

## **WEBSTER, CHAMBERLAIN & BEAN, LLP | NONPROFIT ALERT**

### **Recent Guidance Regarding the Paycheck Protection Program's "Need" Certification and PPP Loan Eligibility.**

In March, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act to blunt the impact of an economic downturn created by the COVID-19 pandemic. Included in the CARES Act is the Payment Protection Program (PPP), a program overseen by the U.S. Small Business Administration (SBA), aimed at providing financial relief to small businesses, including some non-profit organizations, affected by COVID-19 through forgivable loans.

The PPP loan application requires all applicants to certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” This ambiguous requirement has created some uncertainty among applicants and caused SBA to issue updated guidance.

On April 23, SBA clarified what the “need” requirement means for an applicant stating, “[b]orrowers must make this [need] 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.” The SBA established a “safe harbor” for borrowers who applied for a PPP loan before April 24, 2020 if they repay their PPP loans in full by May 14, 2020, they will be deemed to have met the “need” certification in good faith.

On May 13, SBA provided additional guidance as to how it will review the "need" certification. SBA, in consultation with the U.S. Department of Treasury, clarified 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 required certification concerning the necessity of the loan request in good faith.” SBA determined that the \$2 million threshold 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.” See FAQ #46 - [https://www.sba.gov/sites/default/files/2020-05/Paycheck-Protection-Program-Frequently-Asked-Questions\\_05%2013%202020.pdf](https://www.sba.gov/sites/default/files/2020-05/Paycheck-Protection-Program-Frequently-Asked-Questions_05%2013%202020.pdf)

Taking the April and May SBA guidance documents together, a borrower who applied for a PPP loan before April 24, 2020, and repays their loan in full by May 14, 2020, or a borrower who received a PPP loan with an original principal amount of less than \$2 million, will be deemed to have met the prescribed “need” safe harbors. These safe harbors provide clarity for PPP borrowers that their good faith “need” certification will not be questioned by the SBA.

Of note, PPP loans greater than \$2 million will be subject to review by SBA for compliance with PPP program requirements. FAQ #46 provides that if during a compliance review the SBA determines that a borrower lacked an adequate basis for the required “need” certification, 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.

Large borrowers (with loans in excess of \$2 million) should quickly re-evaluate their ability to make the “need” certification in the PPP loan application prior to the safe harbor date expiring May 14<sup>th</sup>. This evaluation should include, but not be limited to, the borrower’s “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.”

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