



Paycheck Protection Program: SBA Extends Safe Harbor Deadline to 5/18 and Issues New Guidance on “Necessity of the Loan” Certification

Hinckley Allen Corporate & Business

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Extension of Safe Harbor Deadline

On May 13, 2020, the SBA issued additional guidance extending the safe harbor period for PPP borrowers’ to make a determination of their “necessity of the loan” certification in light of the newly issued SBA guidance, from May 14, 2020 to May 18, 2020. The guidance came in the form of a new **FAQ 47**, which is set forth below. While the FAQ extends the deadline for making the determination, it does not impact the substance of the analysis related to the “necessity of the loan” certification.

FAQ #47

Question: An SBA interim final rule posted on May 8, 2020 provided that any borrower who applied for a PPP loan and repays the loan in full by May 14, 2020 will be deemed by SBA to have made the required certification concerning the necessity of the loan request in good faith. Is it possible for a borrower to obtain an extension of the May 14, 2020 repayment date?

Answer: Yes, SBA is extending the repayment date for this safe harbor to May 18, 2020, to give borrowers an opportunity to review and consider FAQ #46. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA’s interim final rule providing the safe harbor.

Necessity of Loan Certification Update

On Wednesday, May 13, 2020, the SBA issued additional guidance regarding FAQ 31 and the Safe Harbor deadline of May 14 for returning PPP loan funds. The guidance came in the form of a **new FAQ 46**, which is set forth below. The FAQ provides that any borrower who, together, with its affiliates, received PPP loans of **less than \$2 million** in the aggregate will be deemed to have made the certification concerning the “necessity of the loan” in good faith.

For borrowers with loans **greater than or equal to \$2 million** (in the aggregate, with its affiliates), if the SBA determines that the borrower lacked an adequate basis for the required certification, the SBA will not seek enforcement with respect to this particular certification, if the borrower repays the loan.

The FAQ does not offer any new guidance with respect to what constitutes “other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business” (which was the new criteria introduced by the SBA in FAQ 31). Therefore, for borrowers receiving PPP proceeds of \$2 million or more (in the aggregate, with their affiliates), the SBA has provided no further clarity as to how it will evaluate the “necessity of the loan” certification, and these borrowers run the risk of having to repay the loan, despite having already spent the proceeds on payroll costs and other permitted uses.

FAQ #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^[1], 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 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.

^[1] 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).

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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