

### COVID-19 PPP Loans – New Guidance from SBA Addresses an Applicant’s Certification of Need for PPP Loan

On April 23, 2020, the Small Business Administration (SBA) provided additional guidance to address borrower and lender questions concerning the implementation of the Paycheck Protection Program (PPP), established by Section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

In its Frequently Asked Questions, the SBA notes that although the CARES Act suspends the ordinary requirement that borrowers through the SBA must be unable to obtain credit elsewhere, borrowers still must certify in good faith that their PPP loan request is necessary. In its PPP application a borrower is required to certify that **“current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”** The SBA elaborates that 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. As an example, the SBA indicates that it is unlikely that a public company with substantial market value and access to capital markets would be able to make the required certification in good faith, and that such a company should be prepared to demonstrate to the SBA, upon request, the basis for its certification.

If a borrower who applied for a PPP loan determines that, based on this new guidance, its required certification of need was not appropriately made in good faith, it may repay its PPP loan in full by May 7, 2020.

#### **What does this updated guidance mean for PPP loan recipients?**

The CARES Act references the PPP as a mechanism for “keeping workers paid and employed.” Accordingly, the PPP is viewed as a program designed to assist companies in maintaining employees on their payroll. While all applicants are required to certify that “current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant,” virtually everyone interpreted this certification literally, i.e., that the PPP loan is necessary for employers to support their payroll under the current economic circumstances. The new guidance from the SBA suggests that the threshold to obtain PPP funds might, in fact, be higher. This guidance directs that employers examine “other sources of liquidity” when determining whether a PPP loan is necessary.

#### **What should companies do that have received or will receive PPP funds?**

The recent guidance creates an inconsistency between the stated purpose of the PPP and the

SBA's current position. All companies that have received or will receive PPP funds should carefully consider whether the loan is necessary to support ongoing operations of the applicant when taking into account other sources of liquidity. Contemporaneous documentation of support for the borrower's good faith certification should be assembled and preserved.

Please contact us for guidance on what this new order means for you or your business by reaching out to John Cashen at 743-6077 or [cashen@bodmanlaw.com](mailto:cashen@bodmanlaw.com). Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.