

## Paycheck Protection Program Loan Forgiveness Now Conditioned on SBA Review

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Borrowers and applicants for Paycheck Protection Program (PPP) forgivable loans have new hurdles to overcome in order to obtain the ultimate forgiveness of their loans. In response to public outcry over the receipt of PPP loans by large and publicly traded companies, U.S. Treasury Secretary Steven Mnuchin stated during an interview with CNBC on Tuesday, April 28, 2020 that all PPP loans in excess of \$2 million will be subject to review by the Small Business Administration (SBA) as a condition of loan forgiveness. Secretary Mnuchin further stated that borrowers with loans in excess of \$2 million that did not certify the necessity for their loans in good faith would not have their loans forgiven, and could even be subject to criminal prosecution. Of the over 100 large corporations and publicly traded entities that have PPP loans in excess of \$2 million, twenty-two so far have returned their PPP loan proceeds.

The Secretary has established a deadline of **May 7, 2020** by which PPP borrowers who applied for their loans before April 23 can return their loans without penalty if they determine they could not certify the necessity for their loans in good faith. It is urgent for each PPP borrower to consider its determination of necessity before the May 7 deadline passes.

Secretary Mnuchin's statements serve as a warning to all PPP borrowers and PPP loan applicants with loans in excess of \$2 million, but should also alert borrowers and applicants for loans in lesser amounts as there is no assurance that the \$2 million threshold for review will not be lowered in the future.

### **Certification of Necessity**

The law that created PPP loans, the CARES Act of March 27, 2020, specifically waived SBA's existing requirement that borrowers demonstrate an inability to obtain credit elsewhere. The law requires, however, that each prospective borrower make a "good faith certification" that the "uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations" of the prospective borrower. Recent guidance (Frequently Asked Question No. 31 published by SBA on April 23, 2020) has made clear that in order to make the certification of necessity in good faith, each prospective borrower must have considered its ongoing operations as well as its access to other sources of liquidity "sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business." Although this language is clearly directed toward large and publicly traded companies, it is not limited to them and must be considered by smaller borrowers and applicants.

### **Demonstrating Good Faith**

While the need for a PPP loan may seem self-evident, it is important for each borrower and applicant to have documentation and analysis supporting this conclusion as of the time its certification is made. By way of example, borrowers and applicants should consider their revenue at current and projected levels of business (i.e., whether the business is physically open to serve its customers/clients, operating with reduced staff or closed); anticipated and current problems with collection of receivables; available sources of capital that could be reasonably accessed without any significant detrimental effect to the business, (such as a draw on a credit lines justified by anticipated revenues and in place for such purpose, stock issuance, cash reserves and funding from affiliates); financial viability of customers and suppliers; whether or not customers will return after

the pandemic; have customers already starting asking for delay in payment or reduction in payment amounts; was a reduction in staffing contemplated prior to the loan; have any compensation amounts been reduced; threats to the marketplace and changes in costs and availability of needed supplies. Advice of accounting and legal advisors can be an important element of demonstrating the borrower's or applicant's good faith in making a determination of necessity. Work papers, corporate meeting minutes, analysis documents and projections, avoided furlough/layoff plans and descriptive memorandum should be retained by each borrower and applicant for provision to SBA in the event of a review.

### **Cure by Repayment of Loan by May 7**

There is a cure for borrowers who can't demonstrate their good faith in certifying need. If a borrower that certified its need for its PPP loan before April 23 and has received loan proceeds subsequently determines it is nevertheless unable to demonstrate its need in good faith, the borrower may repay its loan in full by May 7, 2020. The borrower will then be deemed by SBA to have made the required certification in good faith, thus avoiding investigation and possible criminal prosecution.

To date, the Treasury has not provided formal guidance concerning the PPP loan review or prosecution described by Secretary Mnuchin. In addition, while having different connotations, the words "audit" and "review" seemed to be used interchangeably. Further, long promised general guidance on PPP loan forgiveness has yet to be provided. While the regulatory landscape concerning PPP continues to evolve, we urge all PPP borrowers and loan applicants to review their files and consult with knowledgeable legal and accounting advisors immediately so as to minimize the risk that their PPP loans will not be forgiven, or determine that their loan proceeds must be repaid to avoid further consequence.

If you have questions about this alert or wish to discuss your own determination of necessity, please contact [Doug Lubic](#), [Pete Greenbaum](#) or any other member of our [Business Law](#) and [Health Law](#) Teams.

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### **Practice**

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