

## Go Big or Go Home: SBA to Focus PPP Loan “Necessity” Review on Loans Over \$2 Million; Safe Harbor Announced for Smaller Loans

*Corporate and Securities Alert* | May 14, 2020

By: Ryan J. Udell and Adam J. Chelminiak

**Updated 5/14 to reflect the SBA’s decision to extend the safe harbor to return funds until May 18 to give borrowers time to understand FAQ number 46, discussed below.**

In an update to the Frequently Asked Questions (FAQ) post on the U.S. Department of the Treasury (Treasury) website on May 13, 2020, the U.S. Small Business Administration (SBA) and Treasury announced new safe harbor assurances for recipients of Paycheck Protection Program (PPP) loans under \$2 million. FAQ number 46 announces that borrowers receiving PPP loans below that \$2 million threshold will be deemed to have made the required certification as to the necessity of the PPP loan in good faith.

To recap, the CARES Act requires PPP applicants to certify “that the uncertainty of current economic conditions makes [the PPP loan] necessary . . . to support the ongoing operations of the eligible recipient.” The CARES Act does not, however, articulate a standard for evaluating whether a PPP loan is “necessary” for the applicant’s continued operation. Several weeks into the PPP, and after many borrowers had applied for and received funds, the SBA issued an interpretive ruling that advised borrowers to “carefully review” the necessity certification and established a safe harbor allowing borrowers that had applied “based on a misunderstanding or misapplication of the required certification standard” to return PPP funds without penalty by May 7, 2020 (now extended to May 18, 2020). FAQ number 31 offered similar (although not identical) guidance as the SBA rule and advised borrowers to consider their ability to make the necessity certification in good faith after taking into account access to other sources of liquidity (even though the CARES Act explicitly waived the SBA’s “credit elsewhere” test). As we have previously discussed, we believe that these actions were taken largely to stem criticism that larger companies were receiving PPP funds while many small businesses were having difficulty accessing the dwindling capital pool.

In the absence of a clear standard for determining whether a PPP loan was “necessary” for continued operations, the vague and evolving guidance from the SBA and Treasury prompted concern among PPP recipients, particularly among larger borrowers with reports suggesting over \$160 million worth of PPP loans received by publicly-traded companies had been voluntarily returned during the last week of April alone.

FAQ number 46 offers assurances that any borrower that received PPP loans of less than \$2 million will be deemed to have made the necessity certification in good faith. The SBA determined that this \$2 million threshold is appropriate because, in its view, borrowers with loans below that level “are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans.” If an organization received multiple PPP loans of less than \$2 million each, but together they exceed \$2 million, it would not be included in

this smaller loan category.

Conversely, FAQ number 46 confirms the SBA’s previously-announced intention to audit all PPP loans in excess of \$2 million (as well as other PPP loans as deemed appropriate by the SBA) for compliance with program requirements, including the necessity certification. If the SBA determines during the course of this review that a borrower lacked an adequate basis for the necessity certification “based on their individual circumstances in light of the language of the certification and SBA guidance,” a borrower could be subject to civil and criminal liability for fraudulently obtaining a PPP loan. While this is not new (and what concerned larger borrowers when SBA and Treasury issued its “warnings” to them), perhaps as an acknowledgment that the “necessity” standard is still clear as mud, FAQ number 46 clarifies that if a determination that a borrower did not need the loan is made in the audit process, as long as the borrower repays the loan after receiving notice, the SBA will not pursue any enforcement actions or referrals to other agencies.

FAQ number 46 offers welcome certainty to PPP borrowers with more limited resources that their receipt and use of the PPP funds will not be subject to second-guessing by the SBA in the future when the pandemic-induced smoke has cleared. For borrowers with larger PPP loans, FAQ number 46 also recognizes that the SBA has not been able to provide clear guidance on how, what and how much other liquidity availability would, at the time of making the PPP application, render the “necessity” certification invalid by providing for a repayment option, without other penalties, if it determines that the applicant improperly made the certification. While not perfect (because they would have spent the PPP monies and would have to repay them), it does give these borrowers the opportunity to defend the need in any audit without the specters of civil or criminal penalties or other “parade of horrors.” But, if a larger borrower does not desire to roll those dice at the SBA casino, FAQ number 46 reminds all applicants of the previously announced “safe harbor” that they can return the funds by Monday, May 18, 2020, without any possibility of investigation into their decision to apply for a PPP loan.

If you have questions or would like more information, please contact Ryan J. Udell ([udellr@whiteandwilliams.com](mailto:udellr@whiteandwilliams.com); 215.864.7152), Adam J. Chelminiak ([chelminiaka@whiteandwilliams.com](mailto:chelminiaka@whiteandwilliams.com); 215.864.7078) or another member of the Corporate and Securities Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

*This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and legal questions.*