



SBA provides some clarification on the good-faith certification and creates new safe harbor for PPP loans

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On May 13, 2020, the Small Business Administration (SBA) issued a new FAQ providing a clearer safe harbor for loans under \$2 million, more detail for loans over that amount, a notice and cure process, and confirmation that affiliated entities can properly have more than one loan.

In addition to addressing directly the issue of borrower certifications of “necessity” when applying for a Paycheck Protection Program (PPP) loan under the CARES Act, FAQ 46 establishes a possible baseline for how the SBA might address other potentially unclear issues in borrower certifications (such as head count or certain affiliation issues) uncovered during a review.

Under the new FAQ, “[a]ny borrower that, together with its affiliates, 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 request in good faith.” Supporting this significant interpretation, the SBA reasons that borrowers obtaining loans under \$2 million “are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans.” Further, this partial “safe harbor” for loans under \$2 million “will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees.” Finally, as a practical matter, the SBA notes that “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 plain reading of the SBA’s language is that certifications concerning the necessity for PPP loans under \$2 million will be deemed to have been made in good faith—addressing the concerns of many borrowers, given the confusing guidance on certification to date. Importantly, the SBA clarifies in the new FAQ that borrowers with loans greater than \$2 million “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.” Consistent with previous FAQ 39, all loans over \$2 million will be subject to a “review,” the details of which have yet to be published by the SBA.

Equally importantly, FAQ 46 states that “[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.” And, “[i]f 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.” (emphasis added). While FAQs do not carry the authority of law, it is unlikely that the Treasury will pursue enforcement actions against their own FAQ.

This is good news for borrowers. It provides more context to what “good faith” means and provides comfort that those acting in good faith should not be subject to criminal penalties for fraud. It also indicates that borrowers that, in good faith, reached decisions about their qualifications for a PPP loan on issues other than “necessity” are likely to receive similar treatment.

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