

Important PPP Loan Update: FAQ #46 Safe Harbor Guidance on Economic Uncertainty Certifications

May 13, 2020

Additional guidance has been released related to how borrowers' certification of necessity for Paycheck Protection Program (PPP) loans will be evaluated by the Treasury. This topic has caused concern among borrowers since additional restrictions and conditions have been placed on PPP loans throughout the application and borrowing process. Here is some key information to assist you.

The Department of the Treasury (the "Treasury") has issued further guidance to borrowers who are required to make good-faith certifications concerning the necessity of their PPP loan requests. Since the passing of the CARES Act on March 27, 2020, the Treasury has issued 46 Frequently Asked Questions (FAQs) for PPP loans and responses. On May 13, 2020, the Treasury published FAQ #46: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request? The Treasury's answer separates PPP borrowers into two groups based on their loan size: borrowers with loans less than \$2 million and more than \$2 million.

When submitting a PPP application, all borrowers must certify in good faith that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

Safe Harbor for Loans Less than \$2 million:

The SBA and the Treasury have provided the following Safe Harbor: Any borrower that, together with its affiliates, received PPP loans of **less than \$2 million** will be deemed to have made the required certification concerning the necessity of the loan request in good faith. In other words, entities who have borrowed less than \$2

million will **not** need to prove to the SBA that their request for a PPP loan was necessary based on their specific circumstances.

No Safe Harbor for Loans Greater than \$2 million:

Borrowers with loans greater than \$2 million do not get this Safe Harbor treatment for the certification. However, these borrowers 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. If the 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.

Does a Borrower of more than \$2 million, who does not meet the Certification Criteria, Still Need to Return the PPP Loan Proceeds by May 14, 2020?

Based on the guidance in FAQ #46, borrowers with loans greater than \$2 million, who believe they do not meet the certification criteria, do **not** appear to have to repay their loan by May 14, 2020. Rather, if the SBA deems after review that the borrower had not met the certification criteria, the loan would then become due. It is not clear whether such a loan would then be payable immediately or would still have a payment term of some period. FAQ #43 had enabled such borrowers to repay PPP loan proceeds by May 14, 2020 and not be subject to SBA enforcement investigations. **Without this threat of enforcement, the May 14, 2020 deadline no longer seems to be applicable in these cases. Borrowers should consult with legal counsel to determine their best course of action.**

What if I Have Already Returned my PPP loan and Now Wish to Reconsider that Decision?

There is no guidance provided on this question. Our suggestion is that you first

contact your lender to see if they can process that request. If so, consult with your legal counsel to determine your best course of action.

Guidance on Loan Forgiveness

The formal rules and application process for forgiveness from the SBA and Treasury are still forthcoming.

Anchin will continue to monitor updates and guidance related to the PPP Program. If you have additional questions, please contact your Anchin Relationship Partner or contact the Anchin COVID-19 Resource Team at COVID19@anchin.com.

See the following link for all of the Treasury's PPP Loans FAQs:

<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

Disclaimer: Please note this is based on the information that is currently available and is subject to change.