



ATTORNEYS AT LAW

FAQ #46: WELCOMED NEWS FOR MANY PPP BORROWERS

By: Anthony J. Vizzoni, Esq., Partner, Becker LLC

On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”) was signed by President Trump. The CARES Act created a new Small Business Administration (“SBA”) loan program known as the Paycheck Protection Program (“PPP”) which has provided billions of dollars in potential forgivable loans to businesses for purposes of maintaining and restoring jobs to their employees.

In order to obtain a PPP loan, applicants must provide several certifications as part of the application process. One such certification is that *“current economic uncertainty makes this loan request necessary to support ongoing operations of the Applicant.”*

On April 23, 2020, the SBA provided additional guidance to address questions concerning the economic need of the PPP loan applicants by publishing FAQ #31. FAQ #31 created havoc for borrowers by adding a new liquidity element to the current economic uncertainty loan necessity certification of the applicant. In FAQ #31, the SBA provided for a safe harbor date of May 7, 2020 (later extended to May 14, 2020) for those borrowers that wished to return their PPP loan funds as a result of the guidance provided in FAQ #31. Thereafter, FAQ #39 published on April 29, 2020, provided that all PPP loans in excess of \$2 million would be reviewed by the SBA to ensure compliance with PPP eligibility requirements, specifically as to the financial need element.

On May 13, 2020, the SBA published further guidance as FAQ #46. Newly published FAQ #46 asks ***“How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?”***

The answer provided states:

“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, 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.

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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." [Emphasis Added]

So while FAQ #31 has certainly created reason to pause for those borrowers who relied on the certifications in the SBA Form 2483 application, FAQ #46 now provides some peace of mind as to those borrowers that have received PPP loans under \$2 million. This new safe harbor certainly makes much practical sense in light of the goals of the PPP to promote economic certainty for businesses with limited financial resources. Further, as is stated in FAQ #46, with millions of individual PPP loans having been approved in funding totaling hundreds of billions of dollars, the SBA will certainly have its hands full even with limited reviews as to those loans in excess of \$2 million. Interestingly, FAQ #39 refers to SBA reviews for PPP loans in excess of \$2 million, while FAQ #46 places the safe harbor at loans less than \$2 million as opposed to \$2 million or less.

Also worth noting from FAQ #46, the SBA has provided some limited but additional guidance as to those borrowers that the SBA deems as having failed to meet the good faith certification. Specifically, the SBA advises that if the borrower repays the PPP loan amount after receiving notice from the SBA that the borrower lacked the adequate basis for a good faith certification, the SBA will not pursue other enforcement matters or referrals to other agencies such as the Office of Inspector General.

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About the Author:



About Anthony J. Vizzoni, Esq.:

Anthony is Chair of the Firm's Business Services Group and a member of the Firm. He primarily focuses his practice on corporate transactional matters, complex financing transactions and commercial real estate. Mr. Vizzoni has over 30 years' experience in the practice of law and the area of financing.

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