

Insights, News & Events

BUSINESSES THAT OBTAINED PPP LOANS UNDER \$2M WILL NOT BE AUDITED (UPDATED)

Insights
May 14, 2020

One long week after the U.S. Treasury announced that it was extending the Paycheck Protection Program Loan “safe harbor” deadline to May 14, the U.S. Treasury [announced this morning](#) that borrowers whose loan amount (combined with the loan amount of any affiliates) is less than \$2 million is automatically deemed to have made the certification in good faith. There’s also good news for borrowers whose loan amounts are in excess of \$2 million. [The announcement](#) makes clear that such borrowers that do not return PPP loan funds by May 14 may still have an adequate basis for making the required good-faith certification. As long as their business activity and ability to access other sources of liquidity at the time they applied for the PPP loan were insufficient to support their ongoing operations in a manner not significantly detrimental to the business, they can now feel confident in their ability to demonstrate good faith.

[Ed. Note: Late in the day on May 13, the Treasury Department [once again extended the repayment date of the safe harbor from May 14 to May 18 to give borrowers an opportunity to review and consider this announcement.](#)]

HOW DID WE GET HERE?

On April 23, 2020, [the Treasury issued a warning to all borrowers](#) noting that businesses are required to “assess their economic need for a PPP loan” before submitting a PPP loan application” and must take “into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a

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manner that is not significantly detrimental to the business.” This guidance was without question issued in response to public backlash over large, public companies receiving PPP loans.

Significantly, Frequently Asked Question #31 was materially different than the black letter law of the CARES Act. The statute states that “a borrower need only certify that the loan was needed because “current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.””

While undoubtedly moving the goal post after several borrowers had already certified their need for the loan, the Department of Treasury [provided an escape hatch](#) and announced that borrowers could return the loan funds by May 7, 2020, no questions asked. FAQ 31 caused extreme confusion, panic, and frustration for all borrowers. Many simply returned the funds, unwilling to deal with the risk and uncertainty of a future federal audit.

Not to be outdone by FAQ #31, [Secretary Mnuchin announced](#) days later that borrowers who received loans in excess of \$2 million would be subject to a “full audit” and potential criminal penalties, and left open the door to all borrowers being subject to an audit. On May 5, the Federal Bureau of Investigation arrested two New England business owners who obtained PPP loans for business that were not in operation prior to the pandemic and had no employees. Charged with conspiracy to make false statements to influence the SBA and conspiracy to commit bank fraud, the conduct attributed to these business owners is an extreme example of “what not to do,” but still left small business owners uneasy.

Today’s Announcement

On May 6, the Treasury Department issued an update to its [“Frequently Asked Questions,”](#) extending the safe harbor period to return PPP funds from May 7 to May 14, with additional guidance promised before May 14. Today’s announcement, in the form of the addition of a new FAQ #46, offers that expected guidance and ends the rollercoaster ride of uncertainty that many borrowers had been experiencing for the past several weeks.

The new information also confirms that borrowers that believe they made the certification in good faith will

seemingly be given some leeway before the government imposes any penalties. If the borrower is subsequently determined to lack adequate basis for the good-faith certification, the SBA will require the loan be repaid while informing the appropriate lender that the loan is not eligible for forgiveness.

CONCLUSION

Fisher Phillips' SBA Loan Team will continue to monitor the ever-changing COVID-19 situation and provide updates. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information.

For further information, contact your Fisher Phillips attorney, [or any member of our SBA Loan Task Force](#). You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.