



The Chehardy Sherman Williams Healthcare Practice Group is constantly monitoring the way the COVID-19 Pandemic is affecting the industry.



Important Updates from the SBA Regarding the Paycheck Protection Program

The SBA has issued FAQ #46, which provides additional guidance as it relates to its Paycheck Protection Program (PPP) borrower certification that “current economic uncertainty makes this loan request necessary to support ongoing operations,” referred to as the “Necessity Certification.”

In short, the guidance provides the following safe harbor:

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.

For purposes of this safe harbor, a borrower must include its affiliates to the extent required under the SBA rule on affiliates. Generally, affiliation exists when one business controls or has the power to control another or when a third party (or parties) controls or has the power to control both businesses. Control may arise through ownership, management, or other relationships or interactions between the parties. The SBA will consider the totality of the circumstances when determining whether affiliation exists. Affiliation may exist under a number of scenarios; see the SBA Summary of Affiliation Chart below.

It is important to note that the SBA made this safe harbor for the following express reasons: borrowers below the threshold likely do not have access to adequate sources of liquidity in the current economic environment; to promote economic certainty in the pursuit of retaining and rehiring of employees; and to conserve the SBA’s finite audit resources to focus on larger loans.

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Borrowers who received or applied for in excess of \$2 million in PPP loan funds do not automatically have to return the loan funds/withdraw their applications. The SBA specially provides that such borrowers may still have an adequate basis for making the Necessity Certification based on their individual circumstances. In the event the SBA determines that the borrower lacks necessity, the loan must be repaid and forgiveness cannot be sought. If the loan funds are repaid following notification from the SBA, administrative enforcement will not be pursued.

At this point, the deadline to return PPP loan funds has not been extended from its May 14th safe harbor date.

Here is a list of suggested best practices that should be used to help maximize compliance and minimize enforcement exposure.

Document financial and non-financial impacts on your company;

Identify implemented changes, cost-saving measures, personnel and staffing reductions or freezes, and compensation changes;

Evaluate and document the realistic availability of other sources of liquidity;

Document economic necessity of the loan funds;

Document director/manager oversight, approval, and decision process used in determining necessity of loan; and

Stay informed as guidance is frequently being issued.

Further, PPP loan funds should be maintained in a separate bank account, if possible. In addition, detailed documentation and narratives should be made for each expenditure. The documentation and/or narrative should identify the allowable use of the loan funds that support the forgivability of the expenditure (payroll, utility, rent, and/or mortgage interest).

46. Question: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

Answer: 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." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: 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 has determined that this safe harbor 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. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, 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. 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 SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If 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, 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. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

SUMMARY OF AFFILIATION

Category	Affiliation may be found if...
Ownership	<ul style="list-style-type: none"> ▶ An individual, concern, or entity owns or has the power to control more than 50% of voting equity ▶ An individual, concern, or entity owns or has the power to control a block of stock that is large compared to others ▶ Two or more persons owns, controls or has the power to control less than 50% of voting equity and such holdings are equal or about equal in size and are large compared to other holdings, SBA presumes that each controls or has the power to control. ▶ If voting equity is widely held and no block is large as compared to all others, then Board and CEO/President will be deemed to control.
Options, convertible securities, agreements to merge (given <i>present effect</i>)	<ul style="list-style-type: none"> ▶ If an individual or entity has control with the exercise of options and/or convertible securities and agreements to merge; however, agreements that are open or merely continue negotiations about a possible merger are not given present effect
Common management	<ul style="list-style-type: none"> ▶ Officers, managing members, partners who control the management of the concern also control the management of another concern ▶ Individuals or entities that control the board of directors of the concern also control the board or management of another concern
Identity of interest	<ul style="list-style-type: none"> ▶ SBA may <i>presume</i> identity of interest among two or more persons/entities, and therefore affiliation, such as: <ol style="list-style-type: none"> (a) Between family members or individuals/firms with common investments and with identical or substantially identical business or economic interests. (b) If a firm economically relies on another firm (e.g., for a certain percentage such as 70% or more of its receipts).
Newly organized concern	<ul style="list-style-type: none"> ▶ The firm's officers, directors, principal stockholders, managing members, general partners, or key employees <i>organize another concern</i> in the same or related industry or field, and serve in such capacity for the new concern and the one furnishes the other with contracts, or other assistance. The firm can rebut the presumption of affiliation by showing there is a clear line of fracture between the two.
Joint ventures	<ul style="list-style-type: none"> ▶ Parties to a joint venture that submit an offer for a particular procurement or property sale are affiliated with each other for performance of that particular contract, unless one of the exceptions to affiliation listed apply. ▶ Generally, the parties to a joint venture will be affiliated with each other for all purposes if that specific joint venture receives more than three contract awards over a two-year period. The two-year period begins on the date of award of the first contract received by the joint venture. ▶ The same parties may create different, specific joint ventures that can again qualify to receive three contract awards over a two-year period; however eventually such a long-standing relationship may lead to a finding of general affiliation between the parties. ▶ See exceptions to affiliation.
Ostensible subcontractor	<ul style="list-style-type: none"> ▶ The firm is a subcontractor <ol style="list-style-type: none"> (a) that performs or will perform primary and vital requirements of a contract or (b) upon which the concern is unusually reliant.
License agreements	<ul style="list-style-type: none"> ▶ There is a license agreement and the licensee has no right to profit from its efforts with regard to the agreement and does not bear the risk of loss
Totality of the circumstances	<ul style="list-style-type: none"> ▶ Based upon the totality of circumstances, SBA determines that affiliation exists.

Should you have any specific questions or needs, please contact the
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