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Paycheck Protection Program Frequently Asked Question 46: “How Will SBA Review Borrowers’ Required Good-Faith Certification Concerning the Necessity of Their Loan Request?”

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by Nancy A. D. Hancock

On May 13, 2020, the United States Small Business Administration (SBA), in consultation with the United States Treasury, released FAQ 46 to provide guidance as to how SBA will be reviewing the certifications that all borrowers are required to make to receive loans under the Paycheck Protection Program (the PPP) created under the CARES Act.

Each borrower must in good faith certify that, “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA issued guidance regarding its interpretation of this standard in FAQ 31 and FAQ 37, but the responses to those questions have caused great concern among eligible borrowers. Many deserving borrowers have had doubts as to whether they qualify to receive forgiveness of the PPP loans. The responses to questions 31 and 37 remind borrowers that both public companies and private companies with sources of liquidity sufficient to support the business’s ongoing operations in a manner that is not significantly detrimental to the business, should be concerned that they may not satisfy SBA’s review. Public statements suggesting that civil and/or criminal sanctions might be appropriate penalties have left good faith borrowers anxious that if they do not promptly return their PPP loans by the safe harbor date, not only might the PPP loan not be forgiven, but the borrower could be penalized.

FAQ 46 brought relief for both eligible borrowers of less than \$2 million and those borrowing \$2 million or more (who have already been advised that their loans will be reviewed by SBA).

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The good news for borrowers who receive PPP loans with an original principal amount of less than \$2 million is the assurance that a safe harbor will apply to SBA’s review of such loans. A borrower that, together with its affiliates, borrowed less than \$2 million is deemed to have made the required certification concerning the necessity of the loan request in good faith.

And there is something for everyone in FAQ 46. For borrowers with loans greater than \$2 million, the guidance states that such borrowers who do not fall into the 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.” We therefore recommend that borrowers seeking loans in excess of \$2 million continue to make sure that they have adequate documentation concerning the necessity of the loan request.

Moreover, if SBA determines that a borrower lacked an adequate basis for the required certification, 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, 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. (Of course, if SBA finds other evidence of misbehavior or false certification by the borrower, nothing in FAQ 46 suggests that SBA will be precluded from pursuing the panoply of remedies available to the SBA.)

The SBA took only three weeks to move from its initial position on certifications and potential penalties (in FAQ 31) to its current position as articulated in FAQ 46. As with much of the response to the COVID-19 pandemic, the applicable regulations are fluid and can change from day-to-day. Be sure to contact your Pullman & Comley attorney if you have any questions.

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