

Feds Issue Warning To Employers Accepting COVID-19 PPP Loans – And Provide Escape Plan

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The Treasury Department just issued a warning to “all borrowers” scooping up funds from the pool of billions of dollars of potentially forgivable loan money from the Small Business Administration’s Paycheck Protection Program (PPP) – and provided them with an escape hatch if they now realize they shouldn’t have dipped into the well. According to the April 23 update to the Department’s “Frequently Asked Questions,” businesses are required to “assess their economic need for a PPP loan” before submitting an application. Further, the guidance advises borrowers that they have until May 7, 2020 to pay the loan funds back to avoid further scrutiny or other legal consequences.

Why The Need For The New Guidance?

Over the past few days, troubling details have emerged involving publicly traded companies receiving more than \$500 million in potentially forgivable loans out of the \$300 billion dollar PPP pool. In response to recent public outcry over this situation, the Treasury Department updated FAQ No. 31 to state that “all borrowers should review carefully the required certification that ‘current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.’”

And in doing so, borrowers must take “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.” FAQ No. 31 also states that it is “unlikely that a public company with substantial market

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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.”

Escape Plan Announced

But perhaps most importantly, the updated answer indicates that borrowers have until May 7, 2020 to pay the loan back to avoid further scrutiny or other consequences. Specifically, the SBA will deem that borrowers that applied for a PPP loan before the issuance of this guidance and made the required certification “in good faith” if they repay the loan in full by May 7, 2020.

Unanswered Questions

When previously addressing the media, Treasury Secretary Steven Mnuchin indicated that the intent of the PPP was not for companies with access to “plenty of liquidity,” even though the PPP expressly waived any requirement to have credit elsewhere or for collateral or personal guarantees. Mnuchin also indicated that if companies “didn’t understand [the certification] and they repay the loans, that will be okay” – but if they don’t, “there’ll be potentially other consequences.”

The updated FAQ, however, does not address how a company can demonstrate to the SBA the basis for the certification or what consequences borrowers face for not returning the money. The guidance also does not define or address in more detail what is meant by “liquidity sufficient to support...ongoing operations in a manner that is not significantly detrimental to business” or “substantial market value.” This has left many borrowers and potential borrowers with more unanswered questions.

What’s Next?

We anticipate the Treasury and SBA will soon issue new regulations and additional guidance regarding this and other issues related to the PPP in the upcoming days. In the meantime, businesses that have received any loan funds should immediately review current business activity and the ability to access other sources of liquidity to determine whether they completed the required certification “in good faith” given the updated FAQ. For businesses that plan to apply for the anticipated additional funding of the PPP detailed here, the same considerations must be made before applying and accepting any funds.

Conclusion

Fisher Phillips’ SBA Loan Team will continue to monitor the ever-changing COVID-19 situation and provide updates. Make sure you are subscribed to Fisher Phillips’ Alert System to get the most up-to-date information.



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For further information, contact your Fisher Phillips attorney, or any member of our SBA Loan Task Force. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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