

Communication from Heather Kimmel, UCC General Counsel, in response to questions about SBA FAQ #31, liquidity, and necessity as it relates to the PPP Program.

April 30, 2020

The SBA recently issued guidance reminding organizations that they have to certify the loan is necessary, and that if the company's loan is audited and found not to be necessary then the company may be subject to some adverse action. Here is an answer I gave to a similar question on the issue. I'm also attaching the most recent version of the SBA guidance; review question 31:

The FAQ recently issued by the SBA that refer to other sources of liquidity and need for a loan have raised more questions than they have answered for religious and other organizations. Note that the FAQ was updated yesterday but the guidance did not change significantly. The guidance was issued in response to large public companies that received loans that likely were not necessary given those companies' access to capital markets.

Section 7(a)(2)(G)(i) of the Small Business Act, as amended by the CARES Act, and the SBA's form of PPP loan application, requires an applicant to certify that a loan is "necessary" to support the borrower's ongoing operations. The necessity standard is vague, but there has been general agreement that current protection of jobs is the bedrock principle and should form a key part of the support for any church's decision to apply for a PPP loan.

All of the information I am reading suggests the following:

- Companies that borrow \$2 million or more should expect to be audited with respect to their certification of need for the loan (based on the Treasury Secretary's statements). Companies that borrow less may be audited, though the risk is lower.
- Companies (including churches) should assess their need for the loan in light of other available sources of money that can be accessed without serious detriment to the business. Some of those sources may be an undrawn revolving credit line, cash in the bank, etc., though this is not an exhaustive list.
- Companies should document their assessment of need for the loan. For a church, this may include minutes of a meeting or meetings supported by documentation considered at the meeting.