

## **SBA Extends Safe-Harbor Deadline to May 14 Amid Eligibility Confusion**

**Mark Heimendinger & Ferran Arimon**

May 06, 2020



By: Mark Heimendinger & Ferran Arimon

On May 5, the SBA published FAQ #43 of the Paycheck Protection Program Frequently Asked Questions (FAQ), extending the safe-harbor repayment deadline for PPP loans from May 7 to May 14. Borrowers who applied for a loan prior to April 24, 2020, and repay it in full by May 14, 2020, will be considered to have made the required certification of economic need in good faith.

Given the many questions that have arisen regarding what qualifies as "need" for potential borrowers, FAQ #43 also promises additional guidance on how the SBA plans to review the certification regarding necessity of the loan prior to May 14.

The extension comes in the wake of unclear eligibility guidelines set forth in FAQ #31 that seem to contradict the plain language of the CARES Act which waives the "credit elsewhere" requirement for loan eligibility.

Published on April 31, FAQ #31 reiterated that borrowers are required to make a good faith certification that "[c]urrent economic uncertainty makes this loan request

necessary to support the ongoing operations of the Applicant."

When determining whether the loan is "necessary," the SBA suggested borrowers take into account their current business activity and their ability to access other sources of liquidity sufficient to support ongoing operations in a manner that is not "significantly detrimental" to the business.

While FAQ #31 clearly stated that public companies are likely not eligible for PPP loans, it provided no guidance for private companies with alternative sources of funding. Further, the SBA provided no quantifiable guidance as to what makes a loan "necessary" and what is considered "significantly detrimental."

On April 28, the SBA published FAQ #37 - "Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?" In response the SBA provided no additional guidance and referred back to the vague answer set forth in FAQ #31.

While current SBA guidance makes it clear that public companies who received PPP loans by utilizing the affiliation waiver need to revisit their application and determine whether they can in "good faith" establish a basis for necessity, we encourage other companies to revisit their application and evaluate the necessity of the PPP loan as we await additional guidance.

An analysis should include the impact, and projected impacts, of COVID-19 on the company's revenues, expenses and profitability, as well as the impact a PPP loan would have on the company's supply chain and employees. For example, absent a PPP loan, would the company have otherwise instituted layoffs or additional layoffs, and/or delayed any rehiring of employees who have already been laid off?

It would be prudent for any company who has applied for a PPP loan to engage counsel and other advisors, such as an experienced accounting firm, to assist with these analyses.

Be sure to visit our Coronavirus (COVID-19) Resource Center to keep up to date on the latest news.