

CLIENT ALERT

SBA Extends Safe Harbor for Returning PPP Loans to May 14

MAY 6, 2020

On Tuesday, May 5, 2020, the U. S. Small Business Administration (SBA) issued an update to its Frequently Asked Questions (FAQ) regarding the Paycheck Protection Program (PPP) that extends the end of the safe harbor period for returning PPP loans from May 7, 2020, to May 14, 2020. SBA further announced that it intends to issue additional guidance on how it will interpret the certification of need contained in the PPP loan application form. This additional time and guidance should help PPP borrowers and their sponsors make better-informed decisions on whether to retain or return their PPP loans.

The PPP Borrower Application Form requires applicants to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA provided guidance on the meaning of this certification when it published Question and Answer 31 (FAQ 31) in its FAQ on April 23, 2020. FAQ 31 requires PPP borrowers to “make [the] 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.” FAQ 31 encouraged PPP borrowers to review their certifications in light of the newly announced standard and announced a safe harbor under which borrowers that applied for PPP loans before FAQ 31 was issued could repay their PPP loans in full by May 7, 2020, and be deemed to have made their certifications in good faith.

While FAQ 31 arguably may have applied only to “large companies with adequate sources of liquidity to support [a] business’s ongoing operations,” SBA effectively extended FAQ 31 to “all businesses owned by private companies with adequate sources of liquidity to support [a] business’s ongoing operations” when it published Question and Answer 37 (FAQ 37) in the FAQ on April 28, 2020. Since the publication of FAQ 31 and FAQ 37, many PPP borrowers have questioned whether they meet the SBA’s standards and have considered repaying their PPP loans in full during the safe harbor period.

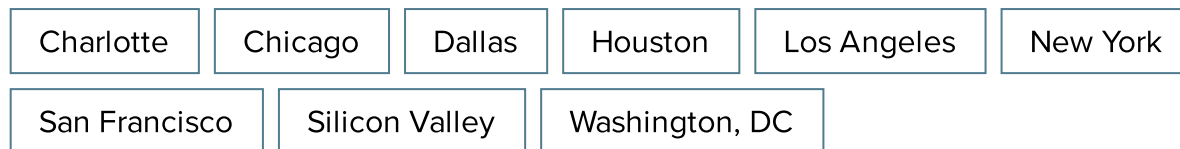
Today’s publication of Question and Answer 43 (FAQ 43) extends the safe harbor through May 14, 2020, giving PPP borrowers and their investors additional time to decide whether to repay their PPP loans. The extension is automatic, requires no action by PPP borrowers, and is to be reflected in a revision to SBA’s interim final rule that originally established the safe harbor. Note, however, that the safe harbor does not currently extend to borrowers who applied for PPP loans on or after April 24, 2020.

FAQ 43 also declares SBA’s intent to provide additional guidance on how it will review the need certification in the PPP loan application. Once that guidance is published, all PPP borrowers should carefully review it and evaluate whether they are eligible to retain their PPP loans under SBA’s standards, document their determination and rationale, and, if they determine they cannot make the PPP need certification in good faith, return their PPP loans in full before the end of the safe harbor period.

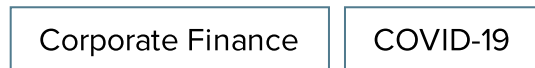
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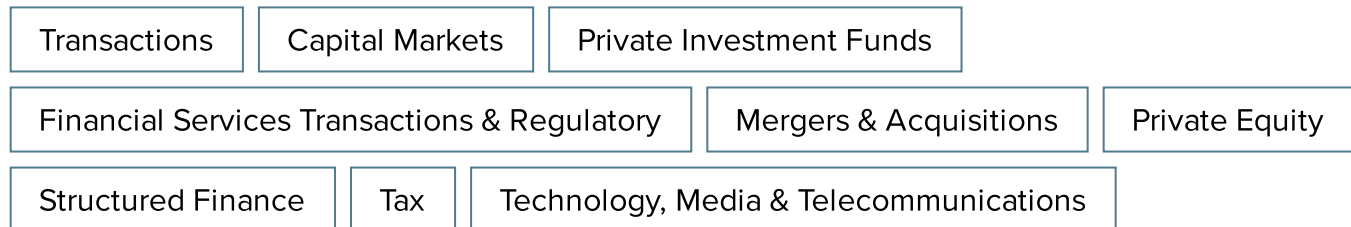
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