

SBA ISSUES NEW GUIDANCE ON PPP LOANS, WITH SAFE HARBORS FOR CERTAIN BORROWER CERTIFICATIONS REGARDING LOAN NECESSITY

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On the morning of May 13, 2020, the Small Business Administration (SBA) issued an [updated version of its FAQs](#) regarding the Paycheck Protection Program (PPP). The new guidance states that, with respect to the SBA's review of any PPP loan and the borrower's good faith certification regarding the necessity of such loan, a new safe harbor will apply to borrowers with PPP loans having an original principal amount of less than \$2 million. Under such safe harbor, such borrowers will be deemed to have made such certification in good faith.

I. Background

Under the CARES Act enacted in late March, Congress established PPP loans to enable small businesses affected by COVID-19 to keep employees on their payrolls. However, a number of problems marred the program from the beginning, including lack of guidance for borrowers and lenders, SBA website failures, and, notably, the depletion of the initial \$349 billion in funding in under 14 days. Following severe public outcry against, and media scrutiny of, the grant of PPP loans to nationally- and internationally-known businesses (such as Ruth's Chris Steak House, the LA Lakers, and Shake Shack), the SBA issued guidance advising certain businesses to return their PPP loan proceeds, pointing out the certifications such businesses made in their PPP loan applications.

The PPP loan application requires borrowers to certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." In prior versions of the PPP loan FAQs, the SBA noted that borrowers, in making such certification, should 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.” The SBA further cautioned that all PPP loans *in excess* of \$2 million — “in addition to other loans as appropriate” — will be subject to SBA review following the lender’s submission of the borrower’s loan forgiveness application.

To encourage the swift and proactive return of PPP loan proceeds from borrowers with access to other sources of liquidity, the prior guidance established a safe harbor for borrowers that repay their PPP loans in full by Thursday, May 14, 2020. However, for borrowers that don’t repay their PPP loans by such date, it is unclear what standards the SBA will apply for the review of borrowers’ certifications.

II. New Guidance as of May 13, 2020

The newly added Question #46 to the PPP FAQs establishes a safe harbor for borrowers (together with their affiliates^[1]) with PPP loans having an original principal amount of less than \$2 million by providing that such borrowers “will be deemed to have made the required certification concerning the necessity of the loan request in good faith.” This provides much needed economic certainty to these borrowers, allowing them to focus on efforts to retain and rehire employees as required under the CARES Act.

Moreover, the safe harbor also enables the SBA to conserve its finite resources for its review of larger loans and, ultimately, its review of applications for PPP loan forgiveness. Accordingly, (i) borrowers with PPP loans having an original principal amount *in excess* of \$2 million should consider whether it would be in their best interests to repay their PPP loans by the May 14 deadline, and (ii) all PPP loan borrowers that intend to seek forgiveness of such loans should continue to ensure they are in compliance with the requirements established under the CARES Act, including any supplemental regulations and administrative rules issued by the SBA and the Treasury.

If you have questions or would like to discuss further, please contact [Jean Boyea](#), [Nikki Gibson](#) and Ira Perez.

[1] In order to satisfy the rules of the 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). Please click [here](#) for more information regarding the affiliation rules for SBA loans.

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