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PPP UPDATE

Borrowers that Received a PPP Loan under \$2,000,000 Will be Deemed to have Made the Required Certification in Good Faith

One long week after the U.S. Treasury announced that it was extending the Paycheck Protection Program Loan “safe harbor” deadline to May 14, the U.S. Treasury announced this morning that borrowers whose loan amount (combined with the loan amount of any affiliates) is less than \$2,000,000 is automatically deemed to have made the certification in good faith.

The SBA’s announcement clears up the confusion as to what are the consequences for a borrower who keeps the money and then is later determined by the SBA to have lacked an adequate basis for the required certification. As a result, for those borrowers whose loan exceeds \$2,000,000, and such borrower does not return the PPP loan funds by May 14, they will not necessarily be subject to criminal sanctions or referrals to other agencies. Instead, according to the SBA announcement, the SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness.

The text of the SBA’s new guidance is below:

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 affiliates¹, received PPP loans with an original

¹ 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).

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.²

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² Question 46 published May 13, 2020.