

Paycheck Protection Program: Treasury Department Issues Guidance Regarding Review and Repayment of Loans in Excess of \$2 Million

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. The Treasury Department and the Small Business Association (the “SBA”) recently issued guidance to ensure that the loans are 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.¹ On May 13, 2020, the Treasury Department issued additional guidance related to the good faith certification that “the uncertainty of current economic conditions makes *necessary* the loan request to support the ongoing operations of the eligible recipient.”²

Any borrower that received or will receive a loan under the Paycheck Protection Program in a principal amount less than \$2 million will be deemed to have made the certification in good faith and will not be subject to review by the SBA. The SBA has determined that borrowers with loans less than \$2 million likely do not have access to adequate sources of liquidity when compared to borrowers that require larger loans; and therefore, are protected by the safe harbor.

Conversely, any borrower that received or will receive a loan in a principal amount in excess of \$2 million will be subject to review by the SBA. If the SBA determines that a borrower lacked the adequate basis for the certification regarding the necessity of the loan, the SBA will seek repayment of the loan balance and the borrower will not be eligible for loan forgiveness. If the borrower repays the loan after notification of its ineligibility, the SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request.³

The guidance that the Treasury Department issued leaves some questions unanswered – for example, the timing of such repayment and whether the repayment amount includes interest. Presumably, the Treasury Department and the SBA will issue further guidance clarifying the review and repayment process.

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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 or Robyn Sablove at 212.701.3753 or rsablove@cahill.com; or email publications@cahill.com.

¹ For more information on the clarification of what it means for a loan to be “necessary” and exclusions applicable to certain larger borrowers, *see* our memorandum “Paycheck Protection Program: Treasury Department Takes Action To Ensure Vulnerable Small Businesses Have Access To Loans,” found [here](#).

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

³ The Treasury Department issued guidance on May 5, 2020, codified in an interim rule passed on May 8, 2020, that borrowers that applied for a loan under the Paycheck Protection Program before April 23, 2020 and that repay it in full by May 14, 2020 will be deemed to have made the certification in good faith and will not be penalized. The Treasury Department’s updated FAQ extends the repayment date to May 18, 2020. A full FAQ can be found [here](#).