



May 14, 2020

SBA Provides Limited Safe Harbor on Paycheck Protection Loan Certification

On May 13, 2020 the Small Business Administration (SBA) published an additional [FAQ on the Paycheck Protection Program Loans](#) (PPP), providing comfort to hundreds of small businesses, nonprofits, and sole proprietors who had received PPP loans but may have been considering returning them by today's May 14 deadline.

The PPP program is a key element of the Coronavirus Aid, Relief and Economic Security Act (the CARES Act), providing potentially forgivable loans to eligible small businesses to meet payroll and certain other operating costs. See our alerts on the PPP and Cares Act here:

- [SBA Issues Interim Final Rules on Paycheck Protection Program](#)
- [The CARES Act: Summary of Select Provisions Related to Small Businesses](#)
- [The CARES Act and Nonprofits](#)

As part of the loan application process, potential borrowers were asked to certify in good faith that the economic uncertainty created by the coronavirus crisis necessitated the PPP loan to support ongoing operations. Recently the SBA, responding in part to media criticism regarding Shake Shack and other public companies receiving these loans, raised questions about the certifications some borrowers made and suggested in earlier FAQs that applicants evaluate whether they did in fact make the certification in good faith, including whether or not they had access to capital elsewhere. The SBA also told borrowers that if they returned their loans by May 14, the SBA would deem them to have made the certification in good faith, thereby avoiding possible fraud charges or other negative consequences of having made a certification of necessity in bad faith. In the wake of that guidance many small businesses and nonprofits who potentially had access to other funds, but nevertheless needed the PPP funds to avoid potential staff reductions, have been seriously considering returning these funds to limit the risk that upon a review, the SBA would treat their certifications of necessity as having been made in bad faith.

The release of new [FAQ #46](#) relieves the pressure caused by the earlier SBA guidance, and shifts the tone in favor of encouraging small businesses who need these funds to apply for them and to use them if they have already received them. FAQ #46 provides a safe harbor for those PPP loan recipients who, together with their affiliates, received loans of less than \$2 million by stating that they will be deemed to have made the certification of necessity for the loan in good faith. The SBA's reasoning in providing this safe harbor for smaller loans is that businesses who received loans of this size are "less likely to have access to liquidity in the current economic environment than borrowers who received larger loans." The FAQ goes on to say that this guidance will also provide economic certainty to these smaller borrowers and free up SBA resources to audit larger loans. This should mean that all loans under \$2 million will be eligible for forgiveness so long as the other criteria for forgiveness are met. We are still awaiting additional guidance on the forgiveness process.





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For loans in excess of \$2 million, the FAQ says that in the event the SBA determines that the borrower lacked an adequate basis for making the certification of need, then it will seek repayment of the “outstanding PPP loan balance and inform the lender that the borrower is not eligible for forgiveness of the loan.” If the borrower repays the loan the SBA will not seek administrative enforcement or refer the matter to other agencies based on its determination that the certification criteria had not been met. This seems to leave open the question of whether the loan must be paid back immediately on such a determination or over the 2 year term that the previous SBA guidance provided.

This new SBA guidance addresses only the certification of necessity, and not the other criteria for eligibility or forgiveness. However, for small businesses and nonprofits that were considering returning PPP funds by today’s May 14 deadline solely because they were concerned that the SBA would challenge their certifications of necessity, this new guidance is highly welcome, and should provide comfort that they can keep these funds and use them as the CARES Act intended.

Further update: In new FAQ #47, the SBA has now extended the safe harbor deadline for returning PPP loan funds from May 14 to May 18.

Additional Resources

- [New Attorney General Guidance on Access to Endowment Funds](#) (April 29)
- [Moratorium on Evictions and Foreclosures Offers Protection to Some Individuals, Small Businesses and Nonprofits](#) (April 21)
- [SBA Issues Interim Final Rules on Paycheck Protection Program](#) (April 6)
- [Complying with Paid Leave Requirements Under the Families First Coronavirus Response Act](#) (April 1)
- [The CARES Act: Summary of Select Provisions Related to Small Businesses](#) (March 31)
- [The CARES Act and Nonprofits](#) (March 31)

Please visit our [COVID-19 resource page](#) for additional resources related to COVID-19.

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