

Publications

PPP Guidance Update: SBA Creates Limited Safe Harbor for Borrowers who have Received Less than \$2,000,000

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The Small Business Administration (SBA) and the Treasury updated the Paycheck Protection Program (PPP) Frequently Asked Questions (FAQs) on May 13, 2020, creating new guidelines surrounding the requirement in the PPP loan application that a borrower certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant” (the Need Certification). These new guidelines clarify the FAQs released by the SBA on April 23 and on May 5, which suggested that certain businesses that have already obtained PPP loans should repay their loan in full by May 14 if they could not justify the Need Certification made on the application date. We have summarized this guidance in a prior *Client Alert*.

In the May 13, 2020 update, FAQs #46 and #47 were inserted. FAQ #47 extends the previous May 14 safe harbor repayment deadline date to May 18. FAQ #46 states that the SBA, in consultation with the Treasury, has determined that any borrower that, together with its affiliates (as determined under the PPP interim final rule on affiliates, 85 FR 20817, effective April 15, 2020), received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the Need Certification in good faith.

Additionally, the new guidance notes that, in reviewing PPP loans greater than \$2 million, if the SBA determines that the borrower did not make the Need Certification in good faith, the SBA will not pursue administrative enforcement based on the Need Certification if the borrower repays the loan after receiving notification from the SBA. Any borrower that is not deemed to have made the Need Certification in good faith will also not be eligible for loan forgiveness. It is important to note that these new guidelines are only with respect to the Need Certification and do not apply to any other rules or certifications made at the time of application. Due to the changing nature of the guidance surrounding PPP loans, all businesses who received PPP loans, even those who received less than \$2 million, should consider conducting an analysis and retaining all files and documentation necessary to justify making the Need Certification.

As with all of the borrower's certifications on a PPP loan application, a lender may rely on the borrower's making of the Need Certification. Additionally, PPP borrowers and lenders may rely on the guidance within the most current FAQs as the SBA's interpretation of the PPP rules. If you have any questions about the PPP program or this latest guidance, please call Drew Parobek, Marty Gates, Cauley Simmons, or your Vorys attorney today.

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Vorys COVID-19 Task Force

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