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SBA Guidance Clarifies PPP Certification Concerning Necessity of Loan

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Since its inception, borrowers of loans under the Paycheck Protection Program (PPP) have been troubled by the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” This certification, coupled with the U.S. Small Business Administration’s (SBA) April 23, 2020 guidance instructing businesses to evaluate “their current business activity and their ability to access other sources of liquidity,” has caused many applicants to question their eligibility for PPP loans and whether they should return PPP proceeds if already funded.

On May 13, 2020 – a day before the May 14 amnesty period for return of loan proceeds was set to expire – the SBA issued guidance and partially reversed field on the ever-troubling certification concerning “necessity,” stating the following:

Question: *How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?*

Answer: *When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: **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.** (Emphasis added)*

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP

borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. 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 necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

For borrowers who, together with their affiliates, obtained PPP loans of less than \$2 million, this guidance should ease worries as to eligibility and the possibility of a future audit or ultimately a claw back of the loan and other sanctions under the False Claims Act. Simply put, the result is that these companies should not be scrutinized by the SBA at a later date, which should free them to begin (or continue) using their PPP proceeds rather than returning funds by May 14. Companies should be aware that an enforcement agency, such as the Department of Justice, could pursue a False Claims Act investigation and prosecution even without a referral by the SBA, as could a private litigant in a *qui tam* action.

If a company and its affiliates borrowed greater than \$2 million, and it is determined that the borrower lacked an adequate basis for their certification as to “necessity,” that is, the borrower is deemed at a later date to have been ineligible for a PPP loan, then this guidance indicates that loan forgiveness will be denied and repayment of the loan will be accelerated, but that there will be no administrative fines imposed or criminal referrals made. The inclusion of affiliates in the calculation of total loan proceeds might require some applicants to revisit the affiliation rules

provided by the SBA.

This guidance doesn't change the SBA's April 23, 2020 instruction that businesses evaluate “their current business activity and their ability to access other sources of liquidity” in determining PPP loan eligibility – especially as regards recipients of loans over \$2 million. It should, however, reassure applicants whose businesses were adversely impacted by COVID-19, that they will not be as likely to be second-guessed about their certifications and their eligibility, and that they will not be automatically and heavily penalized for being found to have improperly certified as to necessity.

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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