

New Hampshire Coronavirus Tracker: CARES Act 2.0 Draft; PPP Update on Necessity Certification, Form 1502, Forgiveness; IG Report on PPP Loans

CARES Act 2.0 House Draft Provisions

Section 110401 – Reporting of Information During Major Disasters

- Suspension of Negative Credit Reporting: suspends negative credit reporting during major disaster periods; prohibits the reporting of negative credit information (except information related to criminal convictions) resulting from consumer “action or inaction” during the covered period; requires adverse information to be excluded from credit reports. (p. 1025)
- Adverse Information on Credit Reports: requires CFPB to create a website for consumers to report economic hardship related to a disaster to facilitate the removal of adverse information from credit reports; the CFPB can’t require documentation from the consumer, only a statement that false reporting is subject to perjury; information reported by consumers through this website is required to be accessible to CRAs via a database so they can remove covered adverse information. (p. 1028)
- Free Credit Reports/Scores: requires CRAs to make available free credit reports and scores to consumers during the pandemic and up to 12 months after the emergency ends. (p. 1032)
- Medical Debt: bans the furnishing of medical debt information to CRAs related to COVID-19 or a major disaster and prohibits covered medical debt information from appearing on a consumer report. (p. 1034)
- Treatment of “Absent” Information: credit scoring models can’t treat the absence of information during the covered period as a negative factor. (p. 1035)
- Restrictions on New Credit Scoring Models: limits the creation of new credit scoring models that would identify a significant percentage of consumers as less creditworthy compared to previous models. (p. 1035)

Section 110402 – Restrictions on Collections of Consumer Debt During a National Disaster of Emergency

- Consumer Debt Collection Moratorium: prohibits during the pandemic (and for 120 days after the end of the presidential declaration) certain actions used in the collection of past due debts; limits fees and interest on past due debt amounts; establishes rigid repayment structures after the expiration of the covered period; prohibits the use of arbitration agreements for disputes arising out of this section. (p. 1037)

Section 110404 – Credit Facility

- Credit Facility for Affected Debt Collectors: establishes a credit facility to make long-term, low-cost loans to debt collectors to recoup costs associated with the suspension of collections. (p. 1044)

Section 110501 – Payments for Private Education Loan Borrowers as a Result of the COVID-19 National Emergency

- Private Student Loan Borrower Relief: requires Treasury to establish a private student loan repayment assistance program to make payments on private student loans (up to \$10K per individual); requires private education loan holders to modify payment and forgiveness plans to reflect terms available for Direct Loans (federal student loans); prohibits pressuring borrowers related to allocating repayment assistance funds; prohibits adverse information furnished to CRAs related to private education loans. (p. 1045)

Section 110601 – Restrictions on Collections of Small Business and Nonprofit Debt During a National Disasters or Emergency

- Small Business Debt Collection Moratorium: prohibits during the pandemic (and for 120 days after the end of the presidential declaration) certain actions used in the collection of debt related to small businesses (as defined by SBA's term "small business concern") and non-profits during a national disaster (appears to be similar language to the consumer collections moratorium). (p. 1054)

Section 90001 – Amendments to Paycheck Protection Program (p. 821)

- Permits 501(c) organizations, including 501(c)(6) organizations, to borrow from the Paycheck Protection Program (PPP); however, credit unions (and other lenders) would still be prohibited from borrowing through this program through the financial institution exclusion in SBA regulations.
- Extends PPP covered period from June 30, 2020 to Dec. 31, 2020.
- Provides that a nonprofit organization that is a critical access hospital may be eligible even if it is a debtor in bankruptcy proceedings.
- Amends the maximum maturity of the loan to 5 years (from 10 originally).
- Sets aside 25 percent of funds for businesses with 10 or fewer employees.
- Sets aside 25 percent of funds for nonprofits (and 12.5% must go to nonprofits with 500 employees or less).
- Sets aside 25 percent or \$10 billion of remaining PPP funds for loans to be issued community financial institutions.
- Returned loan amounts must go to businesses with 10 or fewer employees.
- Extends loan forgiveness period to 24 weeks after such date of origination or Dec. 31, 2020.
- Expands expenditures eligible for forgiveness to interest on any other debt obligations that were incurred before Feb. 15, 2020 and the amounts of EIDL loans that were refinanced.
- Extends the period to rehire employees to Dec. 31, 2020.
- Holds employers harmless from a forgiveness reduction if they are unable to rehire employees (addressing the enhanced UI problem).
- Restricts the Administrator from limiting forgiveness amounts (addressing the 75% rule that the IG found exceeded SBA's authority).

