

Reconsidering PPP Eligibility – Should Public Companies and Financially Strong Borrowers Repay PPP Loans?

Alert

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A number of public companies applied for and received potentially forgivable loans under the Paycheck Protection Program (PPP). To be eligible for a PPP loan a borrower does not need to demonstrate that it is unable to obtain credit through other sources, but the borrower does need to provide its certification that a PPP loan is “necessary to support the ongoing operations” of the borrower in light of the current economic uncertainty.

There has been some media scrutiny of large public companies that obtained PPP loans, most notably a \$10 million PPP loan to Shake Shack (Shake Shack very publicly announced it would return the \$10 million loan). During an April 21, 2020 press briefing, U.S. Treasury Secretary Steven Mnuchin specifically addressed the issue, stating that PPP loans were not intended for large public companies and promising that the Small Business Administration (SBA) would soon release clear guidance on this point.

As of this morning (April 23, 2020), the SBA appears to have released that guidance (although it may fall short of the promised clarity). The SBA updated its [running list of FAQs](#) on the PPP to add question and answer 31, which is excerpted in its entirety below:

31. Question: Do businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business

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Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” 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. Lenders may rely on a borrower’s certification regarding the necessity of the loan request. 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.

As has become typical of the PPP, every attempt at clarification also raises new uncertainties. What is the threshold for “substantial market value”? Does a public company that would currently be unable to raise equity capital on favorable terms really have “access to capital markets” in a meaningful way? Should any debt financing be considered “significantly detrimental” to a business as compared to equity capital in light of the additional cash load it places on the borrower? If a borrower has undrawn but committed capital under its current financing facilities, can it still make the good faith certification required by the PPP application?

These are only some of the questions that borrowers will struggle to answer related to this new guidance. However, in light of the very specific certifications and representations required of the applicant in its loan application, and the CARES Act’s establishment of a Special Inspector General for Pandemic Recovery (SIGPR) to carry out audits in order to ferret out waste, fraud and abuse in this process, answering these questions should be done with an appropriate level of care.

Businesses that are now uncertain as to their eligibility under the new SBA guidance should consider whether they should withdraw their PPP loan application, and those that have received a PPP loan already may want to consider repaying their loan by May 7, 2020 to take advantage of the good faith certification safe-harbor under the new guidance.

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