



**KLEHR HARRISON  
HARVEY BRANZBURG LLP**

**Coronavirus (COVID-19) Task Force**

# You've Gotten a PPP Loan. Now What?

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# Disclaimer

Nothing in this presentation should be interpreted as legal advice. This presentation is intended to be informational only and to help you identify certain legal issues that may arise due to COVID-19. You should consult with your attorney to understand the specific legal issues and potential solutions for your circumstances.

# Agenda

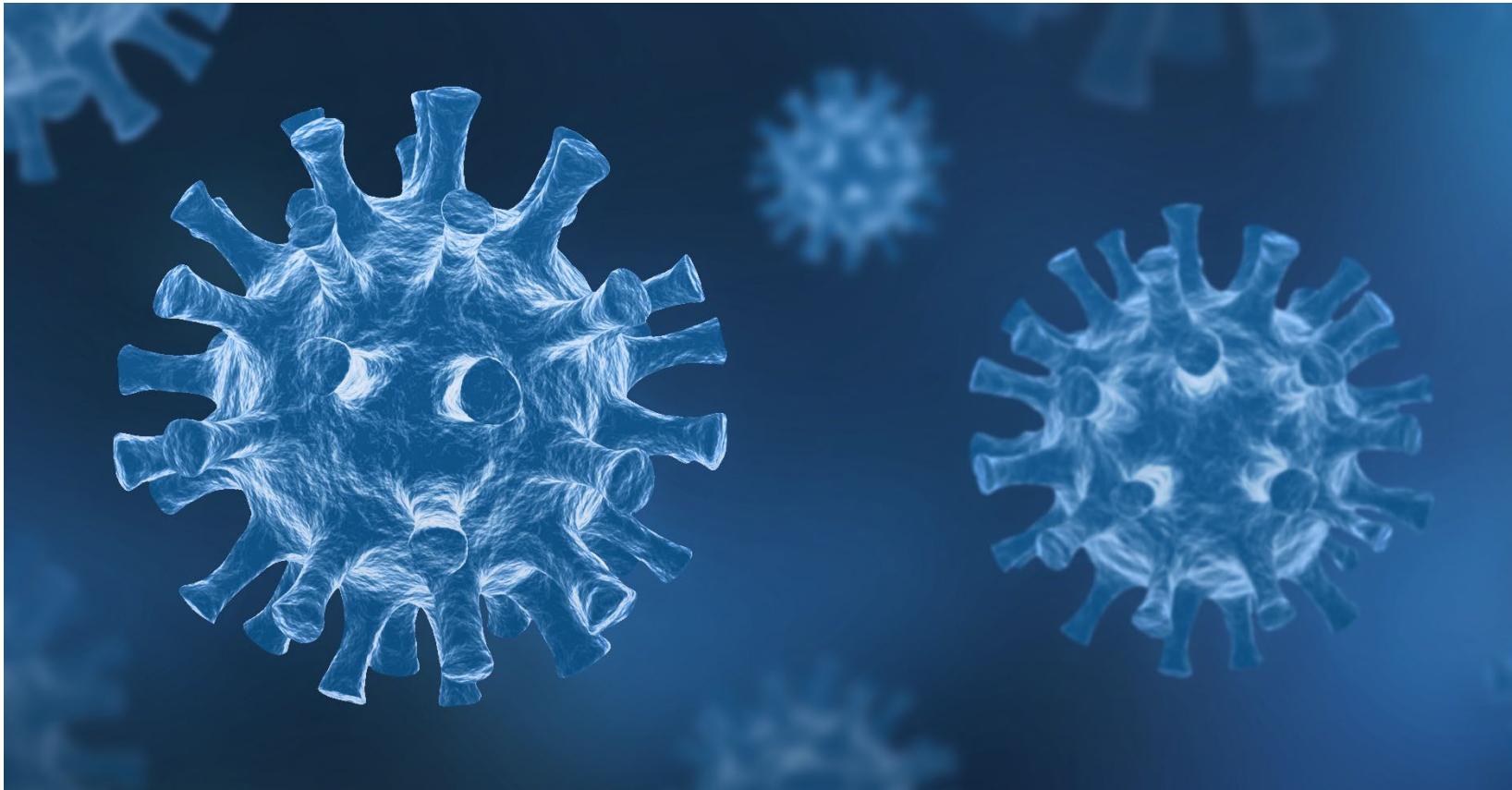
PPP Loans – Evolving Requirements

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Enforcement Considerations

What You Can Do Now





# PPP LOANS – EVOLVING REQUIREMENTS



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# The CARES Act and PPP



The Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, was signed into law on March 27, 2020



