

COVID-19 Alert

CARES ACT PAYCHECK PROTECTION PROGRAM LOANS MAY 13, 2020 UPDATE

MAY 2020

This continues our effort to provide up-to-date information on the Paycheck Protection Program (PPP) loan offerings created by the CARES Act and overseen by the Small Business Administration (SBA). For our previous updates, please see our website from [April 1, 2020](#), [April 3, 2020](#), [April 9, 2020](#), [April 16, 2020](#), [April 24, 2020](#), [May 1, 2020](#), and [May 6, 2020](#).

HAS ANYTHING CHANGED?

Yes.

Major controversy had arisen surrounding the so-called “necessity” or “necessary” certification in PPP loan applications (see our [May 1 update](#)) and SBA had granted a safe harbor on the topic for loans returned by May 7, 2020. SBA subsequently extended the return date to May 14, 2020, and promised additional guidance on the topic prior to that date (see our [May 6 update](#)).

SBA has today provided that additional guidance, in the form of FAQ 46. All of SBA’s PPP FAQs can be found [here](#).

WHAT DOES IT SAY?

Here is the full text of FAQ 46:

46. **Question:** How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?

Answer: When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: Any borrower that, together with its affiliates,²⁰ 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.

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current

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economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

²⁰ For purposes of this safe harbor, a borrower must include its affiliates to the extent required under the interim final rule on affiliates, 85 FR 20817 (April 15, 2020).

WHAT DOES IT MEAN?

We continue to digest it ourselves, but for the "necessary" certification topic SBA has now very concretely divided the universe into borrowers with (or applicants for) PPP loans of \$2,000,000 or less and those with (or applying for) loans in excess of \$2,000,000. The \$2,000,000 dividing line flows from FAQ 39's announcement that loans in excess of \$2,000,000 and for which forgiveness is sought will be audited by SBA (at a minimum, and not precluding audits of smaller loans, or ones for which forgiveness is not sought).

For those in the \$2,000,000 or less category, FAQ 46 says they "will be deemed to have made the required certification concerning the necessity of the loan in good faith." As a practical matter, that should end the discussion.

For those in the more than \$2,000,000 category, we read FAQ 46 to say in effect that the safe harbor date is now a rolling target. They may keep the loan. If and when they seek forgiveness, that act will accelerate SBA review on the topic, and SBA will make a determination of whether the "necessary" certification was accurate. If SBA is satisfied, forgiveness will continue (assuming no other issues on review). If it is not, it will tell the lender, which will inform the borrower.

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The borrower may then repay the loan in its entirety, likely without further consequence on account of the “necessary” certification. What remains vague is whether this means repayment immediately in full, or in accordance with the two-year-term element of the loan. That requirement is important, because a borrower failing to comply will continue to be subject to the various potential ramifications discussed in our [May 6 update](#) for mis-certification. Also, SBA is speaking only about its own enforcement and referral intentions; in theory a repaying borrower would remain open to question on the certification by way of a governmental investigation begun outside SBA or a False Claims Act claim asserted by a whistle-blower.

While this provides borrowers of more than \$2,000,000 a continuing avenue to avoid consequences beyond non-forgiveness, it does not end the “necessary” topic for them. They will still be subject to review of whether they made a good faith “necessary” certification “based on their individual circumstances in light of the language of the certification and SBA guidance.” That guidance still includes all of the vagueness about “access to other sources of liquidity” in FAQ 31. It also means that the threatened “audit,” whatever it may consist of, will now not only occur, but will be an essential part of the loan forgiveness process. Accordingly, all borrowers of more than \$2,000,000 must continue to document now their case for why the loan is necessary.

We emphasize that FAQ 46 addresses only the “necessary” certification topic. It provides no comfort for any other loan issues (e.g., as to borrower size, taking into account affiliation rules, properly calculating the amount of loan applied for, properly identifying 20% owners, criminal convictions and bankruptcy status, etc.).

IS ANYTHING ELSE NEW?

FAQ 45 was added on May 6, after we issued our last update. It provides that borrowers who received a PPP loan and repaid it by the May 14, 2020, safe harbor deadline will be treated as if they had not received the loan in the first place. The upshot of this is to restore eligibility for the Employee Retention Credit created by the CARES Act. Those borrowers of more than \$2,000,000 with concerns about ultimately satisfying SBA on the “necessary” certification, or with other concerns about the bona fides of their loans, should continue to assess whether to repay by May 14, 2020, so as to have the benefit of FAQ 45.

FINAL THOUGHTS

We are a bit stunned by the turn in events with FAQ 46, and still trying to process its full meaning. As we initially read it, we applaud SBA’s seeming movement back toward what we understood the initial purpose and policy of the CARES Act to be. Whether this applies to all PPP borrowers, or just those who borrowed \$2,000,000 or less remains to be seen.

We are interested to hear your experiences with the PPP.

Please contact the Reid and Riege attorney with whom you regularly work, or a member of our Business Services practice listed to the right, for more up to date information, or questions about your unique circumstances.

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