

Goodwin Alerts

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U.S. SBA Provides Important New Guidance and Announces "Amnesty" Program for PPP Loan Applicants

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On April 23, 2020, the U.S. Small Business Administration ("SBA") issued additional guidance in the form of "Frequently Asked Questions" that could have significant ramifications for companies that have applied, or are considering applying, for loans under the Paycheck Protection Program ("PPP"). See [Small Business Administration, FAQ for Lenders and Borrowers](#) ("FAQ").

Specifically, in **FAQ #31** the SBA provided that:

"before submitting a PPP application, all borrowers should carefully review the required certification that 'current 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.**" (emphasis added).

The SBA also highlighted its skepticism about the eligibility of public companies with significant market value, providing:

"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."

This additional guidance by the SBA comes on the heels of public comments this week by Treasury Secretary Steven Mnuchin and Senator Marco Rubio expressing concerns about the administration of the PPP. Secretary Mnuchin warned of "severe consequences for people who don't attest properly to this certification." He went on to explain, "we want to make sure this money is available to small businesses that need it, people who have invested their entire life savings."^[1] Senator Rubio, who chairs the Senate Committee on Small Business and Entrepreneurship, referred to "multiple reports of companies abusing the [PPP] program" and promised robust oversight of the application program, including the use of subpoenas.^[2]

Against this backdrop, in FAQ #31, the SBA is essentially offering an amnesty program for companies that have already received PPP funds, by stating that:

"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."

Given this updated guidance, we believe that the potential risk profile for many companies that have already applied for PPP funds may have shifted and they should take this opportunity before May 7 to reassess their financial condition and eligibility for the program. Such a review should include whether there are alternative means of financing available.

Companies that have not yet applied for PPP funds should pay close attention to this guidance, as it is likely that this amnesty program will not be available to them should they later receive PPP funds.

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[1] <https://www.businessinsider.com/treasury-mnuchin-consequences-big-companies-taking-ppp-small-business-loans-2020-4>

[2] <https://thehill.com/homenews/senate/493775-rubio-warns-he-will-subpoena-companies-as-part-of-coronavirus-aid-oversight>

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