Included a \$349 billion small business loan program known as the Paycheck Protection Program (PPP)



The PPP provides for forgivable loans to eligible small businesses to fund payroll and other qualifying expenses



# The CARES Act – Loan Eligibility

Business concerns either located in the United States or that operate primarily within the United States, including 501(c)(3) nonprofit organizations, that satisfy the employee size restrictions



Eligible employers must employ no more than the greater of (i) 500 employees or (ii) the number of employees in the industry size standard designation



Must have been in operation on February 15, 2020, with employees on payroll or independent contractors being paid

# Requirements Waived

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Forgivable and payments deferred

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Low interest and no fees

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“Credit elsewhere” requirements not applicable

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Nonrecourse and personal guarantee requirement waived

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Affiliation requirements waived for certain industries

# Certification Required



Funds will be used for eligible purposes



No duplicative PPP loan applied for or received



“the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient”



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# Requirements Evolve

Interim final rules and FAQs began adding conditions and requirements not included in CARES Act:



At least 75% of loan (and forgiveness) for payroll costs



No bankruptcy debtors



Other ineligible businesses (13 CFR §120.110)



U.S. or foreign employees?



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# The Buck Stops...

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Program commences April 3, 2020 and 1.67 million loans are processed

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PPP program runs out of money on April 16, 2020

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High-profile cases of borrowers returning funds – Shake Shack, Ruth's Chris and the L.A. Lakers

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“the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient”

# FAQ #31

On April 23, 2020, SBA issues FAQ #31, giving guidance for the first time regarding required certification:

-  Certification must be made in good faith, taking into account current business activity
-  Consider other sources of liquidity sufficient to support ongoing operations in a manner not “significantly detrimental to the business”
-  “Unlikely” that public company with substantial market value and access to capital markets could make required certification
-  Safe harbor date of May 7 to return funds

# Evolution Continues

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Further FAQs and interim final rules refer portfolio companies and other privately owned companies to FAQ #31

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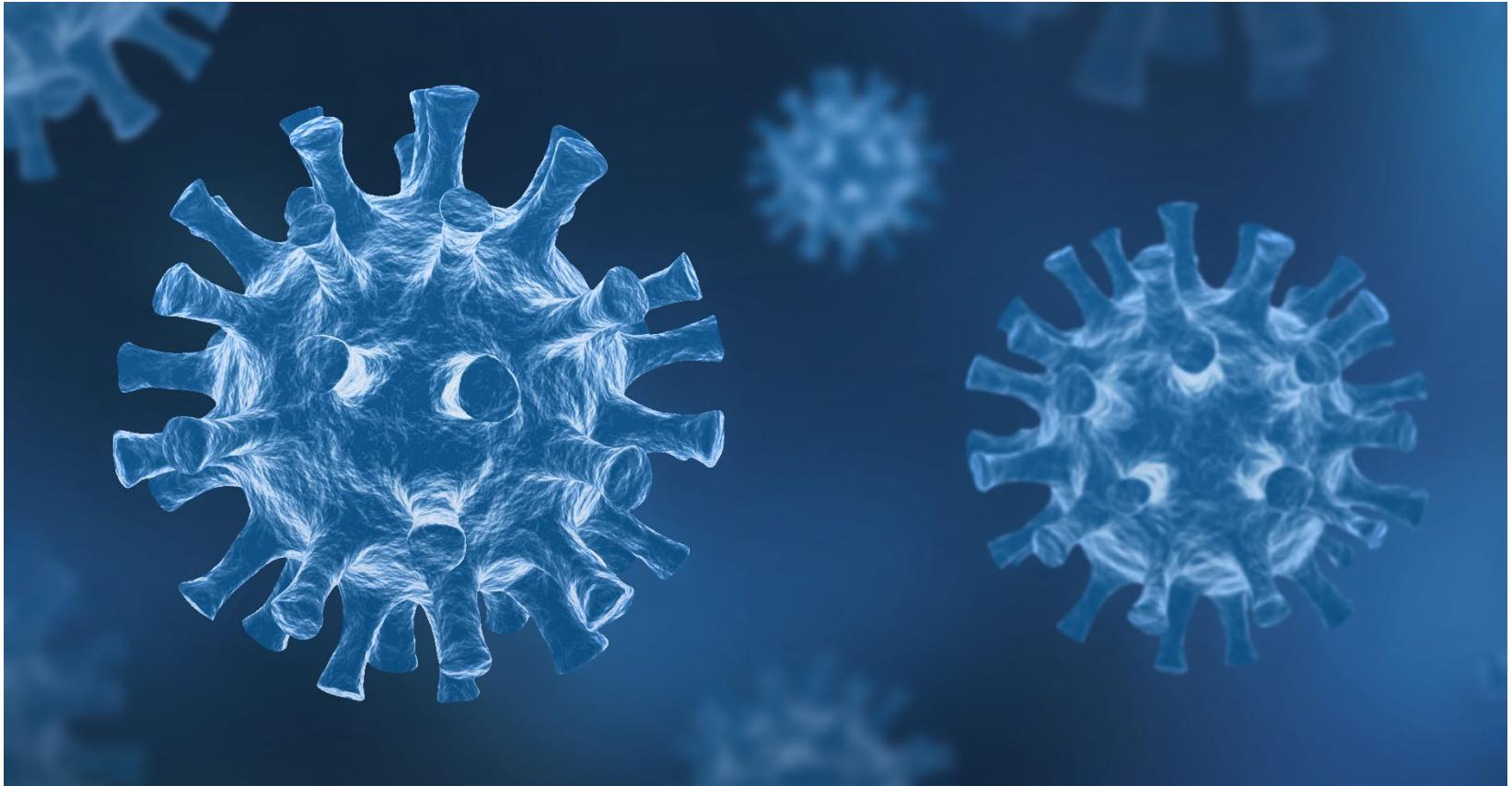
Safe harbor date extended to May 14, 2020 and new guidance promised

