

# ALERT

May 2020

## SBA To Audit PPP Loans Over \$2M

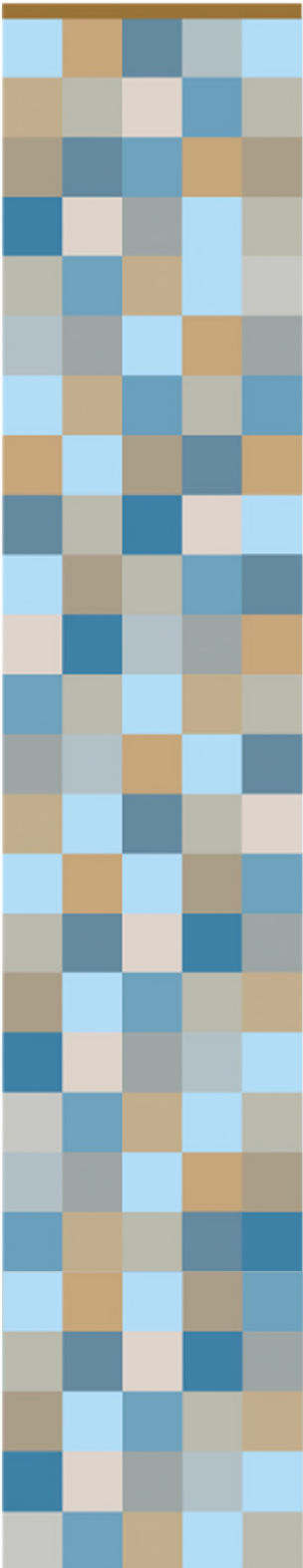
**By: Brett P. Garver & Robert M. Finkel**

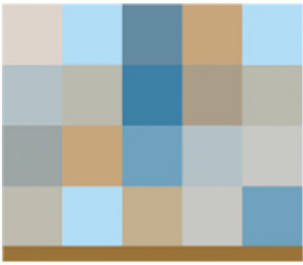
*PPP borrowers of More Than \$2M may be required to demonstrate that need existed. Borrowers can return funds by **May 14<sup>th</sup>** to avoid scrutiny.*

The CARES Act requires that a PPP loan applicant certify, in good faith, that “the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.” The PPP loan application issued by the SBA phrases the certification slightly differently: “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” On April 23<sup>rd</sup>, Treasury explained a bit about the certification in its FAQ 31.

The new guidance provides that (a) applicants must test their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations; and (b) the critical date for testing need is the time of the loan application. Unfortunately, there is no standard for financial need in the CARES Act or the PPP regulations. Treasury, in its FAQs offers little more on this; but in an example states that large public companies with substantial market value and access to capital markets likely will not be able to make the required certification in good faith. FQA applies FAQ31 to private companies who are likely to be viewed as having certified that (i) taking into account their current business activity; and (ii) 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, the loan request necessary to support the ongoing operations.

As for the testing date, FAQ 31 will be given retroactive application. Borrowers with PPP loans that pre-date FAQ 31 should review their certification in light of this guidance. FAQ 31 permits a borrower that applied for a PPP loan prior to the issuance of this guidance to repay the loan in full by **May 14, 2020** to be deemed by SBA to have made the required certification in good faith. Companies with substantial uncommitted accumulated earnings or ready access to capital are advised to consult with counsel, as to whether to return the PPP loan proceeds previously received.





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It is expected that the SBA that it will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application. Treasury Secretary Steven Mnuchin recently told CNBC that the Small Business Administration will conduct full audits of Paycheck Protection Program loans over \$2 million in order to verify borrowers' certifications that they had a legitimate economic for the borrowed PPP funds. According to Mnuchin, the PPP was designed for small businesses without other sources of liquidity. Secretary Mnuchin stated that in the audits the burden of proof will be on the borrower to establish economic need for a PPP loan. It is unclear at this point what the result of the audits will be but Criminal prosecution (presumably under the False Claim Act) is possible for borrowers who made a false certification in connection with the PPP application, however the SBA may choose to proceed civilly to obtain the benefit of a lower burden of proof.

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