



REGULATORY UPDATE: SBA Issues Safe Harbor Guidance on Paycheck Protection Loans May 15, 2020

On May 13, 2020, the Small Business Administration (SBA) [issued guidance](#) in advance of the **May 18, 2020 deadline** for borrowers to return certain Paycheck Protection Program (PPP) loans. [The safe harbor deadline to return loans has been extended several times.]

The CARES Act and previous agency guidance required PPP borrowers to certify that (1) the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient; and (2) funds will be used to maintain payroll, pay mortgage interest, rent/leases, and utilities. The Act waived the requirement that the PPP loan be a last resort for financial assistance. However, the loan must meet actual need.

The May 13, 2020 guidance clarifies that PPP loans:

- (1) less than \$2 million will be deemed certified in good faith, but could be subject to review; and
- (2) in excess of \$2 million will be reviewed by SBA to ensure that the application met the attestation of need requirements.

Businesses have until May 18, 2020 to return loans that do not meet these requirements. If the business keeps a loan and the SBA determines that a loan application does not meet the need requirements, the SBA will ask for repayment of the outstanding loan balance and inform the bank that the loan is not eligible for forgiveness. If the business repays the loan, SBA will not refer the business for further action. This [Journal of Accountancy article](#) provides more information.

The TechServe Alliance Government Affairs Team will continue to monitor the ever-changing developments, including potential federal and state tax consequences of PPP loans, PPP loan forgiveness, the yet-to-launch Main Street Lending Program (which has a \$500,000 loan minimum), and the pending HEROES Rescue bill 4.0.

There are many provisions in HEROES that address concerns with PPP loans that have bipartisan support and could likely end up in the next law. At the same time, many of these HEROES provisions concern Treasury/SBA guidance on the CARES Act that Congress disagrees with; Treasury/SBA could change their own guidance. For example, the CARES Act provides up to 10 years to repay unforgiven portions of PPP loans; the SBA guidance provides only 2 years; and the HEROES Act mandates a minimum 5-year term.

We ask that members share their experiences and concerns with us so we can communicate effectively with policymakers. Please contact Government Affairs Representative Julie Strandlie at strandlie@techservealliance.org.

The new SBA guidance was added as Question #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,²⁰ 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.

Question #47:

Question: An SBA interim final rule posted on May 8, 2020 provided that any borrower who applied for a PPP loan and repays the loan in full by May 14, 2020 will be deemed by SBA to have made the required certification concerning the necessity of the loan request in good faith. Is it possible for a borrower to obtain an extension of the May 14, 2020 repayment date?

Answer: Yes, SBA is extending the repayment date for this safe harbor to May 18, 2020, to give borrowers an opportunity to review and consider FAQ #46. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor.

For more information, review TechServe Alliance's [Legislative & Regulatory updates](#).