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On April 29, 2020, FAQ #39 is published, stating that SBA will review all loans in excess of \$2.0 million (and others “as appropriate”)

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Review will be conducted following submission of forgiveness application



# ENFORCEMENT CONSIDERATIONS



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# Federal Enforcement

CARES Act created three oversight bodies charged with monitoring the distribution of the stimulus funds:

- 1 The Office of the Special Inspector General for Pandemic Recovery, within the U.S. Department of the Treasury
- 2 The Pandemic Response Accountability Committee
- 3 The Congressional Oversight Commission

These bodies undoubtedly will work with the U.S. Department of Justice, as well as with other federal, state, and local law enforcement.



# They Really Mean It



Attorney General Barr has made clear that federal prosecutors will **“prioritize the investigation and prosecution of Coronavirus-related fraud schemes”**



Bill McSwain, U.S. Attorney in the Eastern District of Pennsylvania has left little doubt as to the resolve of federal law enforcement saying, **“anybody who tries to take advantage of the pandemic in this manner will feel the full weight of federal law enforcement.”**



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# They Really Mean It



THE UNITED STATES  
DEPARTMENT *of* JUSTICE

JUSTICE NEWS

Department of Justice  
Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, May 5, 2020

## **Two Charged in Rhode Island with Stimulus Fraud**

**First in the Nation to be Charged with Fraudulently Seeking CARES Act SBA Paycheck Protection Loans**

Two businessmen have been charged in the District of Rhode Island with allegedly filing bank loan applications fraudulently seeking more than a half-million dollars in forgivable loans guaranteed by the Small Business Administration (SBA) under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.



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# Enforcement Agencies

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Special Inspector General For Pandemic Recovery

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Treasury Audits—Over 2 M

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FBI

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IRS-CID

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SBA Office of Inspector General

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FDIC, Office of Inspector General for their efforts investigating this matter.

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DOJ/ US Attorneys Offices

# PPP Certification

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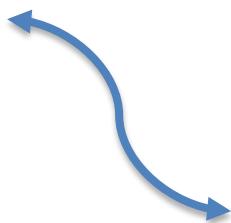
The CARES Act: requires that a PPP loan applicant certify, in good faith, that **“the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.”**

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The PPP loan application issued by the SBA phrased the certification slightly differently: **“Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”**

# The Uncertainty Principle - FAQ 31

...before submitting a PPP application, all borrowers should carefully review the required certification that **“[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”**



Borrowers must make this certification in good faith, taking into account 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.



