

CORONAVIRUS INFORMATION & UPDATES

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Treasury Issues Additional Guidance Regarding Paycheck Protection Program Eligibility

The Department of Treasury and Small Business Administration have issued additional guidance related to the Paycheck Protection Program (PPP) following recent publicity regarding certain recipients. Their focus has been on the certification contained in the application that the proceeds of a PPP loan are necessary to support the ongoing operations of an applicant.

On April 23, 2020, the Treasury Department's updated FAQ stated that borrowers, in making the certification that current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant, must take into account current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. By its terms, the guidance applies to all borrowers, however public company applicants were specifically called out, stating that "it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification."

Updated guidance issued by the SBA on April 24, 2020, categorically excludes all hedge funds and private equity firms from participating in the PPP (while not specifically referenced in the new rule, other traditional asset managers should carefully consider whether the rationale contained in the answer would also exclude them from eligibility). Consistent with prior guidance, the SBA reiterated that portfolio companies of private equity firms are required to apply the SBA's affiliation tests in determining eligibility for PPP loans, except in the case of SBA-approved franchises, businesses in the accommodation and food services industries, and businesses that have received financial assistance from SBIC funds. Importantly, in the newly issued rules, the SBA specifically cautions portfolio companies to carefully review the certification that current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.

Borrowers who have already received a PPP loan based on a "misunderstanding or misapplication" of requirements relating to the certification that the loan was necessary may repay the full amount of the loan by May 7, 2020 and be considered to have made the required certification in good faith. A Treasury spokesperson has indicated that funds returned by May 7 will be recycled and used to make additional PPP loans.