



This Legal Alert contains general advice and you should seek legal counsel regarding your specific circumstances. Also, the guidance provided below is the law as of May 14, 2020. In these uncertain times, the laws and regulations are constantly changing.

SBA Issues Additional Guidance on PPP “Necessity” Certification and Safe Harbor Deadline Extended to May 18, 2020

Jennifer L. Maffett-Nickelman, Esq., Riccardo M. DeBari, Esq., and
Suzanne C. McNabb, Esq., *Thompson Hine LLP*

Key Notes:

- The safe harbor deadline for return of PPP loans HAS BEEN EXTENDED TO MAY 18, 2020.
- Borrowers with PPP loan amounts of less than \$2 million (tallied across all affiliates) will be deemed to have made the “necessity” certification in good faith.
- For borrowers with PPP loans greater than \$2 million, if the SBA deems their “necessity” certification not to have been made in good faith, those borrowers may repay the loan, and if they do, the SBA will not pursue penalties or refer the matter to other agencies.

Prior legal updates, [Paycheck Protection Program Loans and Certifying “Necessity”: New Guidelines Highlight Potential Civil and Criminal Exposure Related to Obtaining PPP Loans](#) and [SBA Extends Safe Harbor Deadline from May 7 to May 14, 2020 for Return of Paycheck Protection Program Loan Funds and Promises Additional Guidance on the “Necessity” Certification Prior to New Deadline](#), detailed the additional guidance issued by the Department of the Treasury regarding the required certification of need for Paycheck Protection Program (PPP) loans, Treasury’s intent to audit all recipients of PPP loans of \$2 million or more and the potential civil and criminal liability that borrowers could face if it is determined they failed to certify in good faith that their PPP loan request is “necessary.” The Small Business Administration (SBA) has now issued its promised new guidance on the required certification of need.

The new guidance provides two primary rules. First, borrowers with loans of less than \$2 million dollars (aggregated with affiliates) will be deemed to have made the required certification of necessity in good faith. Accordingly, the SBA will not be reviewing or evaluating the certification of need made by borrowers with PPP loan amounts of less than \$2 million dollars. That \$2 million threshold will be calculated by adding together all PPP loans received by a borrower and any other borrower deemed to be an affiliate based on prior guidance and existing SBA regulations (see [CARES Act: Paycheck Protection Program - Forgivable Loans for Small Businesses](#)).



Second, while borrowers with loan amounts of more than \$2 million will still be subject to an audit to determine compliance with all PPP requirements, if the SBA determines that the “borrower lacked an adequate basis for the required certification concerning the necessity of the loan request,” the SBA will notify the borrower and the lender and seek repayment of the loan. If the borrower repays the loan upon receipt of that notice, the 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.” The guidance further clarifies that any determination concerning the certification regarding the necessity of the loan request will not affect SBA’s loan guarantee. Accordingly, it appears from this new guidance that, so long as the borrower repays the loan upon notice that the SBA has determined the borrower’s necessity certification was not made in good faith, the SBA will not pursue any further civil or criminal fines or penalties. These limited penalties are specific to review of the necessity certification only, and do not appear to apply to other false statements in the loan application or misuse of PPP funds. Similarly, the SBA’s notice that they will not pursue penalties or refer the matters to other governmental authorities does not necessarily insulate borrowers from all liability from other sources.

While the guidance does not specifically state what the repayment terms would be in the event the SBA requests repayment after an audit, borrowers could fairly assume that a prompt, lump-sum payment, including all accrued interest, would be required. The guidance speaks in terms of loans less than or greater than \$2 million, but we recommend any borrower with a loan in the exact amount of \$2 million prepare for an audit and assume it will not receive the benefit of the deemed good faith certification of need.

This additional guidance also does not provide borrowers with aggregate loans in amounts in excess of \$2 million any further guidance as to what the SBA will consider when evaluating whether the certification of need was made in good faith. Accordingly, all recipients of PPP loans in the amount of \$2 million or more (including all loans to affiliates) should carefully consider the ramifications of retaining PPP loan funds as outlined in our [prior legal update](#). These recommendations include close review of the Treasury Interim Final Rules on the PPP and related guidance, and reconsideration of the necessity of the PPP loan in light of all available guidance by the borrower’s management and board. In doing so, loan recipients should clearly document their analysis and rationale supporting the necessity of the loan, taking into account the borrower’s current business activity and its ability to access other sources of liquidity sufficient to support its ongoing operations in a manner that is not significantly detrimental to the business. Failure to certify necessity in good faith will give rise to denial of PPP loan forgiveness.



Need Legal Advice?

If you are a PBPO client and have questions regarding the content of this article or need legal assistance, please email us at info@pbpohio.org.

Not a client? Apply to become a client by submitting a [Request for Legal Assistance online](#), or contact us at info@pbpohio.org.

About the Authors:

Jennifer L. Maffett-Nickelman - Jennifer is a partner in the firm's Corporate Transactions practice group. She leads the firm's franchise practice, representing franchisors and advising them on their compliance and registration needs, operational issues and strategies and best practices to limit disputes with regulators and franchisees, as well as any disputes that do inevitably arise.

Riccardo M. DeBari - Rich is a partner in the firm's Business Litigation practice group. His practice spans many areas of complex civil litigation and commercial arbitration, including broker-dealer litigation and securities law, white collar defense and investigatory matters, commercial contract actions and product liability.

Suzanne C. McNabb - Suzanne is senior counsel in the firm's Corporate Transactions & Securities practice group. She focuses her practice on general corporate counseling, commercial finance transactions, mergers and acquisitions, and corporate governance.