



LEWIS THOMASON

Today, the SBA issued updated guidance to provide much-needed clarity concerning how the SBA will review borrowers' required good-faith certification concerning the necessity of their loan request. Specifically, and providing good news to many borrowers, the new guidance provides that certifications for loans under \$2 Million will be automatically deemed to have been made in good faith, and the good-faith certification of loans greater than \$2 Million will be based on their individual circumstances. Most importantly, the guidance clarified the penalty-portion for borrowers of loans in excess of \$2 Million who are found to have lacked an adequate basis for making the good-faith certification.

Borrowers Receiving Loans Under \$2 million No Longer Subject to Audit.

The SBA reversed course on subjecting recipients of smaller loans (under \$2 Million) to the certification audit. Instead, the SBA has determined that any borrower (together with its affiliates) that 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 determined that this "automatic" safe harbor approach will promote economic certainty to PPP borrowers with more limited resources, and will enable the SBA to conserve its resources to focus its reviews on larger loans, where the compliance effort may yield higher returns.

Borrowers Receiving Loans in Excess of \$2 Million Subject to Audit and Penalty Clarification.

As prior guidance indicated, all borrowers with loans greater than \$2 million will be subject to an SBA review for compliance with the program requirements set forth in the PPP Interim Final Rules and the Borrower Application Form. If the SBA determines that the Borrower "lacked an adequate basis for the required certification concerning the necessity of the loan request, the SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness."

Importantly, if the borrower repays the loan after receiving notification from the SBA, the SBA will not pursue administrative enforcement or referrals to other agencies with respect to the certification concerning necessity of the loan request. Additionally, the SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

So, for loans under \$2 Million, there is no longer a need to worry about the good faith certification requirement going forward. And for loans in excess of \$2 Million, even a determination that the borrower was ineligible will not place the borrower in the position of a penalty or criminal charges if the borrower repays the balance of the loan upon receiving notification of the ineligibility.

