

CARES Act: Paycheck Protection Program Guidance Updated

The Small Business Administration (the “SBA”), in consultation with the U.S. Department of the Treasury (the “Treasury”), continues to issue guidance on the Paycheck Protection Program (the “PPP”) by updating its [Frequently Asked Questions \(the “FAQs”\)](#) guidance. The updated FAQs as of May 13, 2020 include additional guidance regarding (i) the SBA’s review process of a borrower’s required good-faith certification concerning the necessity of its PPP loan request (the “Necessity Certification”) and (ii) the further extension of the PPP loan repayment deadline for borrowers to repay their PPP loan proceeds and be deemed by the SBA to have made the required Necessity Certification in good faith. Also on May 13, 2020, the SBA posted an [Interim Final Rule on Loan Increases \(the “Interim Final Rule on Loan Increases”\)](#), which provides for certain partnership and seasonal employer PPP loan recipients to increase their PPP loans based on prior guidance on calculation of the maximum PPP loan amount.

Background

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) was signed into law on March 27, 2020. The CARES Act authorizes up to \$349 billion in forgivable loans to small businesses through the PPP administered by the SBA. On April 24, 2020, \$484 billion of additional coronavirus relief was approved, which includes an additional \$310 billion in funding for the PPP.

On April 23, 2020, the SBA released FAQ No. 31, which provides that the CARES Act requires PPP loan applicants to certify, in good faith, that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” FAQ No. 31 also provides that if an applicant who applied for a PPP loan prior to April 23, 2020 has reconsidered its certification and concluded that it does not meet the criteria, the applicant may return the PPP loan proceeds by May 7, 2020, in which case it will be deemed to have made the Necessity Certification in good faith. FAQ No. 43, issued on May 5, 2020, extends this safe harbor period to May 14, 2020. The recently released FAQ No. 47 further extends this deadline for repayment to May 18, 2020 (see detailed discussion regarding FAQ No. 47 below). FAQ No 39, released on April 29, 2020, confirms that the SBA will (i) review all loans made in excess of \$2 million, in addition to any other loans as appropriate, following submission of a loan forgiveness application and (ii) provide further guidance on implementation of that review procedure.

[An Interim Final Rule on Additional Eligibility Criteria and Requirements for Certain Pledges of Loans](#) posted on April 14, 2020 provides that a partner in a partnership may not submit a separate PPP loan application for himself or herself as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to \$100,000 annualized, on a PPP loan application for the partnership. See the detailed discussion below under ‘Interim Final Rule on Loan Increases – Partnerships’ for details on how a partnership can increase its PPP loan to account for inclusion of such income in payroll costs.

[An Interim Final Rule on Additional Criterion for Seasonal Employers](#) posted on April 28, 2020 provides seasonal employers with additional flexibility in calculating their maximum PPP loan amounts by allowing a seasonal employer to calculate such amount using any 12-week period between May 1, 2019 and September 15, 2019 as a base period. See the detailed discussion below under ‘Interim Final Rule on Loan Increases – Seasonal Employers’ for details on how a seasonal employer can increase its PPP loan based on such calculation.

You can find our past alerts on the CARES Act and the FAQs [here](#).

FAQ No. 46

Because the landscape of restrictions and conditions on borrowers applying for PPP loans has changed frequently, the SBA's approach to reviewing the Necessity Certifications of borrowers has become a topic of concern. FAQ No. 46, released on May 13, 2020, sets forth the guidance promised by FAQ No. 39 and provides additional explanation regarding the SBA's review process for the Necessity Certification: a tiered approach that differentiates between borrowers that, together with their affiliates, received PPP loans in amounts less than \$2 million and those that received PPP loans in excess of \$2 million.

FAQ No. 46 establishes a safe harbor for borrowers that received PPP loans of less than \$2 million. Any borrower that, together with its affiliates, received less than \$2 million in PPP loans will be deemed to have made the required Necessity Certification in its loan application in good faith. The SBA considers this safe harbor to be "appropriate" because generally borrowers with PPP loan amounts below the \$2 million threshold are less likely to have had access to adequate sources of liquidity than borrowers that obtained larger loans.

