On May 13, the Small Business Administration issued an additional FAQ #46, providing guidance on how it will review the required good faith certification that current economic uncertainty make the PPP loan necessary to support ongoing operations, which we refer to as the “economic necessity certification.” The SBA has provided that any borrower that, together with its affiliates, has received PPP loans with an original principal amount less than $2 million will be deemed to have made the economic necessity certification in good faith. If the SBA determines that borrowers that received greater than $2 million lacked an adequate basis to make the economic necessity certification in good faith, the SBA will seek immediate repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. The borrower will then have the opportunity to repay the PPP loan without further administrative enforcement or referral by the SBA to other agencies for enforcement actions.

Today's guidance should help ease some of the uncertainty PPP recipients were facing as a result of previous SBA guidance on the economic necessity certification. The SBA issued FAQ #31, which stated that borrowers must consider current business activity and the company's ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. SBA had provided an amnesty period until May 14, 2020 to repay the PPP loan without falling afoul of the economic necessity certification. This period has since been extended to May 18, 2020. Borrowers that were found to not have made the certification in good faith may be ineligible for forgiveness, required to repay the funds immediately.

Now, borrowers who, together with all affiliates, received less than $2 million, do not need to worry about the SBA determining that they did not make the economic necessity certification in good faith. Recipients of loans over $2 million will still have an opportunity to pay back the PPP funds without further consequence from the SBA. Companies will remain exposed to potential whistleblower, civil and criminal liability under the False Claims Act and criminal fraud claims; however, the SBA will not refer any borrowers for these actions if the SBA notifies the borrower that it lacked an adequate basis for the required certification and the borrower repays the loan.

The full text of FAQ #46 is below:

46. Question: How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?

Answer: When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the
Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: Any borrower that, together with its affiliates,20 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.

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, 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.

Importantly, borrowers with loans greater than $2 million that do not satisfy this safe harbor 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. SBA has previously stated that all PPP loans in excess of $2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If 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. If 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. SBA’s determination concerning the certification regarding the necessity of the loan request will not affect SBA’s loan guarantee.

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