# Most Relevant Federal Criminal Statutes

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## The Proverbial Coming and Going

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**False Statements to a governmental agency, 18 U.S.C § 1001**--maximum of (1) five years' imprisonment and/or a \$250,000 fine under;

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**False Statements to the SBA 15 U.S.C. §645**-- (2) two years' imprisonment and/or a \$5,000 fine under

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**False Statements to Federally Insured Bank. 18 U.S.C. §1014** -- 30 years' imprisonment and/or a \$1,000,000 fine,

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**Mail and Wire Fraud, 18 U.S.C. § §1341-1343** --20 years' imprisonment and a \$250,000 fine

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**Bank Fraud 18 U.S.C. §1344**-- up to 30 years' imprisonment and a \$250,000 fine

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# Federal False Claims Act

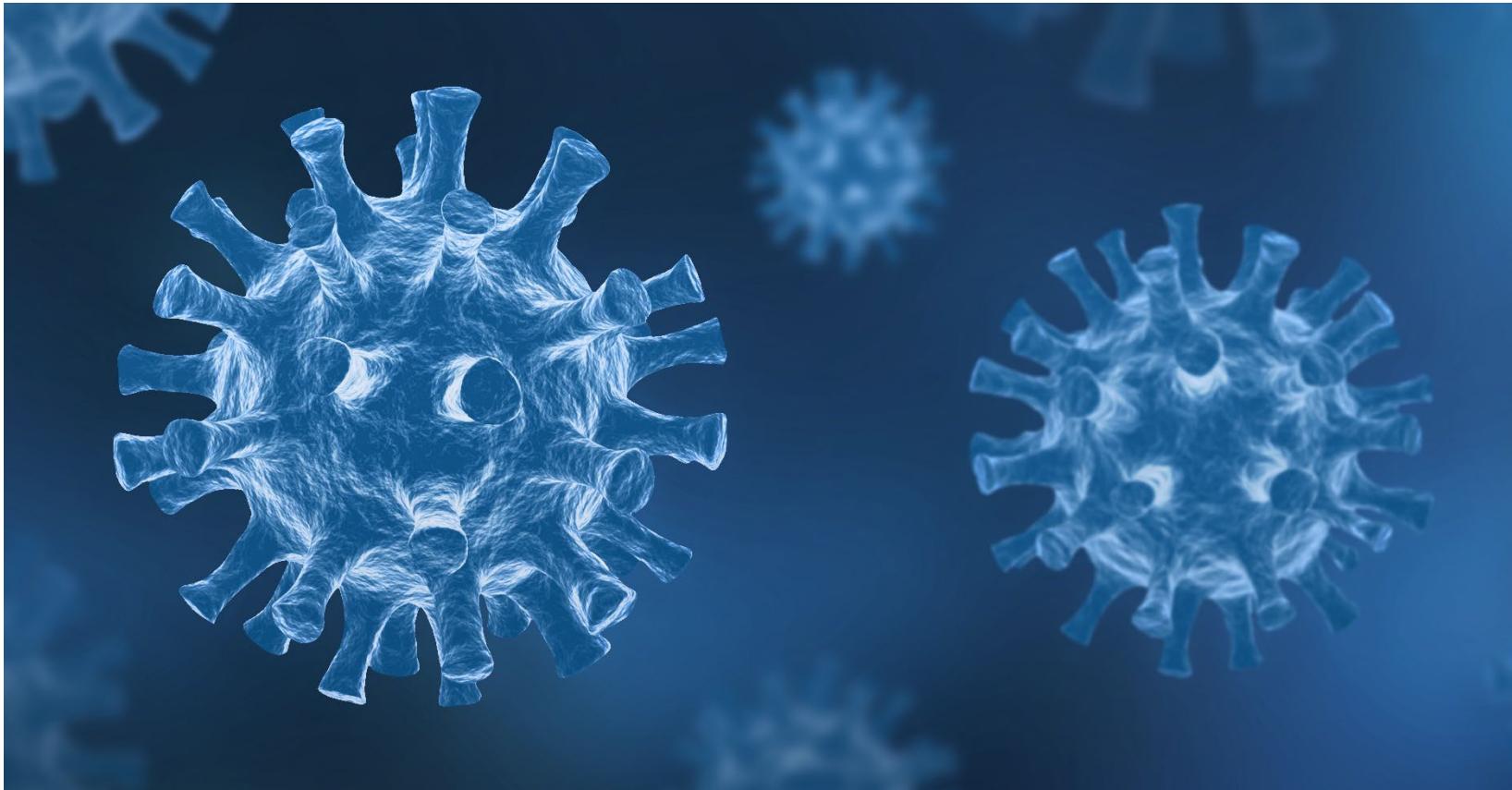
As background: the False Claims Act (FCA), 31 U.S.C. §§ 3729 – 3733, was enacted in 1863, in the midst of the Civil War, when Congress sought to hold accountable those suppliers of goods to the Union Army who were committing fraud against the government. Over the years, the FCA has evolved into one of the government's most useful tools to recover funds obtained through fraud.



