



Paycheck Protection Program: Deadline Extended to 5/14, Updated Guidance on Other Sources of Liquidity

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Update: On May 5, 2020, the SBA issued [Frequently Asked Question #43](#) which extended the repayment date for the safe harbor described below to May 14, 2020, and indicated that further SBA Guidance as to how it will review the “necessity of the loan” certification would be forthcoming.

On April 23, April 24, and April 26, 2020, the SBA issued further guidance through its Paycheck Protection Program (“PPP”) [Loans Frequently Asked Questions](#). The six newly added questions address certain issues around calculation of payroll costs and PPP Loan eligibility.^[1] Of particular note, newly added Question 31 addresses PPP loan eligibility for large companies with other sources of liquidity. This guidance has come out following news reports of several high profile companies that have either withdrawn their PPP applications or returned their loans and raises several important items that any PPP applicant or borrower must consider. The language in Question 31 has further been incorporated into the SBA Interim Final Rule dated April 23, 2020.

Key Takeaways

- ***New PPP loan applicants*** must determine whether the required certification on the PPP Borrower Application Form (SBA Form 2483) stating that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant” is truthful in light of such applicant’s current business activity and access to other sources of liquidity sufficient to support the applicant’s ongoing operations in a manner that is not significantly detrimental to the business.
- ***Existing PPP loan recipients*** must determine the basis upon which they made this certification at the time of the loan application and whether the loan recipient can keep loan proceeds due to this certification of economic need. Existing loan recipients may repay the loan in full on or prior to May 7, 2020 (which has subsequently been extended to May 14, 2020 by SBA FAQ #43) and be deemed to have made this certification in good faith. Repayment of the loan (or withdrawal of the application for an unfunded loan) will enable a loan recipient to avoid potential liability for making an alleged false claim should they determine that the certification was not appropriate, in light of this updated guidance.

Economic Need Certification

Question 31 from the April 23, 2020 ***Frequently Asked Questions*** reads as follows:

31. **Question:** Do businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain

credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. **Specifically, before submitting a PPP application, all borrowers should review carefully 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.** For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower’s certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith (emphasis added).

New PPP loan applicants and existing PPP loan recipients must truthfully establish an economic need that fits within this guidance. In view of the very public attention that this certification is receiving, we recommend that our clients carefully consider their economic need and document the thought process that supports such position.

Watchdog Provision

It is expected that the SBA will take an aggressive posture towards false certifications as \$25 million was appropriated for the SBA Office of Inspector General for expenses relating to monitoring and enforcement of the economic assistance and loan programs passed in the CARES Act. Hinckley Allen’s Government Enforcement & White Collar Defense group’s thoughts regarding what to anticipate in terms of law enforcement actions in the wake of COVID-19, particularly for businesses receiving federal funds, can be found [here](#).

How to Document Economic Need

Due to the anticipated scrutiny and associated risk, businesses can take several steps to ensure they have followed the proper steps to support their certifications in the PPP loan program, including:

- Develop a record of the basis upon which eligibility certifications were made when applying for a PPP loan along with relevant SBA guidance reviewed in making these decisions.
- Document personnel decisions that would have been implemented were it not for receipt of a PPP loan.
- Keep records regarding losses in sales, losses in investment, weakness in the capital structure, lack of conventional lending, and reductions in cash reserves.
- Maintain a record of the economic uncertainty facing the business such as losses of customers, declines in key business metrics, and decline in business operations.
- Review whether the business has access to other sources of liquidity sufficient to support their ongoing operations outside of the PPP.
- Document restrictions in the markets in which the business operates including state and local stay-at-home orders and other restrictions on the operations of the business.

[1] The newly added FAQs (i) clarify that housing stipends or allowances and all other cash compensation paid to employees (subject to the \$100,000 limit per employee) constitute payroll costs for purposes of calculating the PPP loan amount (Question 32); (ii) provide guidance as to how to determine whether an employee’s principal place residence is in the United States (Question 33); (iii) address eligibility questions specific to agricultural producers, farmers, ranchers and agricultural and other forms of cooperatives (Questions 34 and 35); and (iv) clarify that an applicants must count both full-time and part-time employees in its headcount for purposes of determining eligibility for the loan (as opposed to using the standard of “full-time equivalent employee” headcount to determine the extent to which loan forgiveness may be reduced in the event of a reduction in such headcount) (Question 36).

This summary does not include or address every provision of Paycheck Protection Program under the CARES Act, which should be read in its entirety. Furthermore, pursuant to the CARES Act, the SBA continues to promulgate regulations for

the implementation of the Paycheck Protection Program and, as such, there is still uncertainty relating to details of implementation.

We are here to help answer specific questions and offer advice on your options. Please contact any member of our Corporate & Business Group to discuss.

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