

May 13, 2020

Today, the SBA issued FAQ 46 addressing review of borrower's good-faith "necessity" certifications. **The FAQ is copied in full below**, but a couple of highlights:

- The SBA is creating a bright-line rule for those with loans under \$2M – you will be deemed to have made the certification in good faith.
- For those \$2M and above, you may still be able to make the good-faith showing. If the SBA disagrees with you, however, you have to repay the loan and you will not be eligible for forgiveness. If you repay the loan, it appears that SBA will not pursue any additional penalties.

Open questions, we think, include:

- If repayment of the loan is required because SBA finds you did not certify in good faith, will that require immediate repayment or repayment over time (because you lose eligibility for forgiveness)? The FAQ does not specify timing, but does note that the SBA guarantee remains in place in this scenario.
- How will SBA approach the "together with its affiliates" calculation for businesses that have an affiliation rule waiver under the CARES Act (e.g., restaurants and hotels)? The interim final rule referenced in the FAQ refers to those waivers in a footnote, but does not contain any further discussion (the rule is largely focused on extending an affiliation rule waiver to faith-based organizations).

Of course, tomorrow is the deadline for returning loan amounts under the current safe harbor.

As of May 13, 2020

PAYCHECK PROTECTION PROGRAM LOANS
Frequently Asked Questions (FAQs)

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 [citation to the interim final rule on affiliations], 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.

[Click here for the full SBA FAQ.](#)