Importantly, borrowers that (together with their affiliates) received PPP loans equal to or in excess of \$2 million do not qualify for this safe harbor, but may still have an adequate basis for making the required good-faith Necessity Certification, based on their individual circumstances in light of the language of the certification and SBA guidance. FAQ No. 46 further provides that if the SBA determines a borrower did not have an adequate basis to make the Necessity Certification in good faith, the SBA will seek "repayment of the outstanding PPP loan balance" and notify the lender and borrower that such loan is not eligible for loan forgiveness. So long as the borrower repays the PPP loan after being notified of its ineligibility for forgiveness, the SBA will not pursue administrative enforcement or referrals to other agencies based on that determination. The SBA's determination concerning a loan request's Necessity Certification will not affect the SBA's loan guarantee.

Although the safe harbors, including those described in FAQ No. 46, may limit the exposure of borrowers to SBA sanctions for submission of a Necessity Certification without an adequate basis if the borrower fulfills certain conditions or responds to an ineligibility notice as required, the SBA can still pursue sanctions for other borrower violations of the PPP statute or other guidance, and other government agencies (or whistleblowers on their behalf) can still pursue enforcement of the applicable laws in their jurisdictions. In other words, the safe harbor provided by FAQ No. 46 does not bind the U.S. Department of Justice ("[DOJ](#)"), other federal agencies, or potential private litigants.

FAQ No. 47

Pursuant to the [SBA interim final rule posted on May 8, 2020](#), any borrower who applied for a PPP loan prior to April 23, 2020 and repaid the loan in full by the May 14, 2020 will be deemed to have made the required Necessity Certification in good faith. In FAQ No. 47, released on May 13, 2020, the SBA automatically extended the repayment date to May 18, 2020 to allow borrowers an opportunity to review and consider FAQ No. 46.

Guidance provided in FAQ No. 46 and FAQ No. 47, while helpful in certain respects, is less than clear in others. For instance, it is unclear whether borrowers who believe they do not meet the required Necessity Certification and have \$2 million or more in PPP loans have to repay their loan proceeds by the May 18, 2020 deadline provided in FAQ No. 47 or instead can wait until the SBA determines that they are not eligible for loan forgiveness. As noted in FAQ No. 46, so long as the borrower repays the loan in time following the SBA's notification of its determination that the borrower was not eligible for loan forgiveness, the SBA will not pursue administrative enforcement or referrals to other agencies based on that determination. Importantly, as noted above, this will not prevent actions by the DOJ, private litigants, or other agencies.

In addition, many businesses are considering potential negative publicity associated with keeping PPP loan proceeds. As of May 12, 2020, five major news organizations have sued the SBA under FOIA to gain access to PPP loan data,

including information regarding loan recipient, loan size and lender bank.

Interim Final Rule on Loan Increases

The Interim Final Rule on Loan Increases allows partnerships and seasonal employers to increase their PPP loans. Such increase may be made even if the PPP loan has already been disbursed, so long as the PPP loan lender has not yet submitted to the SBA its first SBA Form 1502 report with respect to such PPP loan and the deadline for such submission has not passed. If a PPP loan is so increased, the increased amount can be disbursed notwithstanding prior guidance that PPP loans must be disbursed in full, in one disbursement, within 10 days of approval.

Partnerships

The Interim Final Rule on Loan Increases provides that a partnership that received a PPP loan and calculated the size of the PPP loan based on payroll costs for the partnership's employees without including any amount for partner compensation may increase its PPP loan to an amount calculated based on its payroll costs including appropriate partner compensation. As mentioned in the "Background" section above, prior guidance allows the inclusion of certain partner compensation in payroll costs for purposes of calculating a partnership's maximum PPP loan amount, and the Interim Final Rule on Loan Increases allows partnerships to take advantage of such prior guidance, which may not have been posted at the time they originally applied for a PPP loan.

Seasonal Employers

The Interim Final Rule on Loan Increases also provides that a seasonal employer that received a PPP loan before the alternative criterion for seasonal employers to calculate maximum PPP loan amounts was posted on April 28, 2020 may increase its PPP loan to the amount determined under such alternative criterion. As mentioned in the "Background" section above, prior guidance allows a seasonal employer more flexibility in selecting a base period to calculate its maximum PPP loan amount, and the Interim Final Rule on Loan Increases allows seasonal employers that already received PPP loans before such prior guidance was posted to take advantage of such flexibility.

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