

PUBLICATION

Welcome News on PPP Need Certification: Safe Harbor for Loans Below \$2 Million, More Clarity for Loans Above \$2 Million

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Update: As of May 14, 2020 the SBA has extended the Safe Harbor from May 14, 2020 to May 18, 2020.

Earlier today, the Small Business Administration (SBA) issued FAQ 46 that provides additional guidance related to the certification of need that is required for a Paycheck Protection Program (PPP) loan. As we discussed in a prior alert, on April 23, 2020 (20 days after applications could first be submitted for a PPP loan), the SBA issued FAQ 31 that significantly increased the requirements surrounding an applicant's certification that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." When it initially issued FAQ 31, the SBA also created a Safe Harbor Deadline of May 7, 2020 to return PPP loans, which was then later extended to May 14, 2020. Borrowers that return a PPP loan by the Safe Harbor Deadline will be deemed to have certified in good faith their need for the loan.

On the morning of May 13, 2020, exactly one day before the Safe Harbor Deadline expires, SBA issued additional guidance related to how it will review borrowers' required good-faith certification concerning the necessity of the PPP loan. The guidance issued today confirms that "[a]ny 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." Therefore, the SBA has essentially created a new Safe Harbor related to the certification of need for recipients of a loan that is below \$2 million. The SBA acknowledged that companies that are below the \$2 million threshold "are generally less likely to have had access to adequate sources of liquidity in the current environment than borrowers that obtained larger loans."

A Caveat: Borrower's Affiliates are Included in Safe Harbor Calculation

Notably, the loan amount for the \$2 million Safe Harbor is calculated by adding together the PPP loan received by the applicant with any "PPP loans" received by affiliates of the applicant. Therefore, a business that applied for the PPP loan without considering affiliation because of an affiliation waiver, such as a NAICS 72 restaurant chain, must still consider affiliation when calculating whether the \$2 million Safe Harbor will apply to its certification of need. If the collective loan amount of the applicant and its affiliates is below \$2 million, then the certification will be deemed to have been made in good faith, which eliminates potential enforcement actions related to this particular certification. This, however, does not resolve issues with any other certification made to get the loan, including certifications related to the applicant's size for eligibility purposes.

The \$2 million safe harbor is a positive result for many small businesses that were struggling with the unclear guidance from SBA and concerned by the politicians' threats of criminal liability associated with applying for a PPP loan. This increased clarity will help fulfill a primary goal of PPP, which was to retain American jobs.

For Loans in Excess of \$2 Million – A Further Repayment/Relief Option

For borrowers with loans greater than \$2 million, the SBA will evaluate the individual circumstances of each borrower under the SBA's minimal guidance provided in FAQ 31. Under this minimal guidance, borrowers must take 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. This leaves several open questions about the significance of available lines of credit, cash-on-hand and other sources of capital.

While the SBA has not provided more focused guidance for loans above \$2 million, it has confirmed that if it determines in the course of its review that a borrower lacked an adequate basis to make the certification of need, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. However, SBA has confirmed that if the borrower repays the loan after SBA determines that there was not adequate need, "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." Therefore, if the borrower pays the loan back, the SBA will not refer the borrower for criminal sanctions or sanctions under the False Claims Act related to the certification of need. FAQ 46 does not confirm the time period for paying back the loan when the SBA determines that an adequate need did not exist and also does not reference any interest rate that will be required.

While several issues still remain unclear for those having loans above \$2 million, the confirmation of the ability to pay back the loan without suffering criminal or civil penalties based on the need certification is a significant relief. This allows several companies that feared returning the funds because of significant economic uncertainty to keep the money for now with the understanding that they may need to pay it back later, without further penalty, if the SBA finds an adequate need was not present.

Given the remaining unclear guidance about the need certification, all borrowers above \$2 million should document all reasons that establish need for the loan, taking into account 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. Borrowers above this threshold should keep the documentation and review their need with qualified professionals to prepare to "make the case" to obtain loan forgiveness. The SBA will likely soon issue a loan forgiveness application that borrowers will need to sign to obtain forgiveness, which may include further certifications related to the need for the PPP loan.

To the extent that the PPP loan is returned by May 14, 2020, then the company can take advantage of the Payroll Deferral Program, which will enable the company to defer the employer's share of Social Security taxes prospectively through December 31, 2020 with the deferred amount payable in two tranches (50% by December 31, 2021 and the remaining 50% by December 31, 2022).

Separate and apart from the important relief provided in FAQ 46, questions remain as to whether further guidance will be issued on the scope of "eligible" uses of the PPP funds, let alone whether there will be a liberalization of the SBA imposed requirement that 75% of the PPP loan proceeds be used for eligible wages to secure full forgiveness of the loan.

For specific guidance on this issue, please contact [Stuart Schabes](#) or [Jeff Wagner](#). For more information and general guidance on how to address other legal issues related to COVID-19, please visit the [Coronavirus \(COVID-19\): What You Need to Know information page](#) on our website.