

The SBA Issues Additional Guidance Concerning the Paycheck Protection Program's "Safe Harbor"

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On May 13, 2020, the Small Business Administration (SBA) provided yet further guidance on the "safe harbor" provision in the Paycheck Protection Program (PPP) under the CARES Act.

With FAQ #46, the SBA clarified the requirements and procedures surrounding the "good faith" certification a borrower makes. In short, the SBA has stated the following:

- If the principal amount of your loan was "**less than \$2 million**" it will be deemed to have made the required certification concerning the necessity of the loan request in good faith."
- For "**loans greater than \$2 million**," if you don't otherwise satisfy the safe harbor (*see* FAQ # 31, 43, & 45), the SBA has indicated the borrower "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."
- Upon SBA review, if it is determined that "a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request," the SBA has indicated it will "seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness." The SBA has stated it will "not pursue administrative enforcement or referrals to other agencies" if the loan is repaid.
- If the borrower repays the loan after receiving notification, SBA has stated it "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."
- Finally, the SBA added that its "determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee."

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The deadline to return any loan proceeds under the safe harbor is **May 14**. We will continue to monitor the SBA and Treasury Department for additional PPP Guidance. Please contact Bailey Glasser if you need counseling or assistance with your PPP loan application.

The complete text of FAQ #46 is reprinted below:

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 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.²¹

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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).

²¹ Question 46 published May 13, 2020.

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