

# Limited Safe Harbor May 14 Deadline Looms: Did I Misunderstand or Misapply the PPP Borrower Certification?

Article

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These days you can't have a conversation with a business owner without mentioning the Paycheck Protection Program. It's like the weather. Everybody knows something about it, but nobody knows everything about it. Not even the government.

As businesses and their lawyers, accountants and bankers collectively await guidance from the Treasury on the parameters of the loan forgiveness feature of the program, its hallmark, along came FAQ #31. There is now a looming deadline of **May 14th** (extended from the original May 7th deadline per the SBA's May 5th release of FAQ #43 at approximately 6:00 PM CST; for more details see our article, ***Breaking News: SBA Extends PPP Safe Harbor Repayment Deadline to May 14: Promises Additional Guidance on Certification Review***) to evaluate or re-evaluate the certification that current economic uncertainty makes the loan request necessary to support ongoing operations.

If you clearly determine that you have adequate sources of liquidity sufficient to support your ongoing operations "in a manner that is not significantly detrimental" then you can and should return the PPP funds or withdraw your loan application or approval. You will be deemed to have made your certification in good faith. This limited safe harbor builds in a presumption that you obtained the loan based on "a misunderstanding or misapplication of the required certification standard." No harm, no foul. But no money.

However, if you decide to keep the money, now things aren't so clear cut. And that is the current source of everyone's anxiety. Nobody wants to run afoul of the federal False Claims Act or otherwise defraud the government. And nobody wants to be a pariah for borrowing what they objectively shouldn't have (e.g., Shake Shack, Ruth's Chris, L.A. Lakers).

An existing borrower should take a breath and remember that you are simply making the original certification all over again, with one new certification. Now you are being asked to additionally consider your ability to continue paying your

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employees and to what degree that might have a detrimental impact on your business. As before, the essence of the question is how to best thoughtfully memorialize the reasonableness of the decision to borrow. You should round up all documents, correspondence, internal memoranda, director's approvals, and so forth in support of your initial decision. And then run through a list of questions and scenarios to stress test your thinking process, adding new support where applicable.

As we fast approach the deadline, I've been encouraging clients to work through a checklist of items to consider and debate all pertinent considerations unique to their businesses. In many cases a clear picture emerges and they can make a confident decision. Sometimes, things are less clear, but in either case, we are here to help guide you through the process. It is essential to carefully, thoughtfully and reasonably document and memorialize your good faith certification. Then you can use the PPP loan as intended and shift your focus to the uncertain world of forgiveness. Doesn't that sound relaxing?

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