

'Do I Need to Return My PPP Loan?' SBA Extends Safe Harbor Deadline to May 18

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[Ed. Note: The safe harbor deadline has been updated to reflect FAQ 47, published on May 13, which extends the original safe harbor deadline to May 18 for PPP borrowers to return their loans. The deadline extension is applicable to PPP borrowers who have received loans in excess of \$2 million and want to return their PPP loans to take advantage of the SBA's original safe harbor rule. See this.]

We have written much about the Paycheck Protection Program ("PPP") loans funded through the SBA as part of the government's response to the COVID-19 crisis. The PPP loan application contains a number of eligibility requirements and borrower certifications.

This article addresses a specific borrower certification, “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

Over the last two weeks, significant comments from the Treasury Department, the SBA and the media have centered on this "necessity certification." Statements by Treasury Secretary Mnuchin and the issuance of additional SBA guidance is causing a great deal of uncertainty with many borrowers.

Words from Secretary Mnuchin

In an April 22 press briefing, Secretary Mnuchin advised of then-pending guidance restricting the acceptable basis for a PPP loan borrower's necessity certification and warned of "severe consequences" for borrowers who obtain a PPP loan based on a false statement of the necessity certification. In an April 28 media appearance, Secretary Mnuchin stated that every PPP loan of \$2 million or more will be audited for program compliance prior to determination of the forgiveness amount of the loan, with an apparent focus on any other liquidity available to a PPP borrower. He also reminded borrowers that they could face "criminal liability" if their necessity certification is determined to be untrue.

SBA Guidance

Following Secretary Mnuchin's cue, the SBA published three additional FAQs related to the necessity certification.

Published on April 23, 2020, FAQ #31, asks: "Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?" The SBA responded, in part, "... it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification." The necessity certification guidance applies *retroactively* to all PPP loans. However, FAQ #31 also affords loan recipients a safe harbor for return of funds, "Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith."

Of course, this response provides little, if any, guidance for small businesses, which is the vast majority of PPP loan recipients.

Not surprisingly, five days later, the SBA published FAQ #37, "Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?" The SBA's response to this question was underwhelming at best. It referred the reader back to its response to FAQ #31. Again, most borrowers were left scratching their head and calling their legal counsel and CPAs.

On the heels of Secretary's Mnuchin's comments of April 28, the SBA published FAQ #39 on April 29, 2020. FAQ #39 states the SBA will individually review every PPP loan in excess of \$2 million. In the first and second rounds of funding through May 1, 2020, only **.86%** of all loans issued were over \$2 million. Projections are difficult, but if only 1% of the PPP loans issued (out of the \$650 billion), the SBA is likely to face extended reviews of over 40,000 loans. This will be a daunting task for an agency that is already underfunded and understaffed. The IRS and other Treasury divisions will probably need to be authorized and paid to assist the SBA.

Perhaps in response to the continued panic from many borrowers, the SBA issued FAQ #43 on May 5, 2020, extending the safe harbor deadline an additional 7 days, to May 14, 2020. On May 13, in FAQ # 46, the SBA issued additional guidance regarding the necessity certification issue and we wrote about it extensively, here. Finally, very late on May 13, 2020, the SBA issued FAQ #47, extending the safe harbor deadline to May 18, 2020. When considering the impact of FAQ # 46, the safe harbor extension likely impacts only those borrowers with loans in excess of \$2 million.

The Lenders' Response

Many SBA lenders issued warning notices to all of their PPP loan borrowers. These notices vary in tone, but almost all contain dire warnings for their customers. Here are some examples taken from lenders' letters to borrowers:

Lenders are expressly authorized to rely on such a certification by a PPP loan borrower without review or confirmation. As such, we feel compelled to advise you that your lender's acceptance of your PPP loan application and/or funding of your PPP loan does not constitute, and cannot be relied upon as implying, a conclusion or affirmation by your lender that such PPP loan proceeds are necessary for ongoing operations of your business or that the borrower has otherwise met applicable eligibility requirements for PPP loan participation. We also advise you that this notice may be furnished to the government in response to any inquiry regarding your loan.

and this:

We do not wish any of our customers to suffer criminal liability or other "severe consequences" for certifying that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing

operations” of your business, and so we urge you to reconsider whether you remain comfortable with that certification in light of FAQ #31, the announced audit of PPP loans of \$2 million or more and the availability of the limited safe harbor for those who return PPP loan funds by May 7, 2020 (now May 14). Please contact your legal counsel or other advisors to determine how you wish to proceed.

What should you do?

If your business already returned PPP loan funds to your lender (with accrued interest), not much more needs to be done. When you receive confirmation from your lender of payment, in full, of the PPP loan you should maintain this confirmation along with all documentation related to the application for and payment of the PPP loan.

If you have not yet returned PPP loan funds, but are questioning whether you should, **sit tight**. Hopefully, in the next few days the SBA will issue further guidance to shed more light on this issue. Of course, if the guidance we have seen to date is any indication, further guidance likely will not offer clear answers to borrowers' questions. Assuming the SBA's guidance does not definitively answer your questions, you then should seek out further guidance and consultation from your legal counsel or CPA. While we do not expect anyone will offer you guarantees (we won't), what we can offer is guidance as to how best to analyze the issues surrounding whether to retain or repay your PPP loan before the safe harbor closes.

Finally, if you decide to retain your PPP loan funds, as many will, please read our earlier article on the use of your PPP loan proceeds and recommendations for retention of documentation related to the use of these funds.

[Ed. Note: This article was originally published on May 7, 2020, and was updated on May 14, 2020, to reflect the new SBA FAQ and associated deadlines.]

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