

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



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SBA Establishes PPP Safe Harbor, Deadline Now May 18th

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A key part of the federal government's response to the COVID-19 pandemic and its associated economic fallout is the Paycheck Protection Program ("PPP") loan program administered by the Small Business Administration ("SBA"). The program allows for SBA-administered forgivable loans, provided recipients spend the funds on essential business costs like payroll, benefits, rent, and utilities. Borrowers are required to certify the necessity of their loan requests in good faith.

On April 28th, 2020, Treasury Secretary Steven Mnuchin announced that any company taking out more than \$2 million in PPP loans would be audited to verify the certification of economic need, i.e., that the applicant was eligible for the PPP program due to no other significant source of liquidity available. That announcement naturally led to speculation about the status of PPP loans of less than \$2 million. On May 13th, 2020, the SBA responded by establishing a "safe harbor" for borrowers receiving PPP loans with an original principal amount of less than \$2 million.

The new safe harbor was made by adding "FAQ 46" to the SBA's previously-issued PPP guidance. FAQ 46 provides that any borrower which, together with affiliated entities, receives 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."

According to FAQ 46, the SBA determined the safe harbor appropriate because borrowers below the \$2 million 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." FAQ 46 states further that the 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."

The SBA also noted in FAQ 46 that borrowers who timely repay their loans after receiving notification from the agency would not be subject to administrative

enforcement or referrals to other federal agencies. Additionally, the SBA noted that its determination regarding the necessity of the loan request would not affect the SBA loan guarantee.

Borrowers whose PPP loans are over the \$2 million threshold should take note that the safe harbor is specifically limited to borrowers below the threshold. FAQ 46 provides that borrowers who received PPP loans for amounts over \$2 million will be subject to review by the SBA for compliance with program requirements, including the certification of economic need. It states, "...[i]f 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."

The SBA also issued FAQ 47 on May 13th, 2020. That pronouncement extends the deadline for PPP borrowers who did have access to other sources of capital to return PPP funds until May 18th, 2020. The deadline was previously May 14th, 2020.

Smith Debnam's Business Law Group is working on a comprehensive discussion of the SBA's guidance on the PPP and will release it in the near future. We do want to take this opportunity to mention a key provision in that guidance – FAQ 20, which relates to the timing of the eight-week period for measuring a borrower's payroll costs.

FAQ 20 provides as follows:

Question: The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week period; when does that eight-week period begin?

Answer: The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.

In FAQ 20, the SBA resolves what had been an open question as to when the eight-week period for measuring a borrower's payroll costs began by tying it to the date of the first loan disbursement. While straightforward, the SBA's resolution ignores calls for flexibility in the starting date made by the American Institute of Certified Public Accountants ("AICPA"). The AICPA urged that, rather than be strictly tied to loan disbursement, the eight-week period should start either at the beginning of the payroll period during which funding was received or the beginning of the next payroll period, at the borrower's discretion.^[1]

The entire set of "FAQs" related to the PPP can be found [here](#):

We at Smith Debnam are closely monitoring developments related to the PPP and other programs designed to keep the economy moving as part of our comprehensive response to the COVID-19 pandemic. If you have any questions, please call business law

and tax law partner [Gene Chianelli](#) at (919) 250-2231 or e-mail him at echianelli@smithdebnamlaw.com.

[1] See [AICPA Recommendations: PPP Application and Forgiveness Processes](#)

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