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SBA Issues New FAQ on Review of Borrower PPP "Necessity" Certification

On April 23, 2020, the SBA issued FAQ No. 31 addressing the PPP loan application certification that “current economic uncertainty makes this loan request necessary to support the ongoing operations of the [a]pplicant,” commonly referred to as the “Necessity Certification.” FAQ No. 31 also stated that borrowers must make this representation in good faith after considering current business activity and other sources of liquidity “sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”

FAQ No. 46 Deemed Good Faith Certification for Certain Borrowers

The SBA issued FAQ No. 46 on May 13, 2020, providing that any borrower that, together with its affiliates, received a PPP loan or loans in an original principal amount of less than \$2 million will be deemed to have made the Necessity Certification in good faith. FAQ No. 46 does not provide any additional guidelines or standards for determining “sufficient liquidity” or what would be “significantly detrimental” to the business, and the standard set forth in FAQ No. 31 is still applicable for PPP loans in excess of \$2 million.

FAQ No. 46 makes clear that this safe harbor for loans of less than \$2 million does not foreclose the ability of borrowers with larger loans to make the Necessity Certification in good faith. FAQ No. 46 states that such borrowers may still have an adequate basis for making the Necessity Certification based on their individual facts and circumstances and after consideration of the Necessity Certification language and the SBA guidance.

For borrowers that the SBA determines did not make the certification in good faith, if the borrower repays the outstanding PPP loan balance upon

notification from the SBA of its determination, the SBA will not pursue administrative enforcement or referrals to other agencies based on the Necessity Certification. It is not clear if the repayment under this FAQ contemplates immediate repayment in full upon notification or repayment over the remaining term of the loan. The SBA will inform the lender of its determination that the borrower is not eligible for forgiveness.

FAQ No. 46 only applies to the Necessity Certification and does not apply to the other representations and certifications that the borrower made on the PPP application. The SBA retains the right to audit all PPP loans (including those under \$2 million) for compliance with the various eligibility requirements, including size and affiliation. Regardless of the amount of the PPP loan, all certifications and representations that the borrower made in the application should be accurate at the time of application.

Additionally, it is worth noting that the SBA's statement that it will not pursue administrative enforcement or referrals to other agencies related to the Necessity Certification does not eliminate the risk of the SBA pursuing an action or referral for another type of false certification by a borrower. It also does not eliminate the risk of civil or criminal legal action taken by another agency. Such referrals are only one manner by which such an investigation or action may be initiated. Other agencies, including the Department of Justice, are not precluded from conducting investigations or pursuing legal actions based on the SBA's statement in FAQ No. 46.

If the SBA determines that the Necessity Certification was not made in good faith, that determination alone will not affect the SBA's guarantee of the loan.

Contact us

If you have any further questions or require more information regarding this update, please contact Lauren Hawkins, Chrissie Simpson or your Husch Blackwell attorney.

Comprehensive CARES Act and COVID-19 Guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.