



# MEMORANDUM

To: Utility & Transportation Contractors Association of New Jersey

From: Florio Perrucci Steinhardt Cappelli Tipton & Taylor LLC

Date: May 14, 2020

Re: Updated Guidance from SBA Regarding Good Faith Certification of Necessity for PPP Loan Borrowers

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The Coronavirus Aid, Relief and Economic Security Act (the "CARES Act") requires that Paycheck Protection Program ("PPP") loan borrowers make a good faith certification that "the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient." The Interim Final Rule published on April 15, 2020 (85 FR 20811) did not provide specific guidance on what type of information would be relevant to determining whether a PPP loan would be "necessary" to "support the ongoing operations" of the borrower; however, on April 23, 2020, the SBA issued an updated FAQ, which stated that borrowers must assess "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" in making the good faith certification. Additionally, the revised FAQ provided that borrowers who returned PPP loan proceeds by May 7, 2014 would be deemed to have made the certification in good faith.

Perhaps because of the continued uncertainty created by this new FAQ, the SBA issued an updated FAQ on May 5, 2020 extending the safe harbor to return loan proceeds to May 14, 2020. In the same FAQ, the SBA indicated that they would publish additional guidance to provide clarification on the good faith certification prior to May 14, 2020. As of May 13, 2020, the May 14, 2020 safe harbor deadline remains in place; however, the SBA released updated guidance, by way of a revised FAQ, on how the SBA will review borrowers' required good faith certification concerning the necessity of their loan request.

Most notably, updated FAQ #46 provides that any borrower that, together with its affiliates, 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. The SBA made this determination in light of the fact that borrowers with loans below this threshold would be generally less likely to have had access to adequate sources of liquidity in the current economic environment as compared to borrowers with larger loans. It should be noted that, the exception to SBA review provided by the updated FAQ for borrowers with PPP loans under \$2 million applies only to the good faith certification as to necessity of the loan, and does not apply to other aspects of the borrower's PPP loan, such as initial eligibility determinations and use of loan proceeds.

FAQ #46 also provides welcome news for borrowers with PPP loans in excess of \$2 million. Specifically, it provides that such borrowers 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. Further, although loans in excess of \$2 million will be subject to review by the SBA for compliance with program requirements, including review of the borrower's good faith certification as to the necessity of the loan, should the SBA determine that the borrower did not make the certification in good faith, the SBA will simply seek repayment of the outstanding PPP loan balance and inform the lender that the borrower is not eligible for loan forgiveness. So long as the borrower repays the loan after receiving notification from the SBA as to such a determination, the SBA will not pursue administrative enforcement or referrals to other agencies with respect to the certification concerning necessity of the loan request. Nevertheless, borrowers with loans in excess of \$2 million should still document in detail, with the assistance of counsel, the reasons for their good faith basis (i.e. the reasons the loan was necessary to support ongoing business operations at the time of the certification) so that they can, if they wish, resist or challenge a request to repay the loan. Finally, the SBA's determination regarding the certification of necessity will not affect the SBA's loan guarantee.

Should you have any questions regarding the SBA's updated guidance, or the applicability of such guidance to your company's particular situation and PPP loan, you should seek counsel accordingly.