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NEW GUIDANCE REGARDING BORROWERS’ GOOD FAITH CERTIFICATION FOR LOANS UNDER THE PAYCHECK PROTECTION PROGRAM

May 14, 2020

On May 13, 2020, the Small Business Administration (“SBA”) and the U.S. Department of the Treasury issued new guidance regarding the certification required to be made by all borrowers when applying for a loan under the Paycheck Protection Program (“PPP”). **This new guidance (1) creates two safe harbors regarding loan necessity and (2) extends the repayment deadline for borrowers unable to make the required certification in good faith to Monday, May 18, 2020.** The full text of this new guidance is at the end of this alert.

When submitting a PPP loan application, a borrower must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Initially it was unclear how the SBA would interpret this certification. However, in late April, in a FAQ, the SBA indicated that, in making this certification, borrowers should take into account their “ability to access other sources of liquidity” when applying for a loan. Yesterday’s guidance creates the following safe harbors for borrowers that are evaluating whether or not they are able to meet the requirements of this eligibility test:

- Generally, 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.
- The SBA may review PPP loans in excess of \$2 million to determine if the borrower had an adequate basis to make the required certification in good faith. If the SBA notifies a borrower that it determined the borrower lacked an adequate basis to make the certification, the borrower can immediately repay the loan. The SBA will not pursue administrative enforcement or referrals to other agencies if the loan is repaid.
- If a borrower has an existing SBA approval or has already received PPP loan proceeds and decides it cannot satisfy the eligibility test, that borrower now has until Monday, May 18, 2020 to repay its existing loan. If a borrower repays its loan by this date then it will be deemed to have made the required certification in good faith.

If you have questions or concerns, please contact us. We are available to discuss these new safe harbors and whether the eligibility requirement impacts your ability to obtain a PPP loan or creates an obligation to immediately repay a PPP loan that you have already received.

Below is the full text of this new guidance (with emphasis added). The guidance can also be found at <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.

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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.