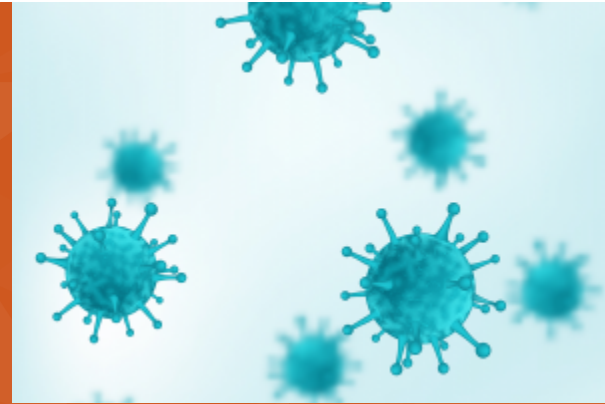


# COVID-19 Alert: Safe Harbor for PPP Borrowers

## Treasury Department Announces Safe Harbor for PPP Borrowers with Loans of Under \$2 Million

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On May 13, 2020, the Treasury Department announced new guidelines that relate to the “economic necessity” requirement for Paycheck Protection Program (“PPP”) loans. Those guidelines may be found [here](#), and are reproduced, in full, below.

**Of particular note:** The guidelines appear to indicate that the Treasury Department, as a matter of administrative policy, will not subject a PPP borrower with a loan amount of under \$2 million to an audit to determine whether that borrower’s certification of “economic necessity” contained in its loan application was made in good faith.

This instruction is materially different from prior guidelines on the subject.

It should be emphasized that the language of the guideline is subject to interpretation and the rules that relate to certification obligations for PPP loans is a developing subject.

Morse will continue to monitor regulatory developments related to the PPP and provide further updates and interpretations as appropriate. [Go to our full COVID-19 Resource Collection.](#)

### 46. Question:

How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?

### Answer:

When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: **Any borrower that, together with its affiliates<sup>20</sup> 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.**

SBA has determined that this safe harbor is appropriate because borrowers with loans below this 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. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor

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. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA 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 will inform the lender that the borrower is not eligible for loan forgiveness. 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. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.<sup>21</sup>

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#### Footnotes.

20. For purposes of this safe harbor, a borrower must include its affiliates to the extent required under the interim final rule on affiliates, 85 FR 20817 (April 15, 2020).

21. Question 46 published May 13, 2020.