

New PPP Loan FAQ: Limited Safe Harbors Related to Necessity Certifications

May 13, 2020

Today, the Small Business Administration (SBA) issued Payment Protection Program (PPP) [FAQ 46](#) providing limited safe harbors related to the necessity certification, but did not issue more clarifying guidance as to what constitutes necessity.

As discussed in our prior alerts on [April 23](#) and [April 24](#), and later extended on [May 5](#), the SBA specifically provided that any borrower that applied for a PPP loan prior to the issuance of FAQ 31 on April 23 will be deemed to have made the necessity certification in good faith if the loan is repaid in full by May 14, 2020 (per the May 5 extension).

Key takeaways from FAQ 46

- Any borrower that, together with its affiliates, received PPP loans having less than \$2 million in principal “will be deemed to have made the required certification concerning the necessity of the loan request in good faith.” Accordingly, absent other concerns around eligibility, miscalculations, actual bad faith or similar concerns, borrowers that, together with all applicable affiliates (determined in accordance with the previously discussed affiliation standards), have loans below \$2 million will not likely have substantial enforcement risk.
- Borrowers with loans over \$2 million “may still have an adequate basis” for making the required good-faith certification in light of individual circumstances. There is no further guidance or clarification on what would constitute an “adequate basis” for the certification. We continue to believe that, as described in our prior alert on [April 23](#), facts and circumstances, including considerations of cash runway/spend, access to other capital and impact to personnel, will be important to consider and document.
- The SBA will not pursue administrative enforcement or referrals to other agencies based on its determination regarding the necessity certification if the SBA notifies the lender that the SBA did not find an adequate basis for the necessity certification and the borrower repays the loan in full. Borrowers of over \$2 million should therefore consider promptly repaying if the SBA notifies them that they did not have adequate basis for the necessity certification to help limit further enforcement action.
- The SBA indicated that “all” loans over \$2 million will be subject to review, where the prior guidance suggested that those loans would be reviewed only upon an application for forgiveness.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as “Cooley”). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our [legal notices](#).

Key Contacts

Alfred Browne Boston	abrowne@cooley.com +1 617 937 2310
Craig Jacoby San Francisco	cjacoby@cooley.com +1 415 693 2147
Ryan Naftulin Washington, DC	rnaftulin@cooley.com +44 (0) 20 7556 4540
Peter H. Werner San Francisco	pwnerner@cooley.com +1 415 693 2172

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.