

CLIENT ALERT

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Paycheck Protection Program Update Continued Guidance on “Necessity” Certification

May 14, 2020

On May 13, 2020, the Small Business Administration (SBA) updated the Paycheck Protection Program (PPP) Loans Frequently Asked Questions (FAQs) to provide further guidance regarding PPP loan borrowers’ obligation, in their loan applications, to certify in good faith that their Paycheck Protection Program loan request is necessary. New FAQ 46 ([found here](#)) poses the question, “How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?”

In an earlier FAQ 31, the SBA restated PPP borrowers’ obligation to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant,” while adding guidance that PPP borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other liquidity sources sufficient to support ongoing operations in a manner not significantly detrimental to their business. FAQ 39, referencing FAQ 31, noted that the SBA will review “all loans in excess of \$2 million, in addition to other loans as appropriate,

following the lender’s submission of the borrower’s loan forgiveness application.”

The new FAQ 46 provides further guidance on the good-faith “necessity” certification, and on SBA review. For PPP borrowers with less than \$2 million in aggregate PPP loan amounts (for this purpose measured in the aggregate with their affiliates’ PPP loan amounts), FAQ 46 states that such borrowers “will be deemed to have made the required certification concerning the necessity of the loan request in good faith.”

For PPP loans greater than \$2 million (again, measured in the aggregate with affiliates’ loan amounts), FAQ 46 notes that such borrowers may still have an adequate basis for making the required certification based on their individual circumstances, but additionally provides that such loans, as well as other PPP loans as appropriate,¹ will be subject to review by the SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower’s Application Form. Where the SBA determines that a PPP borrower lacks an adequate basis for certifying necessity, the SBA will require repayment of the loan and such loan will not be

¹ This “as well as other loans as appropriate” phrase introduces the possibility of review of loans of under \$2 million regardless of the earlier language in FAQ 46.

eligible for forgiveness. A borrower receiving such a determination from the SBA may repay the loan, and in such case, according to FAQ 46, the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification of necessity. Note however that another agency having jurisdiction (such as the Justice Department) may initiate proceedings against a borrower whether or not a referral from the SBA has been made.

New FAQ 46 also indicates that all loans of greater than \$2 million will be subject to review (no longer linking the review of the loans to the borrower having submitted an application for forgiveness, as had been the case in FAQ 39).

We note that, irrespective of FAQ 46, borrowers of PPP loans of any amount should as always carefully consider issues of necessity, and document (and retain documentation relating to) the conditions supporting its “necessity” determination.

May 14 Deadline Extended to May 18

FAQ 31 stated that any PPP borrower that applied for a PPP loan prior to the issuance of FAQ 31, and that repaid the loan in full by May 7, 2020, would be deemed by the SBA to have made the required “necessity” certification in good faith. That May 7 deadline has since been extended, first to May 14, 2020 and most recently to May 18, 2020.

We expect to prepare further updates as additional information becomes available, which will be posted on our website.

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For further assistance in evaluating these or other provisions of the PPP, please contact your primary GEABP attorney or the attorneys listed below:

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