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SBA Issues New Safe Harbor for the Necessity Certification for Paycheck Protection Program Loans – Updated 5/14/20

On May 13, 2020, the Small Business Administration (SBA) issued FAQ #46 providing relief to those borrowers who struggled with the SBA's prior guidance concerning the certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant" and whether the borrower should return the funds by, what was then, the May 14 safe harbor. The May 14 deadline has also now been extended to May 18.

FAQ #46 grants a new safe harbor: **"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."** The SBA has determined that borrowers that fall below the \$2 million loan amount are generally less likely to have adequate sources of liquidity in the current economic environment. It is very important to note however that the \$2 million threshold is determined by aggregating the loans received by all affiliates (using the SBA's affiliation rules applicable to the Paycheck Protection Program). While borrowers with loans below \$2 million should still make certain the original certification is accurate, there is not a need to re-analyze the decision and examine other sources of liquidity as most were doing in response to the prior guidance issued on April 23, 2020 (FAQ #31).

FAQ #46 also provides relief for borrowers with loans of \$2 million or more. For these borrowers, if the SBA determines that the borrower did not have an adequate basis to make the original certification, the SBA will seek repayment of the loan and the loan will not be forgiven. If the borrower repays the loan as requested, the SBA will not pursue enforcement or refer to the matter other agencies to enforce. In other words, the potential civil monetary or criminal penalties will not be pursued by the SBA with respect to

the original certification concerning necessity. Please note that this guidance from the SBA does not preclude other agencies from pursuing enforcement, even without the SBA referring the matter to the other agency. Further, the SBA may still pursue enforcement and associated penalties with respect to other certifications, eligibility, loan amount calculations, etc.

Borrowers with loans of \$2 million or more may still qualify for the safe harbor originally issued on April 23 in FAQ #31. This safe harbor continues to require that the borrower return the full amount of the loan proceeds. The SBA has now extended the repayment date to May 18 so that these borrowers can include the impact of FAQ #46 in their considerations.

For lenders, FAQ #46 also declares that any determination by the SBA concerning whether there was an adequate basis for a borrower to make necessity certification will not affect the SBA's guarantee of the loan. While lenders were already entitled to rely on the certifications made by the borrowers, this statement provides additional clarity that a lender is not obligated to re-examine the basis for the certification.

For more information, please contact [Shannon Kuhl](#), [Rebecca Moore](#), or any attorney on Frost Brown Todd's [Financial Services](#) industry team.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#), including a special team focusing on SBA funding options under the CARES Act. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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