified Expense" [available here](#).

We are happy to discuss further.

**To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).**

# Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

## **ED ZIMMERMAN**

Partner

Chair, The Tech Group

**T: 212.204.8696**

[ezimmerman@lowenstein.com](mailto:ezimmerman@lowenstein.com)

## **RAYMOND P. THEK**

Partner

Vice Chair, The Tech Group

**T: 646.414.6795**

[rthek@lowenstein.com](mailto:rthek@lowenstein.com)

## **KATHLEEN A. MCGEE**

Counsel

**T: 646.414.6831**

[kmcgee@lowenstein.com](mailto:kmcgee@lowenstein.com)

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