

SBA ISSUES UPDATED PPP FAQ AND CLARIFIES INTERPLAY BETWEEN THE NECESSITY CERTIFICATION AND 25% REVENUE REDUCTION TEST FOR SECOND DRAW LOANS

Hodgson Russ COVID-19 Litigation and Employment Action Team Alert
March 11, 2021

Borrowers seeking to apply for First Draw Paycheck Protection Program (PPP) loans or Second Draw (PPP2) loans are required to certify on loan applications that “current economic uncertainty makes this loan request necessary to support the ongoing operations” of the borrower or applicant. That “necessity certification,” as it has come to be known, is riddled with amorphous language that has proven to be a source of confusion and ambiguity for borrowers from its inception. The SBA initially offered vague, interpretive guidance to public and private companies by stating that “borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.” *See* FAQ 31 (April 23, 2020) and 37 (April 28, 2020). SBA subsequently indicated that it will review the certifications of borrowers who, together with their affiliates, took PPP loans of \$2 million or more, but those borrowers who took loans below that threshold presumptively “will be deemed to have made the required certification concerning the necessity of the loan request in good faith.” *See* FAQ 39 (April 29, 2020) and FAQ #46 (May 13, 2020). While the SBA was clear about which group of borrowers it intended to target for review of the certification, the SBA has yet to articulate in a meaningful or defined way how it will gauge or test an individual borrower’s necessity certification.

The SBA developed Loan Necessity Questionnaires (SBA Forms 3509 and 3510) in the Fall of 2020 that require borrowers with loans in excess of \$2 million to complete and provide information and data about business activities and liquidity. Our alert on this topic can be found [here](#). The SBA has stated that the Forms are intended to assist the SBA assess a borrower’s necessity certification “based on the totality of the borrower’s circumstances through a multi-factor analysis.” *See* FAQ 53 (December 9, 2020). But how the SBA intends to use that information still remains a bit of a mystery, as the SBA has not issued guidance on the content of the Forms, described how the responses to these questions fit into the “multi-factor analysis,” or explained how they bear on the propriety and borrower’s good faith underlying the necessity certification. For example, the first question on Form 3509 asks the borrower to state

Attorneys

Brad Birmingham
Jane Bello Burke
Ryan Cummings
Glen Doherty
Reetuparna Dutta
Christofer Fattey
Joseph Goldberg
Patrick Hines
Charles H. Kaplan
Ryan Lucinski
Charles Malcomb
Jason Markel
Christopher Massaroni
Michael Maxwell
Elizabeth McPhail
Adam Perry
Christian Soller
Valerie Stevens
Melissa Subjeck
James Thoman
Michael Zahler
Benjamin Zuffranieri Jr.

SBA ISSUES UPDATED PPP FAQ AND CLARIFIES INTERPLAY BETWEEN THE NECESSITY CERTIFICATION AND 25% REVENUE REDUCTION TEST FOR SECOND DRAW LOANS

gross revenues in Q2 2019 and Q2 2020. While the raw numbers are subject to a facial comparison, the questionnaire asks for no other information or explanation about that data.

The necessity certification is not only a First Draw PPP issue. The same certification carries over to the Second Draw PPP2 loan applications, leaving would-be borrowers again scratching their heads as to its meaning and significance. Perhaps adding to the confusion, PPP2 loan eligibility rules already require a borrower to demonstrate a 25% “gross receipts” revenue reduction. So is there a relationship between both concepts? The SBA’s latest March 3, 2021 version of the FAQ provides some guidance on that issue. The revised FAQ adds nine new questions and answers, and also updates numerous prior FAQ responses to conform to the Economic Aid Act to Hard-Hit Small Businesses, Nonprofits, and Venues Act and updated Interim Final Rules. Included in the updates is a revised FAQ 46 response addressing the interplay of the necessity certification for PPP2 purposes relative to the 25% revenue reduction eligibility test. FAQ 46 now includes the following additional paragraph:

For Second Draw PPP Loans, 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.” ***Because Second Draw PPP Loan borrowers must demonstrate that they have had a 25% reduction in gross revenues, all Second Draw PPP Loan borrowers will be deemed to have made the required certification concerning the necessity of the loan in good faith.*** The loan amounts received by borrowers for First Draw PPP Loans and Second Draw PPP Loans will not be aggregated. (Emphasis added).

