

SBA Issues New Guidance on Certification of Necessity Safe Harbor

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On May 13, 2020, the Small Business Administration (“SBA”) issued an update to the [Frequently Asked Questions document](#) (“FAQs”) relating to its Paycheck Protection Program (“PPP”), originally published on April 2, 2020 and updated regularly thereafter, providing additional guidance on the PPP Certification of Necessity Safe Harbor. The PPP is a small business loan program established pursuant to Title I of the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act signed by President Trump on March 27, 2020,¹ and supplemented by the Paycheck Protection Program and Health Care Enhancement Act (the “PPP/HCE Act”), which provided additional funding for the program.

The PPP loan application requires borrowers to make a certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations” of the borrower (the “Necessity Certification”). On April 23, the SBA released additional guidance on this certification, providing that borrowers must make the Necessity Certification “in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.” (FAQ #31). The latest FAQs released on May 13, 2020 includes the following additional important information concerning the Necessity Certification.

Additional Guidance on Review and Enforcement of the Necessity Certification.

- a. **Any borrower who, together with its affiliates,² receives a PPP loan with a principal amount of less than \$2 million will be automatically deemed to have made the Necessity Certification in good faith.**
- b. Borrowers whose loans are in excess of \$2 million (“Large Borrowers”) may still be able to make this certification in good faith, but these borrowers’ loans are subject to an automatic audit by the SBA for compliance with program requirements.
- c. If the SBA determines that a Large Borrower did not have an adequate basis to certify that its loan was necessary, the SBA will inform the borrower that its loan is ineligible for loan forgiveness and will seek repayment of the loan. **If the Large Borrower repays the loan upon receipt of notification from the SBA, the SBA will not pursue administrative enforcement and will not refer the matter to other agencies.**

¹ Borrowers and lenders may rely on the FAQs as SBA’s interpretation of the CARES Act and the Interim Regulations, but they do not carry the force of independent law. The U.S. government will not challenge lender PPP actions that conform to the FAQs and to the Interim Regulations and any subsequent rulemaking in effect at the time of a borrower’s application.

² The FAQ provides that the affiliation rules generally applicable to determining PPP eligibility will be similarly applied in determining which companies are included for purposes of this \$2 million threshold.

- d. The SBA's determination regarding a borrower's certification of necessity will have no impact on the SBA's guarantee of this loan.
- e. No change was made to the deadline of May 14 for a borrower to take advantage of the loan repayment safe harbor.

A number of open questions concerning the Necessity Certification remain, including (i) the timing of when repayment of a loan based on a challenge to the Necessity Certification would be required, and (ii) how strictly the SBA will interpret the Necessity Certification given at the time of the PPP loan application. Given the fast pace of developments, businesses are encouraged to seek advice from qualified legal counsel before applying for a PPP loan.

For more information, please see the following resources:

1. PPP Resources from the SBA and Treasury Department:

- a. [Top-Line Overview of the Program](#)
- b. [Information Sheet for Lenders](#)
- c. [Information Sheet for Borrowers](#) (updated April 2, 2020)
- d. [Borrower Application Form](#) (updated April 3, 2020)
- e. [Lender Application Form for Federally Insured Depository Institutions, Federally Insured Credit Unions, and Farm Credit System Institutions \(4/3/2020\)](#) (released April 3, 2020)
- f. [Lender Application Form for Non-Bank and Non-Insured Depository Institution Lenders \(4/8/2020\)](#) (released April 8, 2020)
- g. [Lender Agreement to participate in PPP](#) (released April 3, 2020)
- h. [PPP Program Loan Report](#) (updated April 16, 2020)
- i. [How to Calculate Loan Amounts](#)
- j. [Search Tools: Find an Eligible Lender](#)

2. Prior SBA Guidance on the Paycheck Protection Program:

- a. [PPP Frequently Asked Questions](#) (updated May 13, 2020)
- b. [Interim Final Rule 1](#) (originally posted April 2, 2020)
- c. [Interim Final Rule on Applicable Affiliation Rules](#) (originally posted April 3, 2020)
- d. [Interim Final Rule on Additional Eligibility Criteria and Requirements for Certain Pledges of Loans](#) (originally posted April 14, 2020)
- e. [Interim Final Rule on Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility](#) (originally posted April 24, 2020)

- f. [Interim Final Rule Additional Criterion for Seasonal Employers](#) (originally posted April 27, 2020)
- g. [Interim Final Rule on Disbursements](#) (originally posted April 28, 2020)
- h. [Interim Final Rule on Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders](#) (originally posted April 30, 2020)
- i. [Interim Final Rule on Nondiscrimination and Additional Eligibility Criteria](#) (originally posted May 5, 2020)

3. Prior Haynes and Boone Guidance on the Paycheck Protection Program:

- a. [SBA Extends Loan Repayment Safe Harbor Date, Provides Additional Guidance on Employees of Foreign Affiliates](#) (May 7, 2020)
- b. [Could Retention of PPP Loan Funds Create False Claims Act Liability?](#) (updated May 6, 2020)
- c. [President Signs Additional Appropriation for Small Business Relief into Law, SBA Clarifies Eligibility of Large Companies for PPP Loans](#) (April 24, 2020)
- d. [Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program](#) (updated May 7, 2020)
- e. [Special Alert: SBA Releases Additional Guidance via New Interim Final Rule, Update to Frequently Asked Questions on Paycheck Protection Program Loans](#) (April 16, 2020)
- f. [SBA Releases Additional Guidance via Updates to Frequently Asked Questions on Paycheck Protection Program Loans](#) (April 9, 2020)
- g. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
- h. [SBA Releases Interim Final Rule Outlining Additional Details on Paycheck Protection Program Loans](#) (April 3, 2020)
- i. [What Franchise and Hospitality Companies Should Know! A Guide to CARES and Other Relief Programs](#) (April 2, 2020)
- j. [Relief for Employers and Workers under the CARES Act](#) (updated March 29, 2020)

4. Resources on the EIDL Program:

- a. [Looking for an Alternative to PPP? Taking a Second Look at the Economic Injury Disaster Loan Program](#) (Haynes and Boone Alert, May 1, 2020).
- b. [SBA's COVID-19 Disaster Loan Program](#) (Haynes and Boone Alert, March 24, 2020)
- c. [SBA EIDL Resource Page](#)



Additional Questions? Contact a member of the Haynes and Boone [Finance](#) or [Corporate](#) Practice Groups at Haynes and Boone, including the following individuals:

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