



LAW ALERT

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Department of The Treasury Issues New PPP Loan Guidance: A Look at Recent Guidance and Future Enforcement Actions

As part of the Coronavirus Aid, Relief, and Economic Security Act, the Paycheck Protection Program (“PPP”) was designed to assist small businesses nationwide by providing loans that are subject to forgiveness if at least 75% of the loan was used to cover payroll costs. The PPP Borrower Application Form requires that applicants complete a number of certifications in order to finalize their application. These certifications must be made in good faith, and if not addressed with careful deliberation, can expose the applicant and borrower to potential criminal and/or civil liability. Initially, the applicant must certify that the loan is “necessary to support the ongoing operations of the Applicant.” Other required certifications include (1) that the funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments; (2) that the applicant understands that forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments and covered utilities, and that not more than 25% of the forgiveness amount may be for non-payroll costs; and (3) that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. If more than 25% of the amount of the loan was used for non-payroll purposes, the loan will not be forgiven. In that instance, the loan has a two (2) year maturity date with 1% interest.

This so called “necessity certification” has garnered a significant amount of scrutiny recently. The Department of the Treasury published guidance related to whether businesses owned by large companies with adequate sources of liquidity to support the business’ ongoing operations qualify for a PPP loan. The Department of the Treasury noted that borrowers must take into account their ability to access other sources of liquidity sufficient to support business operations that are not significantly detrimental to the business in considering their eligibility for a PPP loan. To add to the confusion, the PPP waived the so-called “credit elsewhere” requirement that would have required applicants to seek alternative sources of credit before applying for a PPP loan. However, Treasury went further and opined that a public company with substantial market value and access to capital markets would be unlikely to be able to make the required certifications in good faith. Treasury Secretary Mnuchin went so far as to state that PPP loans were not intended to be available to public companies, despite that no such intent was expressed in the legislation. Public companies, that borrowed under PPP, were urged to return those funds pursuant to a safe harbor to avoid scrutiny. The safe harbor was also available to privately held companies that re-evaluated their eligibility based upon guidance from the SBA and Treasury. While the FAQs and guidance provide helpful information to borrowers, they do not carry the force and effect of law and borrowers should be mindful of this fact.

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Due to concerns raised by guidance and FAQs, the Small Business Administration (“SBA”) in consultation with the Department of the Treasury extended the safe harbor period. Initially, borrowers who applied for and received a PPP loan based on a misunderstanding or misapplication of the required certifications were encouraged to repay their loan in full by May 7, 2020. If the borrowers repaid their loan in full by that date, they would be deemed by SBA to have made the required certification in good faith. Given the uncertainty surrounding the certifications, SBA and the Department of the Treasury extended the deadline to repay loans in full to May 14, 2020 with the promise that additional guidance would be published explaining how the SBA will review the required certification.

On May 13, 2020, the SBA issued further guidance and extended the deadline to repay with safe harbor protection to May 18, 2020. The newly issued guidance provides some business owners clarity regarding their exposure related to the necessity certification. The SBA stated that “any borrower that . . . 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.” The SBA acknowledges that borrowers with loans below the threshold are less likely to have access to adequate sources of liquidity.

Borrowers who received loans greater than \$2 million will face enhanced scrutiny regarding their certifications. As part of this enhanced scrutiny, the SBA will determine whether the borrower had an adequate basis for certifying that the loan was necessary. If the SBA determines that the borrower did not have an adequate basis for the necessity certification, the SBA will require that the borrower repay the loan and will inform the lender that the borrower is not eligible for forgiveness. The good news for borrowers is that if the borrower repays the loan after receiving this notification, the SBA will not pursue administrative enforcement or referrals to other agencies regarding the certification.

One can imagine the various charges that the Department of Justice could bring under a false certification theory or a variety of other theories. First and foremost, a violation of 18 U.S.C. § 1001 (knowingly making or using a materially false writing). The PPP application itself notes that making a false statement on the application (or in the certification for that matter) is punishable by law under that statute, as well as 18 U.S.C. § 1014 (knowingly making a false statement for the purpose of influencing in any way the action of the SBA) and 15 U.S.C. § 645 (knowingly making a false statement for the purpose of obtaining a loan from the SBA). Furthermore, a borrower who makes a false statement on the application could also be charged with violating 18 U.S.C. § 1344 (Bank Fraud). These statutes all require the government to prove beyond a reasonable doubt that the individual knew that the statement was false at the time it was made. If convicted, the penalties for violating any of these statutes are severe, with some having a maximum term of imprisonment of thirty years.



In addition to criminal penalties, borrowers who submit a false application or falsely certify can face civil liability under the False Claims Act 31 U.S.C. §§ 3729 – 3733. Similar to the criminal statutes described above, the False Claims Act requires that the individual who submitted the claim had knowledge of the falsity. Knowledge is defined as (1) actual knowledge; (2) deliberate ignorance of the truth or falsity of the information; or (3) reckless disregard of the truth or falsity of the information. False Claims Act violations are punishable a fine and up to three times the amount of the government’s damages.

Government enforcement related to PPP loans has already begun. In what appears to be the first criminal case brought against PPP borrowers, the Department of Justice charged two businessmen in Rhode Island with filing fraudulent loan applications. The defendants are charged with Conspiracy to Make False Statements to Influence the SBA and Conspiracy to Commit Bank Fraud. In addition, one defendant is charged with Aggravated Identify Theft and the other is charged with Bank Fraud. The government has alleged that the defendants’ fraudulent loan requests were to pay employees of businesses that were not in operation prior to the COVID-19 pandemic and in fact had no salaried employees. Further, an additional loan application was purportedly used to pay employees at a business that the applicant did not own.

While the first criminal prosecution related to the PPP is certain to give borrowers pause, good faith applicants should take comfort in the fact that the actions that led to the defendants’ arrest appear to be wholly fraudulent and not merely a judgment call concerning good faith qualifications under PPP. Nevertheless, PPP borrowers should be mindful of the certification requirements, in addition to ensuring that all information on their applications is true and accurate. Borrowers should also carefully document their decision making process leading to applications as well as how the funds are utilized.

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