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Client Alert: Small Business Administration (SBA) Releases Guidance on Paycheck Protection Program (PPP) Certification Standards

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On May 13, 2020, the SBA updated its PPP Frequently Asked Questions document ("FAQ") to provide guidance and a safe harbor for the PPP certification standards.

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." On April 23, 2020, the SBA updated the FAQ document to add number 31, which suggests that public companies with access to capital markets may not be able to make the certification in good faith. Less than a week later, the SBA added FAQ 37 to impute the same standard on "businesses owned by private companies" followed by FAQ 39, which insinuated that *all* borrowers had to be mindful of whether the certification was made in good faith. The SBA allows borrowers to repay PPP loans by May 14, 2020 to avoid any issues with the certification standards and to instead be eligible for the Employee Retention Credit created under section 2301 of the CARES Act.

The latest update added FAQ 46, which states that 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 relevant certification in good faith.

For borrowers that, together with their affiliates, received loans in excess of $2 million, if the SBA determines the borrower lacked the adequate basis for the certification, the SBA will inform the borrower that no part of the loan will be forgiven and will request the borrower to repay the outstanding PPP loan balance. If the borrower repays the loan after receiving notification from the SBA, the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination.

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