

PUBLIC COMPANY PPP PARTICIPANTS WITH LIQUIDITY ALTERNATIVES BEWARE: NEW U.S. TREASURY GUIDANCE ALLOWS SAFE HARBOR FOR RETURN OF FUNDS BY MAY 7, 2020 IN CASES OF INSUFFICIENT NEED

Apr 23, 2020

Reportedly more than 100 public companies received more than half a billion dollars of funds available under the SBA's Paycheck Protection Program. On April 23, 2020, the U.S. Department of Treasury published new guidance suggesting public company participants who could not demonstrate sufficient need could be subject to scrutiny unless they return the funds by May 7, 2020.

PPP applications require certification that “[c]urrent economic uncertainty makes this loan request necessary to support ongoing operations.” To the extent that public companies may have had other reliable, accessible sources of capital markets funding, the borrower's certification of economic need could be called into question. In light of this new guidance, public companies should analyze the risks associated with participation in the PPP.

April 23, 2020 Treasury Guidance - [PPP FAQ Question 31](#)

The Treasury guidance focuses on sources of potential liquidity other than potential participation in the PPP. The U.S. Treasury posits: "Borrowers must make this certification in good faith, taking into account their 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. For example, 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".

Treasury provides a safe harbor for applications filed prior to April 23rd. "Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith."

Impacted companies should take notice of the guidance and take action, if necessary, by May 7, 2020. Going forward, both PPP lenders and borrowers should be mindful of FAQ 31's impact on future applications as the supplemental round of PPP funds are made available. In addition to the

risk of governmental regulatory or enforcement action, impacted companies and lenders may face other litigation and reputation risk. Companies may wish to consider whether their employees may believe that other sources of funding were available and may raise those concerns internally and externally as purported whistleblowers, possibly resulting in assertion of False Claims Act claims. Additional regulatory and litigation risk may involve company disclosures when required and potential officer liability. Companies impacted may also face reputational scrutiny and adverse impact on business performance, particularly if Treasury and the SBA publish borrower information. The Federal Reserve announced on April 23, 2020 that it will be publishing monthly borrowers, loan amounts and interest rates for lending programs established under the CARES Act.

Treasury guidance is likely to continue to evolve through the supplemental round of PPP funds. Paying close attention to that guidance and thoroughly analyzing business operations is key to avoiding missteps and adverse risk.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

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