



SBA Extends PPP Loan Safe Harbor Deadline to May 14, 2020 and Issues Other Guidance

05.08.2020 | By [Anna C. Tang](#)

Businesses that accepted a Paycheck Protection Program (“**PPP**”) loan are on the clock. Earlier this week, the Small Business Administration (“**SBA**”) issued Frequently Asked Question (“**FAQ**”) 43. In this latest FAQ, the SBA extended the safe harbor deadline to return PPP loan funds from May 7, 2020 to May 14, 2020.

As indicated in our last *eAlert* containing updates to the PPP, the SBA on April 23, 2020 issued FAQ 31 which effectively imposed a new eligibility test for PPP loan funds. While FAQ 31 appears to refer only to public companies, the language of the answer applies to all borrowers. In submitting a PPP loan application, FAQ 31 provides that you are required to certify in good faith that “current economic uncertainty makes the loan necessary to support your ongoing business operations.” In determining if you are eligible for a PPP loan, you need to take into account your current economic business activity. You must also assess your ability to access other sources of liquidity sufficient to support your ongoing business operations in a manner that is not significantly detrimental to the business. In addition to imposing the additional eligibility test, FAQ 31 also introduced a safe harbor deadline of May 7, 2020 for the return of PPP loan proceeds. Under the safe harbor, if you applied for a PPP loan prior to April 24, 2020 and repay the loan in full by May 7, 2020, you will be deemed by the SBA to have made the required certification in good faith.

Since our last *eAlert*, the SBA has continued to issue additional guidance relating to the new eligibility test. On April 28, 2020, the SBA issued FAQ 37 confirming that the new eligibility test also applies to private companies. On April 29, 2020, the SBA issued FAQ 39 in which the SBA determined that it “will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender’s submission of the borrower’s loan forgiveness application.” The SBA stated that it will be issuing additional guidance implementing this review procedure. Late on May 5, 2020, the SBA issued FAQ 43 extending the safe harbor deadline to return PPP loan funds from May 7, 2020 to May 14, 2020.

Since their issuance, FAQs 31 and 39 have created more frustration and confusion than they have provided answers. For example, what does “ability to access other source of liquidity” mean? Do you need to use up your line of credit and/or seek bridge loans and/or ask for additional equity investment first? Until further guidance is issued, borrowers are faced with a very difficult choice – do they keep the PPP funds and risk that the SBA may later hold the unclear guidance against them, or do they return the funds and accept the resulting negative impacts, including lay-offs and/or possible permanent business closure? The SBA has at least extended the safe harbor deadline to May 14, 2020, but has not yet responded to these borrower concerns.

We can only hope that the SBA will issue additional guidance to confirm the parameters under which businesses can in good faith certify the need for a PPP loan. In the meantime, if you applied for a PPP loan but now wonder if you made the right decision, here are a couple of things to do today to reduce the chance of becoming the target of an expensive federal investigation later down the road:

1. Check again to make sure you qualify. Scrutinize your application in light of the revised FAQs and all the SBA's Interim Final Rules issued to date to confirm your eligibility for a PPP loan. FAQ 31 highlights that applicants must assess “their ability to access other sources of liquidity sufficient to support their ongoing operations” as part of the certification before attesting to eligibility to receive PPP funds. For example, although some public companies applied for PPP loans, the SBA states it is “unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith.” The SBA also expressly states that venture capital and private equity firms are ineligible for PPP loans. However, their portfolio companies may still be eligible, provided they (i) satisfy PPP criteria, taking into account the affiliation rules, and (ii) are able to certify that they have a good faith basis to assert that the funds are “necessary to support the ongoing operations” of the applicant.
 - The PPP rules, requirements and guidance are less than perfect. Recklessly disregarding them can bring scrutiny from various agencies and trigger a criminal investigation. Take time now to give your application and the basis for which you believe you satisfied the eligibility criteria a second, careful examination to be sure you want to pursue a PPP loan and/or keep the money already received.
2. Return the money by May 14, 2020. If you decide you do not qualify or you do not want to risk scrutiny, return the PPP money by May 14, 2020. If you meet the return deadline, the SBA will deem your application to have been made in “good faith.” While this finding does not bind any other federal agency that may want to investigate the loan application, it will likely reduce the heat around an improper application and will bind the SBA.
3. Keep a thorough written record. Do not forget to document and save a written record of not only your loan application, but also all articles, FAQs, internet searches, PDF guidance, advice, notes, emails, drafts, and other materials upon which you relied in order to prepare your application. These resource materials are useful contemporaneous evidence to help explain what you understood at the time you applied for the loan and what you understood when you considered whether to return the funds. It can also help you remember years later if an issue arises.

Other SBA Guidance

In addition to FAQs 31, 39 and 43, since our last eAlert, the SBA has continued to issue additional guidance generally with respect to PPP loans. The most significant are:

- For purposes of determining PPP loan eligibility under the 500-employee threshold established under the CARES Act:
 - An applicant must calculate the total number of employees, including part-time employees; this is compared to loan forgiveness, i.e., for purposes of determining whether the loan forgiveness amount will be reduced in the event of a reduction in headcount; a borrower must look at their number of full-time

equivalent employees (FAQ 36).

- Student workers generally count as employees unless the applicant is a higher education institution and the student worker's services are performed as part of a Federal Work-Study Program (Interim Final Rule – Nondiscrimination and Additional Eligibility Criteria).
- A business that was in operation on February 15, 2020 will continue to remain eligible for PPP loan funding, irrespective of any change in ownership after that date. This is the case even if the change in ownership results in the assignment of a new tax ID number (FAQ 38).
- The eight-week covered period commences on the date the PPP loan is disbursed, with disbursements to be made in one single lump sum within 10 calendar days of loan approval, i.e., when the loan is assigned a loan number by the SBA (Interim Final Rules on Disbursements).
- For businesses that are part of a single corporate group, the maximum aggregate PPP loans that the group can receive is capped at \$20 million. Businesses form part of a single corporate group if they are majority owned, directly or indirectly, by a common parent. The cap applies to any PPP loan that was not fully disbursed as of April 30, 2020 and is intended to ensure that PPP loan funds are available to the largest number of borrowers, consistent with the CARES Act (Interim Final Rule – Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders).
- A borrower's PPP loan forgiveness amount will not be reduced if the borrower laid off an employee and then makes a written offer in good faith to rehire the employee but the employee rejects the offer (FAQ 40). The SBA notes that it intends to issue an interim final rule granting de minimus exemptions from the CARES Act's limit on loan forgiveness.

While the above guidance may provide some clarity, the SBA has not spelled out many details surrounding the PPP. For example, we are still waiting on the SBA's guidance on loan forgiveness. The Nossaman CARES Act team will continue to provide further updates if and when further guidance is issued.

This article is not intended to be an exhaustive summary of the PPP or the information contained in the Interim Final Rules or FAQs. Readers are encouraged to click on the links above and visit the SBA's website for more complete and up-to-date information regarding the PPP.