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Client Alert: New Guidance on the PPP Necessity Certification Provides Automatic Safe Harbor for Borrowers with Loan Amounts Under \$2 Million

BY RORY Z. FAZENDEIRO • MAY 14, 2020

Safe Harbor Deadline to Repay Loans of \$2 Million or More Extended to May 18th

On May 13, 2020, the Treasury issued important and long-awaited FAQ guidance regarding the PPP applicant certification (referred to herein as the “necessity certification”) that “[c]urrent economic uncertainty makes th[e] loan request necessary to support the ongoing operations of the Applicant.” The new guidance (Q&A 46) provides a safe harbor for any borrower (together with its affiliates) that received a loan under \$2 million, such that the necessity certification will be automatically deemed to have been made in good faith. In other words, loans of under \$2 million will not be reviewed or audited by the SBA for purposes of whether the necessity certification was made in good faith.

For borrowers with loans over \$2 million, the Treasury’s Q&A states that there may still be an adequate basis to make the good-faith certification. This will depend on the specific factual circumstances of the borrower, and in particular, whether the borrower has alternative and ample sources of liquidity that are accessible and sufficient to support ongoing operations in a manner that is not significantly detrimental to the business.

While loans of \$2 million or more remain subject to review and scrutiny by the SBA, these borrowers also received good news as part of the May 13th FAQs. As part of Q&A 46, the Treasury has announced that if the SBA determines in the course of its review that a borrower lacked an adequate basis for the required necessity certification, it 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 this notification, the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination concerning the necessity certification.

Previous to yesterday’s guidance, the SBA and Treasury made clear that *all* applicants and borrowers, regardless of loan amount, should reassess the necessity certification in light of alternative sources of liquidity. In response to this directive, borrowers of all sizes scrambled to evaluate the necessity standard and many returned their loans before the May 14th deadline. Bowditch previously issued a series of client alerts surrounding the certification requirement and applicable standard ([here](#) and [here](#)).

Importantly, FAQ 47, also issued on May 13 th, extends the repayment date safe harbor (now applicable to borrowers with loans of \$2 million or more) from May 14 to May 18, 2020, giving additional time for borrowers to assess the necessity certification and repay the loan without consequence if the certification cannot be made in good faith.

Should you have any questions or would like further information regarding any aspect of the PPP, please reach out to

the Bowditch COVID-19 Response Team or your primary attorney contact at the Firm.