SBA PPP Loan Update-New Guidance on Necessity Certification, Form 1502 and Forgiveness

Necessity Certification:

The Treasury Department issued an updated Q&A today that addressed widespread concerns among many PPP loan recipients as to whether they had an adequate basis for making the certification in their loan application that "current economic uncertainty makes this loan request necessary to support the ongoing operation of the Applicant."

As a reminder, on April 30, the SBA issued FAQ #31 which required borrowers to make the necessity certification representation in good faith after considering current business activity and other sources of liquidity "sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business." The prior guidance as to how to interpret this certification was lacking, and left many PPP loan recipients having to decide by **tomorrow** whether to return their PPP loan or risk an SBA audit, a possible subsequent rejection of loan forgiveness, civil penalties and even criminal penalties.

The new guidance is helpful to recipients of PPP loans under \$2 million, as they will automatically be deemed to have made the necessity certification in their application in good faith. Absent suspected fraud or some other grounds for declaring that the PPP loan recipient was ineligible, recipients of PPP loans under \$2 million will not be audited by the SBA on the necessity certification issue.

It also makes clear that recipients of PPP loans of over \$2 million that have not returned the funds by **tomorrow's safe harbor deadline**, will still be subject to an automatic SBA audit of their loan, including their necessity certification. However, even if the SBA determines as part of its audit that the recipient lacked adequate basis for making the necessity certification, as long as the recipient repays the loan after being notified by the SBA, then the SBA will not pursue any administrative enforcement actions or refer the loan to any other agencies that might otherwise pursue civil and/or criminal penalties. Recipients of PPP loans in excess of \$2 million now have some protection from civil and criminal exposure for making the "wrong" decision about returning their PPP loan, however, such recipients will almost certainly be audited by the SBA. Please note that it is not clear if the repayment under this FAQ contemplates immediate repayment in full upon notification or repayment over the remaining term of the loan. The SBA will inform the lender of its determination that the borrower is not eligible for forgiveness.

As a best practice, borrowers should take the time now to draft a written position statement outlining all of the factors they considered when making the original certification in their loan application that the "current economic uncertainty makes this loan request necessary to support the ongoing operation of the Applicant." This analysis should meaningfully describe the circumstances that support the business' need for a loan to support payroll expenses. The business may wish to reference or attach revenue and budget projections and modeling, describe contracts that are likely to be cancelled, and opportunities that are likely to disappear, and explain industry-specific difficulties. The business also should analyze how these conditions have created a payroll shortfall, and what consequences this has had or could have for employees. For example, a business may be able to state that without a PPP loan, the business otherwise would be compelled to engage in layoffs or make substantial reductions in compensation.

While the new guidance issued is generally good news for PPP loan recipients, recipients of loans in excess of \$2 million still have some issues to consider when determining whether or not to keep the PPP funds:

- If the SBA determines that the borrower lacked an adequate basis for making the required certification, will the loan be repayable in accordance with the terms of the original note signed by the borrower or on demand as a result of the SBA's adverse determination?
- If the SBA makes an adverse determination, will the borrower qualify for loan forgiveness for the portion of the loan funds spent on eligible expenditures (payroll, rent, etc.) or will it have to repay the full amount of PPP funds originally advanced?
- Is there a risk that other federal agencies may elect to pursue claims against the borrower following an adverse SBA determination even if the SBA will not do so?
- Will third parties have standing to pursue whistleblower, false claims or other claims against the borrower even if the SBA will not take action following an adverse determination?
- For borrowers who have been holding rather than spending their PPP funds pending issuance of today's guidance, will they be able to spend all of the PPP funds on expenses that qualify for loan forgiveness within what is left of the 8 week expenditure period that commenced on the date the borrower received the PPP funds from its lender?

