

## SBA Paycheck Protection Program Update: SBA Provides Guidance on Certification of Need and Extends Safe Harbor for Repayment of PPP Loans

MAY 14, 2020

*This briefing was originally written on May 13 and was updated on May 14.*

On Wednesday, May 13, 2020, the U.S. Small Business Administration (SBA) issued two updates to its [Frequently Asked Questions](#) (FAQs) regarding the Paycheck Protection Program (PPP). The first of these updates provides guidance on how SBA will review and treat the required certification of need submitted by PPP borrowers and the second extends the safe harbor deadline for returning PPP loans from May 14, 2020, to May 18, 2020. SBA previously promised to provide additional guidance on its review of the certification of need when it last extended the end of the safe harbor period for returning PPP loans. SBA announced in Question and Answer 46 (FAQ 46) that it will deem any borrower that, together with its affiliates, has received less than \$2 million in principal amount of PPP loans to have made its certification of need in good faith. If SBA determines that a borrower outside that safe harbor “lacked an adequate basis for the required certification concerning the necessity of the loan request” SBA will not pursue administrative enforcement or referrals to other government agencies based on that certification if the borrower repays the loan without forgiveness after notice from SBA. Further, new Question and Answer 47 (FAQ 47) provides that if a PPP borrower repays its PPP loan in full by May 18, 2020 (instead of the previous May 14 deadline), SBA will deem the certification of need to have been made in good faith. Accordingly, before the May 18 deadline for returning PPP loans, borrowers should carefully review whether in view of the evolving guidance, they meet the eligibility requirements and are able to attest to the required certifications. They should also consider whether the SBA would deem their certifications of need to have been made in good faith. PPP borrowers should also be aware that SBA’s safe harbors do not necessarily preclude claims by other government agencies or by whistleblowers.

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.” On April 23, 2020, SBA published Question and Answer 31 (FAQ 31), which 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 by SBA to have made their certifications of need in good faith. SBA Question and Answer 43 (FAQ 43) extended the safe harbor through May 14, 2020, and SBA’s Interim Final Rule published on May

8, 2020, extended the safe harbor to all PPP applicants that applied for a PPP loan and repay it in full by May 14, 2020. FAQ 47 further extends this safe harbor repayment deadline to May 18, 2020.

While the guidance provided in FAQ 31 was in response to a question about the eligibility of “large companies with adequate sources of liquidity to support [a] business’s ongoing operations,” SBA effectively extended that guidance 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) 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.

FAQ 46 provides a new safe harbor based on the principal amount of PPP loans received by a borrower and its affiliates: “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.” Affiliation for this purpose is determined based on the rules that apply for determining eligibility for a PPP loan, as announced in SBA’s Interim Final Rule on Applicable Affiliation Rules, which can be found [here](#). SBA announced that it determined this safe harbor is appropriate because those borrowing less than \$ 2 million are less likely to have had access to adequate sources of liquidity, to promote economic certainty, and to enable the SBA to conserve its audit resources and focus on its reviews on larger loans.

FAQ 46 also gives PPP borrowers that do not fall within the new safe harbor a means to limit their exposure to sanctions from SBA. If SBA determines that such a borrower did not have an adequate basis for the certification of need, SBA will notify the borrower and seek repayment in full of the PPP loan, and tell the lender that the borrower is not eligible for loan forgiveness. FAQ 46 provides that SBA will not pursue further administrative enforcement or refer the borrower to other governmental agencies based on its determination regarding the certification of need if the borrower repays the loan in full after receiving notification from SBA.

However, repaying the loan pursuant to FAQ 46 does not shield the borrower from all potential liability. FAQ merely states that SBA will not pursue additional action based on a determination that the borrower lacked an adequate basis for the certification of need. SBA could still pursue remedies if there are other violations of the PPP statute or implementing regulations. Other government agencies and whistleblowers could also seek enforcement within their respective jurisdictions. For example, FAQ 46 would not prevent the government or a whistleblower who believes that the borrower intentionally made a false statement in connection with its PPP loan application, knowing that it was false, from bringing or investigating a complaint under the False Claims Act.

Each PPP borrower should carefully review its certification of need in light of FAQ 46, evaluate whether it is eligible to retain its PPP loan under SBA’s standards, document its determination and rationale. If a PPP borrower determines it cannot make the PPP need certification in good faith, it should return its PPP loan in full before the end of the safe harbor period, which FAQ 47 extends to May 18, 2020.

*We note that government orders on the local, state, and federal levels are changing every day, and the information contained herein is accurate only as of the date set forth above.*

*All entities should consult legal counsel for compliance issues and questions related to rapidly evolving COVID-19 legislation and policy.*

For further information, please contact Alan Roth, Chris Douglass, Suzanne Jaffe Bloom, or your Winston relationship attorney.

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