

## Client Alert

### Updated Frequently Asked Questions Pertaining to the Paycheck Protection Program—Smaller Borrower Safe Harbor and Other Relief Regarding Borrower Necessity Certification

*Please note that this alert updates prior publications made by our firm pertaining to the subject matter discussed below.*

In order to obtain a Paycheck Protection Program (PPP) loan, applicants are required to make numerous certifications, including that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operation of the Applicant.” On April 23, 2020, the Small Business Administration (SBA), in consultation with the Department of the Treasury, expanded its “[Frequently Asked Questions](#)” (FAQs) pertaining to loans under the PPP by publishing cautionary guidance under FAQ 31, which required borrowers to carefully re-evaluate their certifications based on additional criteria, as explored in more detail in our Client Alert found [here](#).

On May 13, 2020, SBA provided additional guidance in connection with an applicant's certification requirements regarding the necessity of the PPP loan.

The additional guidance provides much-needed comfort to certain borrowers, especially smaller borrowers, including the following:

- **Smaller Borrower Safe Harbor.** 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.
- **SBA will not Pursue Certain Actions Against Large Borrowers that Repay PPP Loan.** 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.

The additional guidance provides that borrowers with loans greater than \$2 million that do not satisfy this smaller borrower 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. As previously stated by SBA, 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.

May 13  
**2020**

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The foregoing summary is qualified in its entirety by the full text of the new FAQ, which reads as follows:

**“46. 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.

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.”

Despite this new guidance, applicants and borrowers that determine that a PPP Loan is necessary should continue to carefully document the basis for that conclusion, including their analysis of economic uncertainty, their liquidity needs and why obtaining one or more alternative sources of funding in lieu of a PPP loan would be significantly detrimental to their business based on its current business activity. The CARES Act authorizes criminal penalties for fraud or other misconduct related to the PPP and provides funding for audits and investigations. The federal government also has the power to level criminal and civil penalties against individuals and entities who provide false information or defraud the government.

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If you would like additional information, please contact:

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**Brian A. Haskel, Esq.** | [bhaskel@sillscummis.com](mailto:bhaskel@sillscummis.com) | (212) 500-1541

**Alan E. Sherman, Esq.** | [alansherman@sillscummis.com](mailto:alansherman@sillscummis.com) | (973) 643-5959

**Jason L. Sobel, Esq.** | [jsobel@sillscummis.com](mailto:jsobel@sillscummis.com) | (973) 643-5295

**Lori M. Waldron, Esq.** | [lwaldron@sillscummis.com](mailto:lwaldron@sillscummis.com) | (973) 643-5158