

COVID-19 Alert

CARES ACT PAYCHECK PROTECTION PROGRAM LOANS
MAY 6, 2020 UPDATE

MAY 2020

This continues our effort to provide up-to-date information on the Paycheck Protection Program (PPP) loan offerings created by the CARES Act and overseen by the Small Business Administration (SBA) in consultation with the Department of the Treasury. For background, please see our prior pieces from our website on [April 1, 2020](#), [April 3, 2020](#), [April 9, 2020](#), [April 16, 2020](#), [April 24, 2020](#), and [May 1, 2020](#).

HAS ANYTHING CHANGED?

Yes. SBA has issued additional [FAQs](#) on the so-called “necessary” certification, as well as certain other discrete matters.

WHAT IS NEW ON THE “NECESSARY” CERTIFICATION?

Our [last article](#) discussed the required borrower certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant” set forth in SBA’s model loan application. FAQ 31, issued April 23, 2020, caused borrowers to re-think the meaning of this certification. It also allowed borrowers until May 7, 2020, to repay their PPP loans, in which case the repaying borrowers will be deemed to have made the required certification in good faith. This May 7 safe harbor was given legal force in an Interim Final Rule published April 28, 2020.

New FAQ 43 issued May 5, 2020 extends the safe harbor period out from May 7 to May 14, 2020, and states that this will be formalized in a revised Interim Final Rule. It also states that SBA intends, prior to May 14, 2020, to provide additional guidance as to how it will review the “necessary” certification: The full text of the answer to FAQ 43 is:

ANSWER: SBA is extending the repayment date for this safe harbor to May 14, 2020. 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. SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020.

We will be on the lookout for the additional guidance.

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WHAT ELSE IS NEW?

Our [original piece](#) provided an overview of the PPP program, including how to calculate the amount of a loan that may be forgiven and limitations on forgiveness. A key limitation on forgiveness results from a reduction in full-time equivalent employees (FTEs). In FAQ 40, SBA has provided some additional guidance. An employer will not be treated as having a reduction in FTEs on account of any employees who have been laid-off, offered a chance to return to work, and elected not to return.

FAQ 42 addresses whether certain nonprofit hospitals qualify as eligible borrowers. Specifically, SBA has elected to treat as eligible borrowers nonprofit hospitals exempt from taxation under Internal Revenue Code (Code) section 115, despite not being formally recognized by the Internal Revenue Service as tax exempt under Code Section 501(c)(3) due to a failure to seek that recognition, so long as the hospital “reasonably determines, in a written record maintained by the hospital, that it is an organization described in section 501(c)(3) of the Internal Revenue Code...” Note that this only speaks to the nonprofit element of eligibility and not other factors such as size, taking into account affiliation rules.

FAQs 41 and 44 address specialized issues for seasonal employers and the application of SBA affiliation rules for potential U.S. borrowers with foreign affiliates.

FINAL THOUGHTS

While we await SBA’s promised additional guidance on the “necessary” certification, some borrowers who originally sought PPP loans in perfectly good faith have already returned them in light of FAQs 31 and 37. They are now foreclosed from reapplying to the PPP under current terms, even if the new guidance lends credence to their initial “necessary” determination. Those who have not yet acted are best served by continuing to document why their loans are in fact necessary, and preparing to re-evaluate in light of the promised guidance.

We are interested to hear your experiences with the PPP.

Please contact the Reid and Riege attorney with whom you regularly work, or a member of our Business Services practice listed to the right, for more up to date information, or questions about your unique circumstances.

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