If the SBA determines that the necessity certification was not made in good faith, then that determination alone will not affect the SBA's guarantee of the loan. Also, please note that the SBA's statement that it will not pursue administrative enforcement or referrals to other agencies related to the Necessity Certification does not eliminate the risk of the SBA pursuing an action or referral for another type of false certification by a borrower. It also

does not eliminate the risk of civil or criminal legal action taken by another agency. Such referrals are only one manner by which such an investigation or action may be initiated. Other agencies, including the Department of Justice, are not precluded from conducting investigations or pursuing legal actions based on the SBA's statement in FAQ #46.

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, 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.

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). Question 46 was published today, May 13, 2020.

Reporting of PPP Loans on Form 1502:

The Interim Final Rule states that lenders must report PPP on Form 1502 within 20 days of disbursement, effective May 22. The SBA and Treasury are still working on procedural instructions. In the meantime, reporting continues as usual.

PPP Loan Forgiveness:

Guidance remains pending.

Inspector General Report on PPP Loans

The Inspector General of the Small Business Association (SBA) issued a "Flash Report" on the SBA's Implementation of the PPP requirements and may be found at: https://www.sba.gov/sites/default/files/2020-05/SBA_OIG_Report_20-14_508.pdf

The report was prepared to immediately investigate reports that certain PPP lenders were prioritizing larger and wealthier clients to the detriment of smaller businesses, and to "provide recommendations on SBA's current rules, regulations, policies, and procedures to ensure small businesses get the money they need and are treated fairly by PPP lenders." Although the Inspector General's Report did not conclude whether lenders were wrongfully prioritizing larger and wealthier clients over smaller businesses, the Report identifies several key areas in which the SBA has either failed to implement certain provisions under the CARES Act or implemented regulations that "fail to align" with the plain terms of the Act.

- The Interim Final Rule added a requirement that 75% of the PPP loan must be used for payroll costs (the CARES Act did not restrict the proportion of funds for each allowable use) and shortened the loan maturity date to two years (the CARES Act provided for a maximum maturity of up to 10 years). As a result, the IG concluded, borrowers who use more than 25% of the PPP funds for nonpayroll expenses will be unable to have all of their loan forgiven and will be face additional burdens by having to repay the remaining loan in less than two years.
- The SBA failed to issue guidance to lenders regarding the deferment process, despite an explicit directive to do so from Congress within 30 days of the enactment of the CARES Act. The Inspector General noted that the lack of guidance may cause borrowers and lenders to be uncertain about servicing and loan repayments for PPP loans with balances remaining after forgiveness.
- The SBA failed to issue guidance to lenders to prioritize borrowers in underserved and rural markets, despite an explicit directive to do so from Congress in the CARES Act. The Inspector General expressed concerns that rural, minority-owned, and women-owned businesses may have already been left behind, despite clear congressional intent to the contrary.
- The SBA failed to register PPP loans using borrowers' Taxpayer Identification Numbers (TIN) within 15 days after loans were made, as required under the CARES Act.

The Report notes that, as of April 30, 2020, the SBA had issued seven Interim Final Rules and 39 FAQs as of April 30, 2020 (additional guidance has been added since April 30). The Report includes a chart comparing key CARES Act provisions, the Interim Final Rules, and the FAQs – underscoring the complexity of these rules. Although it is unclear how or whether the SBA or Treasury will react to the Inspector General's Report, the Report may provide a helpful roadmap for borrowers or lenders, in the event they decide to challenge the SBA's PPP rulemaking and enforcement actions in the future.