

COVID-19 NEWS OF INTEREST

SBA Extends “Safe Harbor” for Return of PPP Loans and Promises Further Guidance on Need for Loans

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The Small Business Administration (“SBA”) has extended its informal “safe harbor” for returning Paycheck Protection Program (“PPP”) loans from May 7, 2020 to May 14, 2020 for recipients that determine they were unable to make the required certification that current economic uncertainty made the loan request necessary to support their ongoing operations. The SBA also has said that it will provide additional guidance prior to May 14, 2020 on how it will review the certification.

As previously explained in our [April 27, 2020 alert](#), in the wake of negative publicity for many recipients of the PPP loans, the SBA issued [guidance](#) on April 23, 2020 encouraging all borrowers to carefully review the required certification and ensure that they could make it in good faith. In FAQ 31, the SBA reminded borrowers that, although the underlying CARES Act suspended the requirement that borrowers must be unable to obtain credit elsewhere, borrowers must still make the certification taking into account the applicant’s current business activity and its ability to access other sources of liquidity sufficient to support its ongoing operations in a manner not significantly detrimental to the business. The SBA stated that any borrower that applied prior to April 24 and repays the loan in full by May 7, 2020, now extended to May 14, 2020, will be deemed by the SBA to have made the required certification in good faith.

Based on existing guidance, the SBA seems to be encouraging a case-by-case assessment for each borrower to determine whether it is able to make the certification in good faith. Indeed, the SBA in FAQ 37 addressed the situation of a company owned by a private company with adequate sources of liquidity to support the applicant’s ongoing operations,

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but merely referred readers back to the general guidance in FAQ 31 that all applicants should consider their ability to access other sources of liquidity. While there is no definitive guidance on this point, applicants determining their ability to make the certification should consider both whether investors have funds and also whether those funds are available to the applicant.

As we advised in our prior client memo, applicants should consider the following issues in deciding whether they are able to make the certification in future applications or can retain a PPP loan already received:

- a. Watch carefully for further guidance from the SBA or Treasury for considerations that will clarify these issues as they relate to portfolio companies of private equity firms. The SBA in particular has issued iterative guidance where, as here, questions have been left unanswered in prior guidance.
- b. Consider carefully other investments or loans recently made, planned to be made, or available to the portfolio company and how that impacts the considerations described in the recent guidance. Consider carefully the impact that availability of the PPP loans will have on business operations. Are the PPP loans necessary to support ongoing operations?
- c. Consider whether circumstances have changed since the date of the application for the PPP loans. Guidance has evolved. If facts have evolved as well, keep in mind that review of the application and certifications could be made with the benefit of or influenced by hindsight. Consider these developments and related optics when determining whether to utilize the May 14 safe harbor.

Finally, access to PPP loans by private equity firms and their portfolio companies has been debated since the first stimulus bills were contemplated. Scrutiny of utilization of the PPP by portfolio companies could be intense, even in circumstances where, as with recent cases, applicants believed in good faith that they satisfied the eligibility criteria. Following Treasury Secretary Steven Mnuchin’s comments that all loans over \$2 million would be audited, the SBA also issued an additional FAQ, number 39, stating that it will review all loans in excess of \$2 million, in addition to other loans as appropriate, following submission of the borrower’s loan forgiveness application. Especially in light of recent guidance and related political theater, applicants should carefully evaluate the potential risks associated with anticipated oversight and publicity when considering using the PPP or other government stimulus programs.

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