

# The “Uncertainty” of the Paycheck Protection Program Economic Uncertainty Certification

**UPDATE:** On May 5, 2020, the SBA extended the safe harbor deadline for a borrower to review its certification related to the Paycheck Protection Program application from May 7, 2020 to May 14, 2020. Importantly, the SBA guidance also states that it intends to provide additional guidance on how it will review the certification prior to the extended May 14, 2020 deadline. Thus, businesses who are considering returning PPP Loan funds should wait until the updated guidance is provided.

One of the seminal programs under the CARES Act is the forgivable Paycheck Protection Program (PPP) loan fund, which has been reported on in depth over the past month. For details on the program and its forgiveness calculations, please see our prior posts available [here](#). Congress’ intent behind the PPP was for small businesses to retain their employees and maintain payroll. However, PPP funds were quickly depleted, and backlash arose when it was discovered that some publicly-traded companies had been early beneficiaries of the program while small businesses failed to obtain PPP loans. Although some of these organizations have since returned their PPP loan funds, Secretary Mnuchin has recently commented that all businesses should exercise caution when representing to the effect of the current economic uncertainty necessitating the loan. As such, businesses who have applied for or have already received PPP loan funds should review whether their “economic uncertainty” certification is with merit.

The PPP loan application has always required businesses to certify that the “current economic uncertainty makes [the] loan request necessary to support the ongoing operations of the Applicant.” Making a false statement on the application is punishable under federal criminal law.

When the news broke that companies such as Shake Shack, Ruth’s Chris, and Potbelly had received PPP loan funds, Treasury Secretary Mnuchin said that businesses need to look carefully at their applications to be sure they can certify that the forgivable loans of up to \$10 million are necessary. The secretary has also announced that “for any [PPP] loan over \$2 million, the SBA will be doing a full review of that loan before there is loan forgiveness.”

The definition of “economic uncertainty” is still by no means clear and is a highly discretionary matter. With that being said, the Treasury Department has issued guidance pertaining to the availability of funds and good-faith certifications. When asked whether businesses owned by large or private companies with adequate sources of liquidity to support the business’s ongoing operations qualify for the PPP loan, the department issued the following guidance on April 24, 2020:

*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...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.*

Importantly, the guidance also states that **any business that applied for a PPP loan prior to April 28, 2020 and repays the loan in full by May 7, 2020 will be deemed by the SBA to have made the required certification in good faith.** In light of this guidance, businesses of all sizes should assess whether, as of the date of their loan application, they had adequate liquidity to support the operations of their business in a manner that was not significantly detrimental to the business. If this is true, businesses should consider paying back the PPP loan amounts by May 7, 2020 to avoid potential audits or criminal charges.

The attorneys at Bond, Schoeneck & King can help you determine whether your business qualifies for the PPP loan under the good-faith economic uncertainty certifications. Please contact [Jeffrey B. Scheer](#), any of the [attorneys](#) in the [Business and Transactions Practice](#), or the attorney at the firm with whom you are regularly in contact.



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