# FCA

The FCA allows both the government and individual whistleblowers – called “relators” – to bring claims against persons or entities who knowingly submit or cause to be submitted false claims to the government for payment, or made false certifications material to the disbursement of government funds (“knowingly” being defined by law as (a) having actual knowledge, (b) acting with reckless disregard, or (c) acting in deliberate ignorance). Potential exposure under the FCA includes treble (triple) damages, heavy monetary penalties, and the payment of attorneys’ fees.





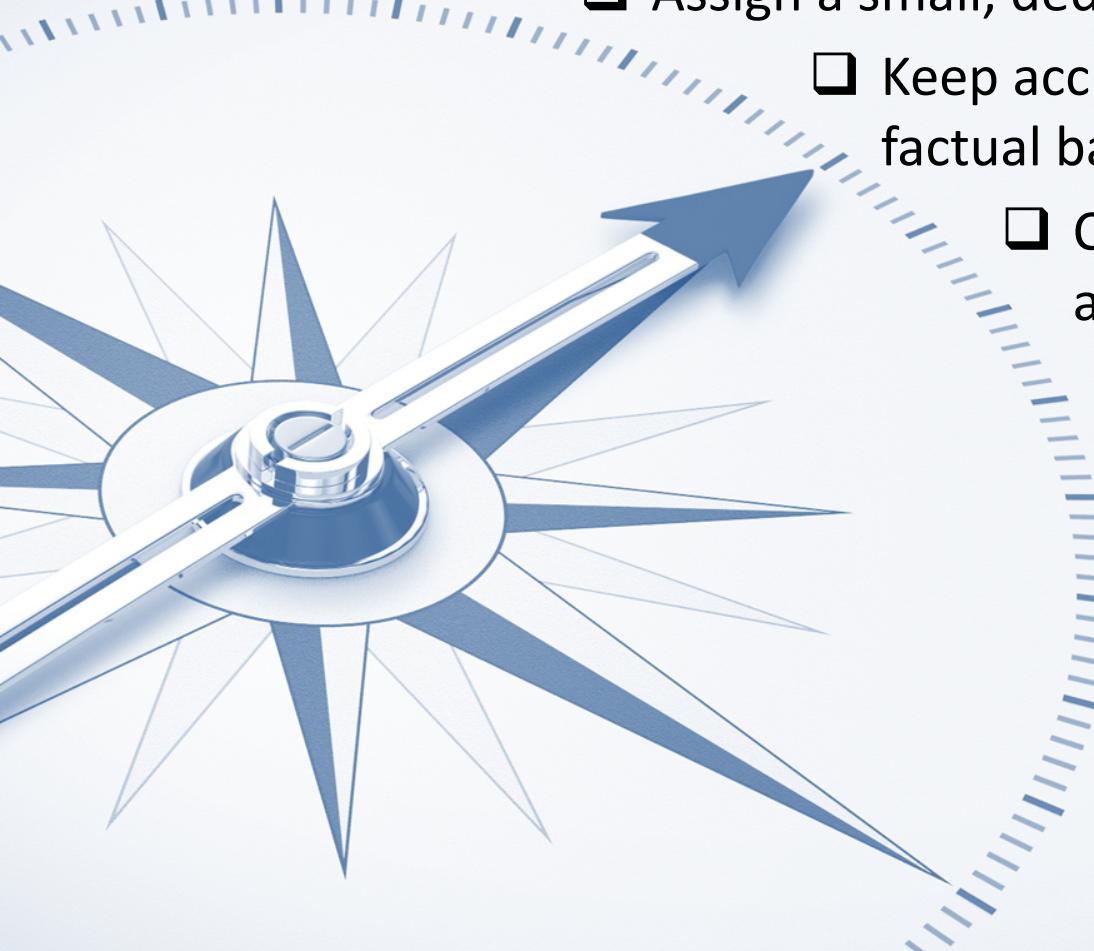
# WHAT YOU CAN DO NOW



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# Practical Steps

## Use SBA guidance as a roadmap.



- Assign a small, dedicated team
- Keep accurate records and maintain factual backup
- Consult with legal and financial advisors
  - Segregate PPP funds
  - Avoid appearance of self-dealing
  - Establish compliance policies, including channels for reporting and internal investigations

