

COVID-19 NEWS OF INTEREST

# SBA Introduces New Safe Harbors for PPP Necessity Certification Requirement

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On May 13, 2020, the Small Business Administration (“SBA”) published [FAQ 46](#) which provides additional guidance on the Paycheck Protection Program (“PPP”), specifically the requirement that businesses applying for a PPP loan must certify that the current economic uncertainty makes the loan necessary to support the applicant’s ongoing operations. The SBA has now stated that it will deem an applicant’s certification of necessity as having been made in good faith for any loan under \$2 million, when aggregated across the applicant’s affiliates, and will not take any administrative or other action against a company that returns a PPP loan if the SBA determines it did not have an adequate basis for making the certification.

In FAQ 31 and an [interim final rule](#) released on April 23, 2020, the SBA provided a safe harbor for borrowers who applied for a loan prior to April 23 and repaid the loan in full by May 7, 2020. The SBA extended the safe harbor to May 14 in a subsequent [interim final rule](#). The SBA has now published FAQ 47, further extending the safe harbor to May 18 in order to allow borrowers to review and consider the new information provided by the SBA in FAQ 46. Borrowers who do not take advantage of the extended May 18 safe harbor now have additional guidance on whether and how the SBA will scrutinize the necessity certification.

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### 1. No Review of Necessity of Loans Under \$2 million per Affiliate Group

The new FAQ 46 states that any borrower, together with its affiliates,<sup>1</sup> that received PPP loans with an aggregate original principal amount of less than \$2 million will be deemed to have made the required certification of necessity in good faith. The FAQ states that a borrower's affiliates are determined in accordance with the SBA's rules on affiliation in 13 C.F.R. 121.301(f) and laid out in a [Treasury guidance document](#) published on April 3.<sup>2</sup>

### 2. SBA Will Require Repayment for Invalid Certifications

For loan recipients that, when aggregated with any other PPP loans received by its affiliates, received \$2 million or more in PPP funds, the SBA will review their certification that the loan was necessary.<sup>3</sup> FAQ 46 states that if the SBA determines during a review that the borrower lacked an adequate basis for making the certification, the SBA will seek repayment of the outstanding loan amount and the borrower will not be eligible for loan forgiveness. However, the SBA has not specified the timing of such repayment. If the borrower repays the loan after receiving notification from the SBA, then the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination specifically with respect to the certification of necessity.

### 3. Remaining Possibility of SBA Review and Public Scrutiny

The guidance from the SBA offers significant comfort to recipients of a PPP loan regarding the consequences of the SBA disagreeing with the conclusion that the loan was necessary. Nonetheless, borrowers should consider a number of factors in deciding whether to apply for or retain a PPP loan, including the following:

- While the SBA will not pursue administrative enforcement or make a referral to other agencies when the borrower repays the outstanding amount on the loan, other violations of the rules and requirements of the PPP, including the borrower's eligibility for the loan under the SBA's affiliation rules, remain subject to the SBA's administrative enforcement authority.

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<sup>1</sup> A prior [interim final rule](#) released by the SBA capping the aggregate maximum amount of PPP loans provided to corporate groups at \$20 million did not use the SBA's affiliation rules to determine if businesses are part of a single corporate group and instead looked at whether the businesses shared a common majority owner parent. Here, the SBA is using its affiliation rules found at 13 C.F.R. 121.301(f).

<sup>2</sup> The SBA did not affirmatively state that the affiliation waivers in the CARES Act apply for the purposes of calculating the \$2 million threshold. It appears that the SBA is reserving the discretion to review loans to affiliates regardless of whether a waiver applies such as where the borrower has received SBIC financing or is a restaurant.

<sup>3</sup> Prior SBA guidance in FAQ 39 stated that the SBA would review all PPP loans over \$2 million following the lender's submission of the borrower's loan forgiveness application. FAQ 46 suggests that the SBA may review loans prior to the submission of a loan forgiveness application.

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- In earlier guidance, the SBA stated in FAQ 39 that it would review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application.
- If the SBA requires repayment of the loan and the loan is not repaid, the guidance preserves the SBA's discretion to pursue administrative enforcement or refer the case to other agencies as appropriate.
- The SBA's decision to waive its administrative enforcement powers specifically for determinations regarding the certification of necessity does not eliminate the risk of False Claims Act ("FCA") prosecution, private causes of action under the FCA, or independent action or referrals from the Inspector General or congressional oversight committees. Additionally, these risks still apply to the other requirements of the PPP including eligibility criteria and compliance with the terms of the PPP loan.
- The SBA's safe harbor on the necessity certification does little to diminish the risk of public or congressional scrutiny of a recipient and its need for the loan. The safe harbor is unlikely to stem the tide of negative PR directed at recipients that the public perceive as taking improper advantage of the PPP. Even if the SBA is willing to defer to the applicant's certification that the loan was necessary, a borrower may be forced to defend its decision to receive and retain a PPP loan in the face of public opinion.

Based on this, we continue to recommend careful analysis of the necessity and eligibility factors for a PPP loan for your business, and consideration of whether to return all or a part of any loan already received by May 18.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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