For those careful and cautious borrowers grappling with the meaning of the necessity certification in the context of PPP2 loans, this guidance provides welcomed clarity. Borrowers who meet the 25% revenue reduction eligibility test now have a level of assurance from the SBA that the necessity certification will not be subject to later second-guessing.

Neither revised FAQ 46, nor any other updated FAQ answer, explicitly offer anything new or instructive about how the necessity certification will be tested by the SBA for purposes of First Draw PPP loans. But does the SBA’s interpretation potentially mean more than it says on its face? Is there an implicit inference to be drawn from the presumption of good faith, at least with respect to those borrowers qualifying for PPP2 loans? PPP2 eligibility is intended to be narrower and more limited than eligibility for the original round of PPP loans. Therefore, if satisfying the PPP2 revenue reduction is deemed presumptively adequate to establish that the necessity certification was made in good faith for purposes of a new PPP2 loan, doesn’t that also impliedly suggest that the certification should be deemed in good faith for the original PPP loan, even if it was over \$2 million? Perhaps at the very least, there is an argument to be made. Notably, FAQ 53 (December 9, 2020), which addresses the purpose and use of the Loan Necessity Questionnaire, leaves open the possibility for the SBA to consider circumstances both before and after the borrower’s certification:

This certification is required to have been made in good faith at the time of the First Draw PPP Loan application, even if subsequent developments resulted in the loan no longer being necessary. In its review, SBA may take into account the borrower’s circumstances and actions both before and after the borrower’s certification to the extent that doing so will assist SBA in determining whether the borrower made the statutorily required certification in good faith at the time of its First Draw PPP Loan application.

SBA ISSUES UPDATED PPP FAQ AND CLARIFIES INTERPLAY BETWEEN THE NECESSITY CERTIFICATION AND 25% REVENUE REDUCTION TEST FOR SECOND DRAW LOANS

If the SBA is apparently not constraining itself to look only at the totality of the circumstances as they existed at the time of the original PPP application, shouldn't the borrower be permitted the same license on the back end? Indeed, while many of the liquidity assessment questions in Forms 3509 and 3510 target the date of the loan application or the covered period, most of the business activity assessment questions apply to the period after March 13, 2020. Thus, the impacts on the business over the course of 2020, including declining revenues or receipts, would seem to be an important consideration.

One of the other interesting FAQ updates is #47. The question focuses on the safe harbor created in previous interim final rules which provided that a borrower who initially took a First Draw PPP loan, but returned the proceeds by May 14, 2020, would be deemed by the SBA to have made the required necessity certification in good faith. FAQ question 47 asks whether a borrower may obtain an extension of the May 14, 2020 repayment date. The SBA's response says "yes", but doesn't exactly answer that question with its response, except to state that the repayment date was extended to May 18, 2020 through a revision to the interim final rule. Borrowers concerned about whether they perhaps should have repaid the proceeds, or the consequences of not doing so by May 18, 2020, should be mindful of the following statement included in the SBA's response to FAQ 46: "If the borrower repays the First Draw PPP 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." While that language is not an extension of the repayment window per se, a borrower who is deemed ineligible by SBA on necessity certification grounds may still be able to mitigate adverse consequences by timely repayment upon notice of such determination.

Given SBA's position on the issue, it would seem a fair question to ask why SBA did not simply create a new amnesty window for borrowers (both large and small), who have not yet submitted forgiveness applications, to just pay back the loan proceeds in full. A simple repayment option could potentially save administrative hassle, time, and cost to borrowers, lenders, and SBA to prepare, submit, review, and determine forgiveness applications. Perhaps SBA will reconsider its approach in further guidance or rules.

If you have questions about the PPP or PPP2 loan eligibility or forgiveness; or concerns about strategies to better protect your business from SBA review or other government scrutiny relating to your PPP or PPP2 loans, please call [Jason Markel](tel:716.848.1395) (716.848.1395), [Reetuparna Dutta](tel:716.848.1626) (716.848.1626), or [Benjamin Zuffranieri](tel:716.848.1469) (716.848.1469).