Paycheck Protection Program Enforcement Guidance

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In light of the impending safe harbor deadline to return funds received from the Paycheck Protection Program ("PPP"), the Treasury Department released additional guidance today to assist businesses in evaluating whether to take advantage of the safe harbor or retain PPP loan proceeds.

This additional guidance appears in Frequently Asked Question # 46 on page 16 of the SBA's **PPP FAQ document** updated today, May 13th. This guidance relates to the "necessity" certification, in which the business certified that "current economic uncertainty" made the PPP loan "necessary to support the [business's] ongoing operations." Prior to today's guidance, there was very little guidance for businesses attempting to interpret this certification's specific application to determine whether they should return the PPP loan proceeds by tomorrow, May 14th, to avoid SBA or Treasury Department enforcement under a "no harm, no foul" Safe Harbor rule.

Essentially, this new guidance provides that all businesses receiving PPP loans with less than $2 million in original principal, the Treasury Department will deem the borrower to have made the "necessity" certification in good faith. As a result, neither SBA nor the Treasury Department will conduct an audit of businesses receiving PPP loans less than $2 million. However, businesses in this category may still be subject to claims under the False Claims Act (FCA) that can be brought by private whistleblowers and who may receive share of any recovery awarded to the government. Businesses receiving PPP loans of less than $2 million should still document their need for such loan in order to defend any potential lawsuit under the FCA.

All businesses receiving PPP loans in excess of $2 million will be subject to review by SBA in the form of a formal audit. These businesses may still have an adequate basis for making the required good-faith certification of necessity based on their individual circumstances, but they will need to prepare proper documentation to support their necessity certification through such audit as **we previously highlighted.**

In addition, today's guidance indicates that if the SBA determines that a business lacked an adequate basis for making the necessity certification, the SBA will seek immediate repayment of the outstanding PPP loan balance and will inform the lender that the business is not eligible for loan forgiveness, meaning the entire loan amount must be repaid. Under SBA's new guidance, if the business repays the loan after receiving this notice from SBA, SBA will not pursue administrative enforcement or refer the business to other agencies for prosecution. However, as with businesses receiving loans less than $2 million, SBA's enforcement policy is not binding on third parties, meaning businesses are still subject to claims under the FCA brought by private whistleblowers.

In determining the total original principal amount of the PPP loan a business received, businesses must combine the amount of the PPP loan it received with any PPP loan amount received by an affiliate, meaning that if the business and its affiliates received separate PPP loans, the amounts of each such loans must be aggregated to determine whether the business falls under the $2 million threshold.

Our attorneys continue to monitor updates from the SBA and other entities related to the PPP program and will update this guidance if additional information is provided.

This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by authorities on a daily basis so please monitor new developments and guidance. Readers with legal questions about how these orders apply to your business and your employees should consult the authors John Fuchs (jfuchs@sb-kc.com), Bailie Schnackenberg (bailies@sb-kc.com) Char Heins at (cheins@sb-kc.com) or or your regular contact at Seigfreid Bingham at 816-421-4460.

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