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SBA Extends Safe Harbor Period to Repay Paycheck Protection Program Loans Without Certification Risk

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As we have previously observed, on April 23, 2020, the U.S. Small Business Administration (SBA) issued guidance—and a warning—to Paycheck Protection Program (PPP) loan applicants and borrowers related to the certification of need required by the CARES Act in what has been known as FAQ 31:

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. (Emphasis added.)

Within days, the SBA issued further guidance in FAQ 37 that “businesses owned by private companies with adequate sources of liquidity to support

the business's ongoing operations” may not qualify for a PPP loan and may need to repay the loan by the expiration of the “safe harbor” period on May 7, 2020 or may need to refuse an approved loan which has not yet been disbursed.

Late on May 5—only two days before the deadline—the SBA extended the safe harbor period until May 14, and promised additional guidance:

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.*

In light of the extended safe harbor period and the promised additional guidance, applicants and borrowers may wish to consider deferring any final decision to repay, or not accept, a PPP loan until the SBA's position becomes clear in the coming days.

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.

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