

SBA Issues Guidance on Good Faith Necessity Certification Safe Harbor, Limits PPP Funds to \$20 Million for Corporate Groups

Related People:
Howard M. Berkower

Coronavirus Legal Advisory

05.13.2020

The SBA has provided a good faith necessity certification safe harbor for certain PPP borrowers with loans less than \$2 million and also has limited PPP funds to \$20 million for corporate groups.

Good Faith Necessity Certification Safe Harbor

As borrowers grapple with whether to return their PPP loans ahead of tomorrow's "no fault" return policy deadline and thereby avoid uncertainty should the SBA, after June 30, challenge whether a borrower properly took "into account its current business activity and its ability to access other sources of liquidity sufficient to support its ongoing operations in a manner that is not significantly detrimental to the business" and seek the return of a PPP loan after most of the funds have already been spent, the SBA has extended an important safe harbor to those borrowers that, along with their affiliates, have received PPP loans in an aggregate principal amount of less than \$2 million.

Following statements from the Treasury Department and the SBA that all PPP loans in excess of \$2 million will be audited after June 30 when borrowers applied for loan forgiveness, the SBA announced on May 13, in [Frequently Asked Question](#) ("FAQ") 46, that any borrower, together with its affiliates, that 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 in good faith"** [emphasis added].

This is an important update for many small businesses because all PPP borrowers must certify that "[c]urrent economic uncertainty makes this loan **necessary to support the ongoing operations** of the Applicant" ("Necessity Certification"), and previous SBA guidance has indicated that this is the critical factor in determining an applicant's eligibility and good faith.

Previously the SBA announced that if it determines a borrower lacked an adequate basis for the Necessity Certification, the borrower's loan will not be eligible for forgiveness and the SBA will seek repayment. However, in FAQ 46, the SBA further clarified that it will not pursue administrative enforcement or referrals to other agencies should the SBA determine upon its "audit" post-June 30 that a borrower lacked an adequate basis for its

Necessity Certification, as long as the borrower repays the loan upon receiving notification from the SBA.

While this additional guidance is very helpful to those borrowers that with their affiliates received PPP loans in an aggregate amount less than \$2 million, borrowers that received PPP loans in excess of \$2 million continue to be subject to the uncertainty caused by the ever-evolving PPP rules and the SBA's failure to provide additional guidance as to how to analyze and evaluate a borrower's "ability to access other sources of liquidity sufficient to support its ongoing operations in a manner that is not significantly detrimental to the business." These borrowers, should they decide not to return their PPP loans by tomorrow's close of business, should carefully document, with assistance from their professional advisers, the conditions and factors they considered and the process employed to support its Necessity Certification.

Interim Final Rule Limits PPP Funds for Corporate Groups

On April 30, 2020, the SBA announced in an [Interim Final Rule](#) ("Rule") that in order to preserve limited PPP funds available, businesses that are part of a corporate group will be limited to no more than \$20 million in PPP funds in the aggregate (the "Cap"). The Rule is the latest in a series of rules and other [guidance](#) from the SBA following an uproar after it was widely reported that large publicly traded businesses, hedge funds and private equity firms received millions in PPP funds.

The Rule classifies businesses as part of a single corporate group if **"they are majority owned, directly or indirectly, by a common parent"** [emphasis added]. It is the responsibility of a PPP loan applicant to notify the approved SBA lender if the applicant has applied for or received PPP loans beyond the Cap and to withdraw any pending PPP loan application or approved PPP loan not in compliance with the Cap. Failure to do so will be considered using PPP funds for unauthorized purposes, and will make the loan ineligible for forgiveness. The Cap applies to all PPP loans that have not been fully disbursed as of April 30, 2020. Any undisbursed amounts that bring the total amount to over \$20 million will be withheld.

SBA's [affiliation rules](#) regarding a PPP loan applicant's eligibility and any waiver of those rules still apply. The CARES Act contains a specific affiliation rules exemption for businesses operating as [franchises](#) and businesses that fall under NAICS code 72 (accommodations and food services). The Rule may have the greatest impact on limiting PPP loan amounts available to restaurants and franchises that have benefited from the affiliation exemption.

McCarter & English, LLP, will continue to monitor and report on guidance that impacts the availability of PPP proceeds and loan forgiveness.