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Updated PPP Loan FAQ from the U.S. Treasury Department with Guidance on Its Review of the Certification Regarding the Necessity of the Loan

The U.S. Department of the Treasury recently updated their "Paycheck Protection Program Loans FAQ" with guidance regarding its review of a borrowers' required good-faith certification concerning the necessity of their loan request.

The PPP application requires a borrower to certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

The updated FAQ provides that any borrower that, together with its affiliates (to the extent required under the interim final rule on affiliates, 85 FR 20817 (April 15, 2020), 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 updated FAQ also provides that borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. The SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by

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SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. **If the SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, the 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 the SBA, the 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.

The safe harbor for PPP loans under \$2 million only applies to the certification regarding the necessity of the loan – and would not apply to other certifications made in connection with a PPP loan (including ineligibility based on the business of the borrower, the calculation of the number of employees of the borrower and its affiliates and the calculation of the loan size).

As discussed in our May 7, 2020 client alert, “Updated PPP Loan FAQ from U.S. Treasury, Safe Harbor to Repay Loans Extended to May 14, Employee Count Clarified to Include Foreign Employees,” borrowers should continue to consider all relevant factors in connection with determining whether to apply for or repay a PPP loan prior to the May 14, 2020 safe harbor date, including publicity and reputational effects of taking the loan, effects on future transactions and potential impact on director and officer insurance rates.

Borrowers should also note that this guidance is in the form of a FAQ, and not a regulation, and may be subject to change.

If you have questions about this guidance or any other matters related to the PPP program, please contact Chadwick Hoyt, Michael Gray, Robert



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Gerber, David Milligan, Tom Wolford, Rudy Radasevich or your personal Neal Gerber Eisenberg attorney.

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