

## The Small Business Administration Publishes Helpful Guidance Regarding Its New “Economic Necessity” Certification Requirement for Paycheck Protection Program (PPP) Loans

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As a result of media criticism related to public companies obtaining loans under the Paycheck Protection Program (PPP), the Small Business Administration (SBA) on April 23, 2020, updated its “Frequently Asked Questions” (FAQ) to include Question 31, and an answer.

Ostensibly, FAQ #31 was intended to clarify the meaning and scope of the following certification included in all PPP loan applications: “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” The clarification provided by FAQ #31 retroactively deems to include in the certification a good faith consideration of the borrower’s financial needs based on “current business activity” and the borrower’s “ability to access other sources of liquidity sufficient to support their on going [sic] operations....” For borrowers who determine that their original “economic certification” (as clarified by FAQ #31) is no longer accurate, FAQ #31 also created a safe harbor by allowing those borrowers to repay their loan no later than May 7, 2020. That date was extended to May 14, 2020 by FAQ #43, and further extended to May 18, 2020 by FAQ #47.

The ambiguity of FAQ #31 has caused considerable uncertainty with a number of borrowers taking advantage of the safe harbor and repaying their loans. Undoubtedly, this was the SBA’s intent, particularly with respect to public, or larger companies, but the ambiguity has caused smaller companies to return loans as well.

The issuance of FAQ #46 on May 13, 2020 provides some much-needed guidance by responding to the posed question: “How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?” Not surprisingly, the answer depends on the size of the loan.

Specifically, for borrowers with a PPP loan of less than US\$2 million, the answer to FAQ #46 states (emphasis added):

“Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million **will be deemed to have made the required certification concerning the necessity of the loan request in good faith.**”

In other words, loans of less than US\$2 million are deemed to be “necessary to support the ongoing operations” of the business as the economic necessity certification requires (and making the economic necessity certification a non-issue for PPP loans that are less than US\$2 million). *Note that the US\$2 million amount is calculated by aggregating the borrower’s PPP loan together with any PPP loans of the borrower’s affiliates.*

For borrowers with a PPP loan of US\$2 million (it is not clear from the way the rule is written which rule applies to loans of exactly US\$2 million), the answer to FAQ #46: (a) confirms that (i) the borrower will be subject to the economic necessity certification (as clarified by FAQ #31), and (ii) the loan will be subject to automatic review pursuant to FAQ #39; but also (b) importantly, limits the consequences to a borrower for failing to prove the economic necessity of their PPP loan by providing as follows (emphasis added):

“**If SBA determines** in the course of its review that a **borrower lacked an adequate basis** for the required certification concerning the necessity of the loan request, **SBA 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 notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies** based on its determination with respect to the certification concerning the necessity of the loan request.”

Effectively, FAQ #46 limits a borrower’s liability for an inadequate economic necessity certification to the loss of loan forgiveness and an obligation to repay the loan.

While FAQ #46 has provided some helpful guidance and a limitation of liability under certain circumstances related to the economic necessity certification, it is important to note that FAQ #46 only applies to the economic necessity test and specifically does not shelter any borrower (regardless of whether they have a loan less than or greater than US\$2 million) from review for (and related liability for) “compliance with PPP program requirements set forth in the PPP Interim Final Regulations and in the borrower’s Application Form”, such as issues and concerns related to eligibility or issues pursued by other regulatory organizations, comprising the CARES Act a formidable oversight and auditing infrastructure. For a discussion of that infrastructure and those organizations, we refer you to our publication, [“You Can’t Take the Money and Run—Federal Oversight of COVID-19 Spending.”](#)

Please contact us with any questions on the economic necessity certification requirement and government oversight.

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