# Certification Considerations



Effects of (continuing) uncertainty



Customers, vendors and suppliers – immediate versus “long tail” impacts



Employee skills and training



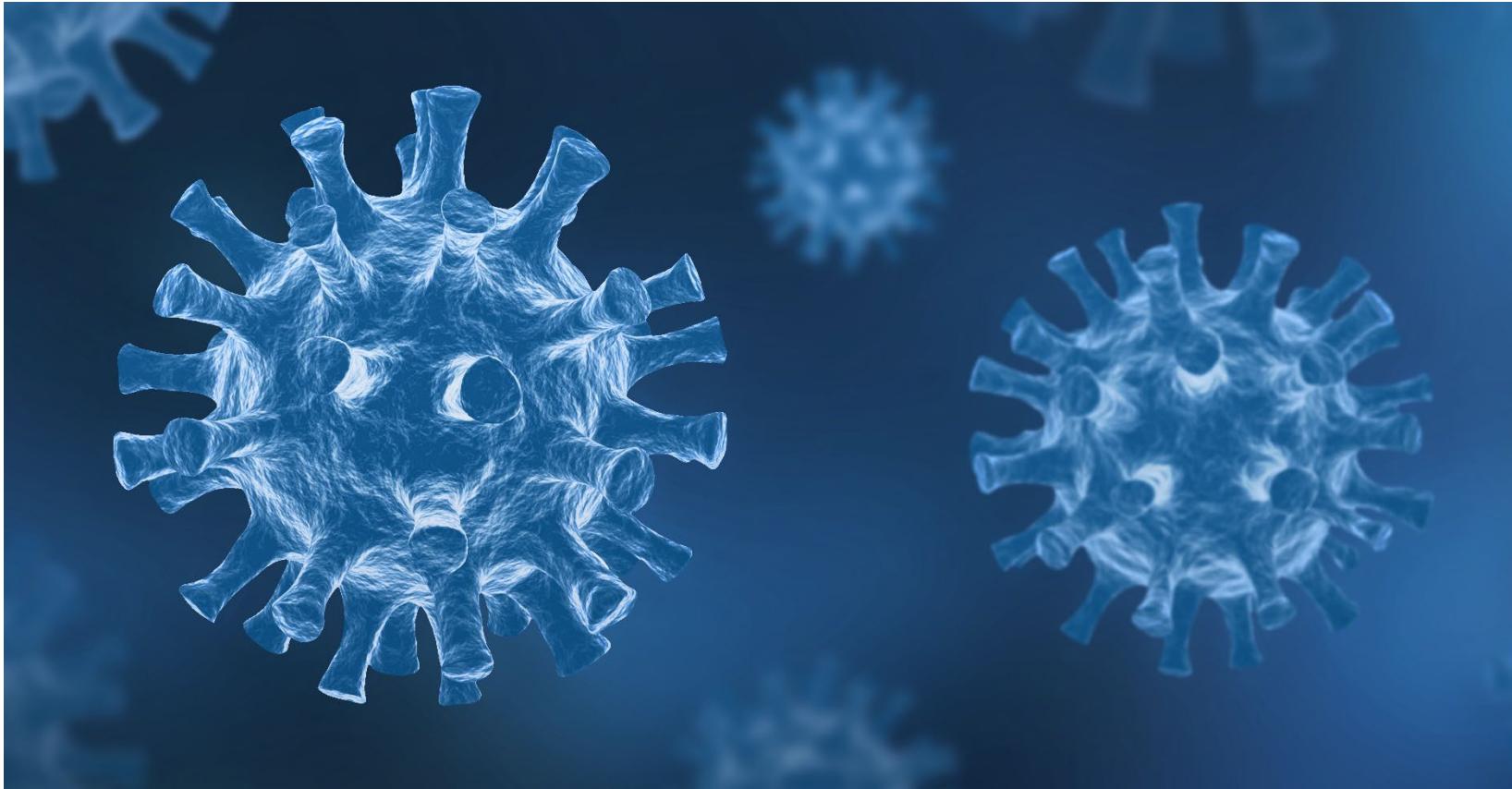
Layoffs or furloughs?



Other sources of liquidity



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# QUESTIONS AND ANSWERS



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# Thank You

Questions? Contact:

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**Follow our Coronavirus (COVID-19) Task Force  
Resource Center for all the latest guidance:**

[www.klehr.com/covid-19](http://www.klehr.com/covid-19)