

PPP Loans: Extended Loan Returns and Further Guidance on “Necessity”

Summary: Based on new SBA guidance, the SBA is extending the window for return of SBA loans by borrowers that may not be able to certify the loan is “necessary to support ongoing operations” from May 7th to May 14th.

Detailed Analysis: On May 5, 2020, the Small Business Administration (SBA) provided additional guidance to address questions concerning previously issued FAQ #31 relating to the implementation of the Paycheck Protection Program (PPP), established by Section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

In its guidance dated April 23, 2020 (particularly Frequently Asked Question #31 (FAQ #31)), the SBA reminded all borrowers to review carefully the required certification on the borrower application that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” The SBA elaborated that borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. The SBA provided a temporary “safe harbor”, stating that if a PPP borrower determines that, based on this new guidance, it can no longer in good faith make the required certification of need, it may repay its PPP loan in full by May 7, 2020 (the “Repayment Deadline”), and the SBA will deem the borrower to have made the required certification in good faith.

The guidance provided in FAQ #31 on April 23, 2020 in large part created additional confusion, causing many applicants to reconsider whether they could, in fact, make the “need” certification through the lens of this seemingly heightened standard.

What does this updated guidance mean for PPP loan recipients?

The May 5 guidance, in the form of FAQ #43, automatically extended the Repayment Deadline to May 14, 2020. Importantly, the updated guidance states that, “SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.” Unfortunately, the SBA did not otherwise provide any indication of the practical implications of such additional guidance or the expected release date.

What should companies do that have received or will receive PPP funds?

All companies that have received or will receive PPP funds should carefully consider whether the loan is necessary to support ongoing operations of the applicant when taking into account other sources of liquidity. Companies should review all guidance from the SBA, including forthcoming guidance on how the SBA will review the aforementioned certification, before making a final determination. Contemporaneous documentation of support for the borrower's good faith certification should be assembled and preserved. The documentation to support the borrower's good faith certification may include, but would not be limited to, financial projections, board meeting reviews, reduction in force analyses, financial stress test results, communications from customers, and cash flow projections.

If you need assistance reviewing your company's certification regarding the necessity of the PPP loan to support ongoing operations, please contact a member of your Bodman team or Brian Kersey (616) 205-3129 or bkersey@bodmanlaw.com or Adam Weiner at (313) 392-1076 or aweiner@bodmanlaw.com. Please note that Bodman cannot respond to any emailed question or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.