

Client Alert: SBA Clarifies Paycheck Protection Program Certification Concerning Loan Necessity

On May 13, 2020, the Small Business Administration (SBA) issued new guidance regarding the requirement that borrowers under the Paycheck Protection Program (PPP) certify in good faith that the loan is necessary and extending the date for borrowers to repay PPP loans to May 18. SBA also issued an Interim Final Rule on May 13, 2020 (the “May 13 Rule”) that permits certain partnerships and seasonal employers that obtained PPP loans to increase the amount of their PPP loans in certain circumstances. The new guidance, which consists of an update to SBA’s PPP Frequently Asked Questions (the FAQs), and the May 13 Rule can be found on SBA’s website for the Coronavirus Aid, Relief, and Economic Security (CARES) Act, [here](#).

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.” The new guidance provides (i) a safe harbor for borrower’s receiving PPP loans of less than \$2 million and (ii) borrowers receiving PPP loans of \$2 million that lacked an adequate basis for the required certification an opportunity to avoid administrative enforcement or referrals to other agencies, if such borrowers repay their PPP loan after receiving notification from SBA. This new guidance only addresses whether a borrower has complied with the certification regarding necessity of the loan. It does not address any other eligibility issues (e.g., compliance with affiliation rules, etc.).

Safe Harbor for Borrowers Receiving PPP Loans Less than \$2 Million

SBA’s May 13 update to the FAQs states that any borrower that, together with its affiliates (to the extent required under the SBA’s Interim Final Rule on affiliates, 85 FR 20817 (April 15, 2020)), 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 stated that it reached this determination 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.

Borrowers Receiving PPP Loans Greater than \$2 Million May Avoid Penalties by Repaying Loans

SBA previously stated that all PPP loans in excess of \$2 million 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. The May 13 update to the FAQs provides that, if SBA determines in its review that a borrower lacked an adequate basis for the required certification regarding the necessity of the loan, 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 SBA’s determination that the borrower did not have an adequate basis for certifying that the loan was necessary. It is important to note that the SBA guidance does not preclude investigations or enforcement by agencies other than SBA or claims by whistleblowers.

Extension of Safe Harbor Date

In light of the uncertainty surrounding the requirement that borrowers certify that a PPP loan is necessary, SBA created a safe harbor for borrowers who repaid their loans prior to May 7, 2020. Any borrower repaying its loan by that date will be deemed to have made the certification regarding necessity in good faith. On May 8, SBA extended the deadline to May 14, 2020. On May 13, SBA further extended the date for complying with this safe harbor to May 18, 2020, to give borrowers time to consider the guidance issued by SBA described above.

PPP Loan Increases for Certain Partnerships and Seasonal Employers

Pursuant to the May 13 Rule, SBA authorizes lenders to increase loans to certain borrowers and seasonal employers. On April 14, SBA issued an interim final rule that provided guidance for partnerships to calculate their maximum loan amount. In particular, that rule provides that a partnership may include the self-employment income of general active partners as payroll costs, up to \$100,000 annualized per partner. The May 13 Rule authorizes

lenders to request an increase to a loan to a partnership to include partner compensation (to the extent partner compensation was not included in the original loan), even if the loan has already been fully disbursed.

On April 28, SBA issued an alternative method for a seasonal employer to calculate its maximum loan amount. The May 13 Rule provides that if a seasonal employer received a PPP loan before the alternative criteria was posted and would be eligible for a higher maximum loan amount under the alternative criteria, a lender may request an increase to the PPP loan amount, even if the loan has been fully disbursed.

The loan increases may only be requested if the lender has not submitted its first SBA Form 1502 on the PPP loan to SBA. After the initial Form 1502 has been submitted or was required to be submitted to SBA, the PPP loan cannot be increased. With respect to PPP loans approved before April 28, 2020, the deadline for filing a Form 1502 report is May 22, 2020. For all other loans, the deadline is 20 calendar days after the date the loan is approved. A borrower that wants to increase its loan amount should contact its lender to determine whether the Form 1502 has been filed with respect to the borrower's loan.

In addition, the increased loan amount cannot exceed \$10 million for an individual borrower or \$20 million for a corporate group.

Additional Resources

For additional background on small business loans available under the CARES Act, including PPP loans, please see our Client Alert on Small Business Loans under the CARES Act, available [here](#). For additional background on SBA's guidance with respect to PPP loans, please see our Client Alerts on SBA Updates to PPP loans [here](#), [here](#) and [here](#). Due to the recent adoption of the CARES Act, interpretation of some of its provisions is uncertain, and it is subject to additional clarification and interpretation by Treasury, IRS, SBA and other federal regulatory agencies.