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FAQs for PPP borrowers, safe harbor from SBA audit for “good faith” certification

The U.S. Treasury Department today posted an updated set of “frequently asked questions” (FAQs) concerning the Paycheck Protection Program (PPP) as administered by the Small Business Administration (SBA).

The PPP is one of two programs to provide approximately \$900 billion to support lending to both small and large businesses pursuant to measures included in the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) (Pub. L. No. 116-136).

The [FAQs](#) [PDF 120 KB] (updated May 13, 2020) now include FAQ #46 (full text of FAQ #46 is provided below).

- FAQ #46 provides a safe harbor from SBA audit for good faith certification of borrowers that received less than \$2 million under the PPP.
- FAQ #46 applies affiliate rules, so that it appears any borrowers with controlled entities that received loans totaling in aggregate more than \$2 million, will still be subject to SBA good faith certification audit. Borrowers receiving over \$2 million in PPP funds continue to be subject to SBA audit and will be required to demonstrate an adequate basis of need. There will be relief from enforcement actions as long as the PPP borrowers repay the loans if they are deemed to be ineligible.

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Full text of FAQ #46 is 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 (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.

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