

## **Paycheck Protection Program: Treasury Department Takes Action To Ensure Vulnerable Small Businesses Have Access To Loans**

The Coronavirus Aid, Relief, and Economic Security Act (H.R. 748) (the “CARES Act”) implemented the Paycheck Protection Program through which small businesses and not-for-profit organizations with fewer than 500 employees can receive low-interest, small business loans to provide a much-needed cash infusion to help weather the storm created by COVID-19.<sup>1</sup> Because of the popularity of the Paycheck Protection Program, likely due to the possibility of 100% loan forgiveness, the funds for the Paycheck Protection Program were depleted as of April 16, 2020. On April 24, 2020, an additional \$310 billion was added to the Paycheck Protection Program. The Treasury Department and the Small Business Association (the “SBA”) recently issued guidance to ensure that this latest tranche of funds is provided to the most vulnerable small businesses by clarifying what it means for a loan to be “necessary” — a requirement for receiving one under the CARES Act — and by excluding and discouraging certain larger borrowers from receiving loans who were able to do so under the original statute.

### **I. Certification Requirement That The Loan Must Be Necessary**

The Paycheck Protection Program expands eligibility for small businesses and not-for-profit organizations to receive small business loans under the Small Business Act (15 U.S.C. 636) (the “Small Business Act”) and waives the requirement under Section 3(h) of the Small Business Act that small businesses must be unable to obtain credit elsewhere. However, businesses must certify, in good faith, that “the uncertainty of current economic conditions makes *necessary* the loan request to support the ongoing operations of the eligible recipient.”<sup>2</sup>

On April 23, 2020 the Treasury Department issued guidance instructing applicants to consider both their current business activity and their ability to access other sources of liquidity that are not significantly detrimental to their business. It specifically states that public companies with substantial market value and access to capital markets unlikely could make this certification in good faith. An applicant should be prepared to demonstrate the basis for its certification to the SBA. A lender, however, can rely on an applicant’s certification. Several businesses have already returned loan proceeds received under the Paycheck Protection Program.

### **II. Audit of Businesses Receiving More Than \$2 Million**

On April 27, 2020, Treasury Secretary Steven Mnuchin told CNBC that borrowers will face potential criminal liability for falsely certifying the necessity of the loan.<sup>3</sup> On April 29, 2020, the Treasury Department updated its Paycheck Protection Program Loans Frequently Asked Questions (“FAQ”) to announce that borrowers that have received or will receive loans over \$2 million will be subject to audit.<sup>4</sup> Furthermore, borrowers may face civil liability under the False Claims Act for such false certifications.<sup>5</sup> Borrowers that applied for a loan under the

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<sup>1</sup> For information on the low-interest rate loan programs available to small businesses and not-for-profit organizations with fewer than 500 employees, *see* our memorandum “The CARES Act: What Small Business Owners and Not-for-Profit Organizations Need to Know,” found [here](#).

<sup>2</sup> The Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, 116th Cong. §1102(a)(1)(G)(i)(I) (2020) (enacted) (emphasis added).

<sup>3</sup> The full interview can be found [here](#).

<sup>4</sup> The full FAQ can be found [here](#).

<sup>5</sup> Additionally, borrowers may face criminal and civil liability under 18 USC 1001 and 3571 by imprisonment of not more than five year and/or a fine of up to \$250,000, under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000 and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more

Paycheck Protection Program before April 23, 2020 and repay it in full by May 14, 2020<sup>6</sup> will be deemed to have made the certification in good faith and will not be penalized.<sup>7</sup> Additional guidance from the Treasury Department is expected.

### III. \$20 Million Maximum For Business Part Of A Single Corporate Group

On April 30, 2020, the SBA announced an interim final rule, which set a maximum aggregate loan amount of \$20 million for businesses that are part of a single corporate group under the Paycheck Protection Program (13 C.F.R. Part 120). This loan cap will apply to any loans not fully disbursed as of April 30, 2020. Businesses are considered part of a single corporate group if they are at least majority owned, directly or indirectly, by a common parent. This interim rule is in direct response to the high demand for loans and the previous lapse of Paycheck Protection Program appropriations. Applicants that have applied for loans or borrowers that have received loans after April 30, 2020 under the Paycheck Protection Program in excess of \$20 million must withdraw or request cancellation of any pending application or approved loan not in compliance with this rule. Applicants and borrowers that fail to withdraw or request cancellation will not be eligible for loan forgiveness under the Paycheck Protection Program. A lender, however, can rely on the applicant's representation that it is in compliance with this limitation.

The Treasury Department's guidance and the SBA's interim final rule are intended to ensure that small businesses and not-for-profit-organizations that do not typically have a large cushion of cash or easy access to lines of credit have access to loans under the Paycheck Protection Program.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Helene R. Banks at 212.701.3439 or [hbanks@cahill.com](mailto:hbanks@cahill.com) or Robyn Sablove at 212.701.3753 or [rsablove@cahill.com](mailto:rsablove@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

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than thirty years and/or a fine of not more than \$1 million.

<sup>6</sup> The Treasury Department extended this date from May 7, 2020 to May 14, 2020 in its FAQ dated May 5, 2020.

<sup>7</sup> In its FAQ dated May 6, 2020, the Treasury Department announced a business that returns its loan under the Paycheck Protection Program by May 14, 2020 may be eligible for an employee tax retention credit. For more information on the employee tax retention credit, *see* our memorandum "Employee Leave Provision Under CARES Act and FFCRA," found [here](#).