

PPP Loans – New Guidance on the Necessity Certification for Borrowers

In response to recent SBA guidance regarding eligibility for PPP loans, many companies are following the SBA's advice to reevaluate the certifications on their PPP loan application. The SBA has given companies until May 18, 2020, to utilize a "safe harbor" and return PPP funds or otherwise withdraw their application. The SBA issued additional guidance, in the form of FAQ #46, to clarify how borrowers should expect to be treated with respect to the necessity certification in the PPP application.

UPDATE: The SBA further clarified the safe harbor date with the release of FAQ #47 after business hours on May 13th. To take advantage of the repayment "safe harbor", funds must be repaid by May 18th, 2020 (not May 14th.) FAQ #47 has been excerpted below for reference.

Summary:

On May 13, 2020, the SBA issued an updated FAQ with further clarification on a borrower's good faith certification that the PPP loan was "necessary" for ongoing operations. The updated FAQ is available [here](#).

With this new guidance, any borrower, together with its affiliates, that received PPP loans in an amount less than \$2 million is assumed to have made the necessity certification in good faith, which means the SBA will assume the borrower did not have access to other sources of liquidity. To the extent a borrower received a loan of less than \$2 million (including PPP loans extended to its affiliates), the latest guidance suggests these borrowers will be presumed to have a *per se* need for the loan and such borrowers will not be audited with respect to necessity for the loan.

Additionally, if borrowers with loans in an amount greater than or equal to \$2 million are audited and found not to have had a good faith basis for the necessity certification, the penalty will be repayment of the loan with interest and without any forgiveness.

Detailed Analysis for FAQ #46:

Bodman Analysis:

We view this new guidance to have three important parts:

1. If a borrower and its affiliates have a cumulative loan amount of less than \$2 million, absent fraud, the certification of necessity will not be reviewed by the SBA. This decision was made by the SBA to promote certainty for small businesses that may be struggling to determine what the necessity certification means and how they could be penalized in the future. This FAQ should provide significant relief and certainty to small businesses.

2. If a borrower and its affiliates have a cumulative loan amount of \$2 million or more, the borrower may be audited but will have a chance to prove the loan was “necessary” in light of the circumstances in which the borrower applied for the PPP loan. As previously discussed, documenting a borrower’s financial situation, including financial projections and the impact of COVID-19 on a borrower’s business and employee needs, is critical to proving the loan was necessary. Borrowers with loan amounts of \$2 million or more should be diligently documenting their need for the loan now (if they have not already.)
3. In the event that a borrower with a cumulative loan amount of \$2 million or more is unable to prove to the SBA that the PPP loan was necessary, the SBA will instruct the borrower to pay the loan back, with interest, and no portion of the loan will be forgiven. Absent any other actionable conduct, if the loan is repaid, the SBA will not take further enforcement action or refer the matter to any other agency.

The FAQ reads as follows:

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, 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.

47. Question: An SBA interim final rule posted on May 8, 2020 provided that any borrower who applied for a PPP loan and repays the loan in full by May 14, 2020 will be deemed by SBA to have made the required certification concerning the necessity of the loan request in good faith. Is it possible for a borrower to obtain an extension of the May 14, 2020 repayment date?

Answer: Yes, SBA is extending the repayment date for this safe harbor to May 18, 2020, to give borrowers an opportunity to review and consider FAQ #46. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor. ²¹

If you have questions about this information, please contact your Bodman attorney or Darren Burmania at (616) 205-3313 or dburmania@bodmanlaw.com or Joseph Morrison at (734) 930-2942 or jmorrison@bodmanlaw.com or Brian Kersey at (616) 205-3129 or bkersey@bodmanlaw.com or Adam Weiner at (313) 392-1076 or aweiner@bodmanlaw.com. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.