

UPDATE!

As of May 14, the Treasury Department and SBA have extended the Paycheck Protection Program (PPP) repayment date safe harbor to May 18, 2020 from May 14. The extension was announced via the newly released [#47](#). Essentially, if deemed necessary under the guidance, PPP borrowers have until May 18 to repay their loan to be deemed by the SBA to have made the required certification in good faith. In addition the FAQ notes that the SBA will be providing more guidance on how it will review the certification prior to May 14. *(See the full text of FAQ # 47 and #43, plus FAQs #31 and #37 at the end of this article.)*

May 14, 2020

TREASURY AND THE SBA UPDATE PPP GUIDANCE

The U.S. Department of Treasury (Treasury) and the Small Business Administration (SBA) continue to provide updated guidance on Paycheck Protection Program (PPP) rules via updates to their Frequently Asked Questions (FAQ) sheet, which can be found [here](#). As the PPP has evolved, it seems that as certain questions get answered by updated guidance, more questions arise. From time to time, we will be providing our thoughts on the FAQs as they are posted, including potential recommendations to PPP borrowers.

FAQs #31 AND #37 - BORROWER CERTIFICATIONS OF NECESSITY

As several publicly held businesses provided required financial disclosures indicating that they were a recipient of a PPP loan, multiple interest groups and media outlets began expressing concerns over what businesses were (or were not) getting funded through the PPP loan process. Media coverage on the matter increased, and to address the public backlash, the PPP's FAQ sheet was updated on April 23, 2020 to add FAQ #31 which emphasized the fact that all PPP borrowers certified some level of need for PPP funds to support their ongoing operations on their PPP application.

FAQ #31 went on to give an example of circumstances (specifically “a public company with substantial market value and access to capital markets”) when it may be viewed that such a certification was likely not made in good faith. FAQ #31 also provided an optional safe harbor date of May 7, 2020 for borrowers who applied for a PPP loan prior to April 23 to repay their PPP loan in full in order to have the SBA automatically deem their certification to have been made in good faith.

In a likely attempt to clarify that FAQ #31 was intended for all PPP borrowers and not just public company PPP borrowers, the PPP's FAQ sheet was updated to add FAQ #37 on April 28, 2020, which essentially referred private companies “with adequate sources of liquidity to support the business's ongoing operations” to the guidance in FAQ #31.

MCC'S THOUGHTS & RECOMMENDATIONS

Unfortunately, there is currently no guidance available as to how the SBA intends to evaluate a PPP borrower's "access to other sources of liquidity sufficient to support their current business activity." It is likely that a determination will be extremely subjective and evaluated by the SBA on a case-by-case basis, absent further clarification from Treasury and/or the SBA.

As the SBA's evaluations will likely be conducted during the PPP loan forgiveness process (and performed with the benefit of hindsight), we are recommending that PPP borrowers adequately document their rationale for applying for a PPP loan now, including examples of need, under the expectation that they will be required to substantiate to the SBA as part of the forgiveness process.

As the use of PPP funds are limited only to eligible expenses (such as payroll, certain employee benefits, rent, and utilities), we also recommend that any documentation of need focus on the borrower's likely inability to fund such eligible expenses in the ordinary course had a PPP loan not been secured and the probable courses of action to respond to liquidity concerns, such as employee layoffs or furloughs, salary reductions, and/or deferred payment of rent to preserve cash in the midst of the current economic uncertainty.

In the event a PPP borrower is concerned about its ability to argue that obtaining a PPP loan was necessary given its financial situation, we recommend that management give serious consideration to repaying its PPP loan by the May 7, 2020 safe harbor deadline.

May 5, 2020

FULL TEXT OF FAQs # 31, #37, AND #43

31. **QUESTION:** Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

ANSWER: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make

the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

37. **QUESTION:** Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

ANSWER: See response to FAQ #31.

43. **QUESTION:** FAQ #31 reminded borrowers to review carefully the required certification on the Borrower Application Form that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA guidance and regulations provide that any borrower who applied for a PPP loan prior to April 24, 2020 and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith. Is it possible for a borrower to obtain an extension of the May 7, 2020 repayment date?

ANSWER: SBA is extending the repayment date for this safe harbor to May 14, 2020. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor. SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.

47. **QUESTION:** An SBA interim final rule posted on May 8, 2020 provided that any borrower who applied for a PPP loan and repays the loan in full by May 14, 2020 will be deemed by SBA to have made the required certification concerning the necessity of the loan request in good faith. Is it possible for a borrower to obtain an extension of the May 14, 2020 repayment date?

ANSWER: Yes, SBA is extending the repayment date for this safe harbor to May 18, 2020, to give borrowers an opportunity to review and consider FAQ #46. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor.