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SBA Safe Harbor Does Not Guarantee Free Pass for COVID-19 PPP Borrowers

As you know, a short time ago, the Small Business Administration (SBA) published its long-promised guidance regarding its standard for reviewing each borrower's required "good faith" certification concerning the necessity of the Paycheck Protection Program (PPP) loan request.

> 46. **Question**: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?
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> **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 [by the SBA] to have made the required certification concerning the necessity of the loan request in good faith**.
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> 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.
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> 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.

Within minutes of the issuance of the guidance, we began reading suggestions by borrowers and advisors that there was no risk to the borrower or the individual making the required certification, even if no basis exists for the certification. We caution against reading this SBA guidance too broadly.

In our view, while this safe harbor should provide significant comfort to borrowers that are below the $2M threshold, this SBA guidance should not be read as a "get out of jail free" card. The SBA is not the only executive branch entity with the authority to bring action against a borrower. For example, in connection with all required loan certifications, including the good faith certification regarding necessity, the U.S. attorney's office can bring its own action under 18 U.S.C. § 1001 (criminal charge for knowingly making a false statement to influence an act of the SBA) or the False Claims Act (31 U.S.C. §§ 3729, et seq.).

This new guidance only suggests that the SBA is not going to pursue remedies other than repayment and will not make referrals based on the SBA's determination with respect to the certification concerning necessity. Other executive branch agencies are still allowed to make their own enforcement decisions. Furthermore, we continue to recommend that clients conduct due inquiry and analysis prior to making the certification, because the SBA can still determine that the borrower lacked an adequate basis for the required certification and demand repayment of the loan.

In short, the SBA guidance does not imply that no thought is necessary regarding the required good faith necessity certification. But, if the borrower, after reasonable inquiry, has formulated an honestly held subjective belief as to the truth of the matter asserted in the necessity certification, the consequences to the borrower of being second-guessed by the SBA appear (based on the FAQ) to be limited to (1) loss of forgiveness and (2) acceleration of loan maturity, so long as the borrower does not dispute the SBA's determination that a borrower lacked a good faith basis for the required certification. If the borrower wants to dispute the SBA's determination, it is free to do so, but the SBA then reserves its right to pursue an enforcement action and referral to other agencies.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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