

SBA Issues Additional Guidance on Good Faith Certification Requirement for PPP Loans

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On April 23, 2020, the U.S. Small Business Administration (SBA), in consultation with the U.S. Department of the Treasury (Treasury), updated its [Frequently Asked Questions](#) (FAQ) document with FAQ #31. FAQ #31 addressed the necessity certification required to be made by borrowers under the Paycheck Protection Program (PPP) at the time of application and advised borrowers to carefully review the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

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. On April 28, 2020, SBA added FAQ #37, which stated that FAQ #31 applied to businesses owned by private companies.

FAQs #31 and #37, together with statements by Treasury Secretary Steven Mnuchin that any businesses receiving a PPP loan of more than \$2 million will be audited and any business that improperly received PPP funds may be subject to criminal prosecution, created panic and uncertainty for many borrowers.

SBA provided a safe harbor which allowed any borrower who may have misapplied or misinterpreted the necessity certification to repay the loan in full by May 7, 2020, in which case the borrower will be deemed by SBA to have made the certification in good faith. On May 5, 2020, SBA extended the safe-harbor deadline to May 14, 2020, and indicated it would provide additional guidance on how it will review the certification.

On May 13, 2020, SBA added FAQs #46 and #47, which give borrowers the following additional guidance on how it will review the good-faith certification:

- 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 necessity certification in good faith
- SBA acknowledged that borrowers with PPP loans greater than \$2 million may still have an adequate basis for making the required good-faith certification based on their individual

circumstances

- All PPP loans in excess of \$2 million may still be subject to review
- If SBA determines, in the course of its review, that a borrower lacked an adequate basis for the required necessity certification, SBA will seek repayment of the outstanding PPP loan balance and the borrower will not be eligible for loan forgiveness
- If the borrower repays the PPP loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination regarding the necessity certification
- SBA's determination regarding the necessity certification will not affect SBA's loan guarantee
- The safe harbor deadline is extended to May 18, 2020, to give borrowers an opportunity to review and consider FAQ #46

Borrowers who received PPP loans in excess of \$2 million still face the risk that their loan will be audited and their good-faith certification scrutinized. The updated guidance does not offer any clarity to these borrowers who are still considering issues such as what constitutes "current business activity," "ongoing operations" or "other sources of liquidity."

Over the past couple of weeks, many borrowers have already started the process of reviewing the good-faith certification and documenting the factors they considered in support of why the PPP loan was necessary. It is important for borrowers to continue to do so as SBA's review of the good-faith certification will be dependent upon the facts and circumstances for each individual business.

The following factors should be considered by borrowers as part of their necessity assessment:

- The meaning of "current economic uncertainty" to the borrower and the risks to the business if the economic uncertainty continues
- The business operations and finances at the time of the application, the current business activity and the anticipated on-going effects of the COVID-19 pandemic, including factors such as reduced sales, supply chain issues, backlog, delayed or cancelled orders, stretched receivables, employees having to miss work, and mandatory business closures
- The strategy for the use of the PPP loan proceeds and how receipt of the proceeds impacted other business strategies, including with respect to employee headcount and compensation
- The ability to access other sources of liquidity, any restrictions on accessing such sources, the terms associated with accessing such sources, the planned uses of such sources and whether accessing such sources could be detrimental to the business

It is important to note that any business could still face governmental investigation or criminal prosecution if it knowingly made false statements in the PPP loan application or misused the PPP loan proceeds. Fraud investigations for false statements regarding employee headcount and

calculations of payroll costs have already been reported.

FULL EXCERPTS OF FAQs #31, #37, #46 AND #47

31. Question: *Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?*

Answer: *In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." 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. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.*

Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.¹

37. Question: *Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?*

Answer: *See response to FAQ #31.²*

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,³ 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.⁴

¹ Question 31 published April 23, 2020.

² Question 37 published April 28, 2020.

³ For purposes of this safe harbor, a borrower must include its affiliates to the extent required under the interim final rule on affiliates, 85 FR 20817 (April 15, 2020).

⁴ Questions 46-47 published May 13, 2020.