

ALERT

May 2020

Payroll Protection Program Updates

By: **Robert M. Finkel**

1-Safe Harbor Deadline Pushed To May 18, 2020

FAQ 47 extends the FAQ 43 Safe harbor deadline to May 18th. FAQ 43 permitted PPP borrowers to avoid a certification of eligibility penalty by returning borrowed funds on or before May 7, 2020. This date was later extended to May 14th. On May 14th, Treasury issued FAQ 47 further extending the Safe Harbor Deadline to May 18th. The safe harbor provides an opportunity for borrowers who received PPP loans to return them if they are not able to make a good-faith certification of the necessity of their loan requests.

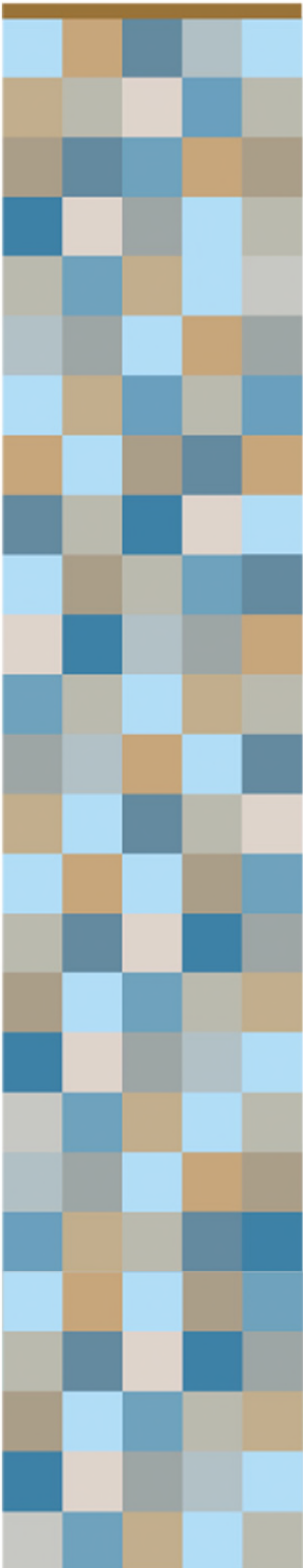
2-Tax Partnerships and Seasonal Businesses Permitted Time to apply to Increase PPP loans to Reflect Later Guidance.

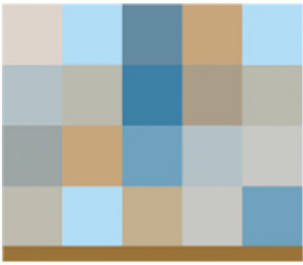
A new interim final rule permits partnerships and seasonal employers to apply for increased PPP loans. The new rule relates to partnerships that submitted their loan applications prior to the issuance of April 14th guidance. Under the April 14th interim rule, the self-employment income of general active partners was permitted to be reported as a payroll cost, up to \$100,000 annualized, on a PPP loan application filed by, or on behalf of, the partnership. Tax partnerships that submitted PPP applications without including partner self-employment income most likely did not receive the maximum amount of PPP loans for which they would be eligible based upon the April 14th guidance. An unrelated interim final rule issued April 28th established an alternative criterion for calculating the maximum loan amount for PPP loans issued to seasonal employers.

The new interim final rule allows PPP lenders to increase existing PPP loans to partnerships and seasonal employers to include partner compensation in accordance with the April 14th interim final rule and to permit seasonal employers to calculate its maximum loan amount using the alternative criterion issued on April 28th, as the case may be.

3-New FAQ Provides Safe Harbors for Good faith Certification

FAQ 31 requires borrowers to assess and certify their economic need for a PPP loan “under the standard established by the CARES Act and PPP regulations.” Though there is no standard established in the CARES ACT, PPP regulations or Interim Final Rules, the FAQ provides that current economic uncertainty must make the loan request necessary to





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Robert M. Finkel is a partner of the firm where he serves as co-chair of its Tax Practice Group. He concentrates his practice on the areas of individual and business taxation including tax controversy and tax litigation.

support the ongoing operations of the applicant and explains that the analysis must take into account the business' current business activity and its ability to access other sources of liquidity sufficient to support ongoing operations in a manner that is not significantly detrimental to the business. FAQ 37 applies the same standard to small private companies.

The SBA indicated that all loans over \$2 million will be subject to review. SBA FAQ 46 provides limited safe harbors related to the borrowers' necessity certification. The guidance speaks only to the good faith certification. Borrowers will be subject to enforcement on other eligibility criterion.

Borrowers with PPP loans less than \$2 million. A borrower that, together with its affiliates, received PPP loans having less than \$2 million in principal "will be deemed to have made the required certification concerning the necessity of the loan request in good faith."

Borrower's with PPP loans over \$2 million. Borrowers may still have to demonstrate an adequate basis for making the required good-faith certification. The SBA will not pursue administrative enforcement or referrals to other agencies based on its determination regarding the necessity if the borrower repays the loan in full. Borrowers of over \$2 million should consider promptly repaying if the SBA notifies them that they did not have adequate basis for the necessity certification to help avoid further enforcement action.

Any issues raised in this Alert may be addressed to Robert M. Finkel. He can be reached at (212) 239-5526 or at rfinkel@moritthock.com



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