

# Payroll Protection Program Update: Safe Harbor Guidance

**May 13, 2020**

The CARES Act created the Paycheck Protection Program (“PPP”), which amended the Small Business Act (“SBA”) to provide short-term loans to companies with fewer than 500 employees and other companies (such as those in the restaurant and hospitality industry). Such loans may be eligible for full forgiveness if used for payroll and other business expenses and all other statutory requirements are met. The SBA continues to issue guidance on a rolling basis, which can impact a company’s eligibility for the loan, use of the loan, and the level of forgiveness.

## **Safe Harbor Guidance for PPP Loans Above and Below \$2 Million**

SBA guidance and regulations previously provided a safe harbor for any borrower who applied for a PPP loan prior to April 24, 2020, and repays the loan by May 14, 2020, will be deemed by the SBA to have made the

required certification on the Borrower Application Form in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

Today, SBA provided further safe harbor guidance as to the certification, stating that: *“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 explained 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 obtain larger loans and that this safe harbor will promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees.

Importantly, SBA noted that borrowers with loans **greater** than \$2 million may still have an adequate basis for making the required necessity certification in good faith 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. Today, SBA clarified that if it determines in the course of its review that a borrower lacked an adequate basis for the required necessity certification, SBA will seek repayment of the

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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.

FordHarrison's PPP team will continue to monitor the release of new guidance and provide such updates on a regular basis as guidance continues to roll out. The following attorneys are members of our PPP team:

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FordHarrison is closely monitoring the spread of Coronavirus and associated federal and state legislation and has implemented continuity plans, including the ability to work remotely in a technologically secure environment when necessary, to ensure continuity of our operations and uninterrupted service to our clients. We are following all CDC guidelines and state and local laws as applicable. We are committed to ensuring the health and welfare of our clients, employees, and communities while continuing to provide our clients with the highest quality service. Please see our dedicated [Coronavirus Taskforce](#) and [Coronavirus – CARES Act](#) pages for the latest FH Legal Alerts and webinars on Coronavirus and workplace-related provisions of the CARES Act, as well as links to governmental and industry-specific resources for employers to obtain additional information and guidance. For more information or to be connected with a Coronavirus Taskforce or CARES Act attorney, please contact [clientservice@fordharrison.com](mailto:clientservice@fordharrison.com).