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ALERT – Paycheck Protection Program 2.0: New Rules and Additional Guidance as of April 26, 2020

While the additional Paycheck Protection Program (PPP) funding legislation approved by Congress April 23, 2020, and signed by the president April 24, 2020, did not specifically change the program, the SBA and U.S. Department of Treasury have issued various rules, statements and guidance beginning April 23, 2020, that affect the program.

When will the new funding be available?

The SBA began accepting applications at 10:30 a.m., Monday, April 27. Improvements have been made to the SBA's platform, but no changes were made to the form of application in connection with the additional funding or platform changes. While the SBA did not queue applications received, but unfunded, before the exhaustion of the first round funding, most banks have said they did create queues and will enter these applications first. Any applicant who did not receive funding in the first round should contact their lender to understand if they are entering already received applications or starting fresh and requiring new applications.

Any business looking to participate in the program must again act quickly as the program continues to be on a "first come, first served" basis. Funds are expected to be exhausted quickly, especially given that there are so many applications in the queues of the various lenders that will be entered first.

Can you certify the PPP funds are necessary?

In response to complaints following the first round of funding that large companies received program loans meant for small businesses, the Department of Treasury and SBA issued new guidance on April 23, 2020, followed by an interim final rule April 24.

The April 23, 2020, guidance (included within the Frequently Asked Questions maintained by the SBA) makes specific reference to the following certification contained within the application: “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.” When making this certification, the new guidance requires borrowers to “tak[e] 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.” The guidance continues with an example that a public company with substantial market value and access to capital markets will be unlikely to be able to make this certification in good faith.

In its original design, the PPP specifically excluded a requirement that borrowers establish they did not have access to credit elsewhere but was silent in terms of a liquidity standard. No specific measures or factors for making this liquidity determination are provided and borrowers and applicants should consider their individual situations carefully. Current borrowers and new applicants should consider other funds available to them, intended uses for these funds (excluding their use for continued business operations), cash-flow needs, whether these liquidity sources are themselves stressed in the current environment, and to what extent use of these funds create future stress on the business (particularly in an environment where liquidity issues may continue for an extended period). Attention should be paid to the statement that the use of these other sources of liquidity is not expected to cause *significant detriment* to the business.

Any decision that other liquidity sources are not appropriate for use, making the PPP funds a necessity, should be well-documented. The accuracy of the application certification will be examined closely by the SBA. How the SBA will ultimately review this certification and the amount of flexibility that will be afforded to smaller companies is unknown. The public company example sets only the high-end of what the SBA thinks will not qualify.

The interim final rule and guidance provide a safe harbor for borrowers who applied before April 23, 2020, and who repay their

PPP funds by May 7, 2020. Those who repay the loan in full by May 7, 2020, will be deemed to have made the certification in good faith. The language says that the loan has to be repaid in full, which likely means that the borrower may not seek forgiveness of all or any portion of the loan.

We recommend that all current borrowers and applicants who have already applied or have received PPP funds review this new liquidity concept, document their determination and consider, if appropriate, whether to take advantage of the safe harbor.

Are hedge funds and private equity funds eligible?

The new rules and guidance make it clear that hedge funds and private equity firms are not eligible to participate in the PPP. However, companies owned by private equity funds may themselves be eligible under the program, but the affiliation rules must be applied. These companies must also carefully consider the availability of other liquidity sources; specifically, funds that may be received from the owning private equity firm.

What about government owned hospitals?

The new rules and guidance remove the traditional prohibition on SBA program eligibility for government owned entities for purposes of participating in the PPP if the hospital receives less than 50% of its funding, excluding Medicaid, from state and local governments.

Can legal gaming establishments participate in the PPP?

Yes. The traditional prohibition on gaming establishments is not applicable to legal gaming establishments. Businesses that receive illegal gaming revenue remain ineligible.

How may bankruptcy affect PPP eligibility?

An applicant that is presently a debtor in bankruptcy will not be able to participate in the PPP. The new rules and guidance clarify that this limitation applies in the event of involvement in bankruptcy proceedings either at the time of the application or at any time before the disbursement of PPP funds. Any applicant that becomes a debtor in bankruptcy after applying for a PPP loan, but before PPP funds are disbursed, must notify the lender and request cancellation of the application. Any failure to do this will be considered an unauthorized use of PPP funds (should the funds be disbursed).

Are farmers and ranchers eligible for PPP loans?

Farmers and ranchers with 500 or less employees or who have annual receipts of less than \$1 million are eligible. These businesses are also eligible if they meet the alternative size standard of having both a tangible net worth of \$15 million or less and average net income of \$5 million or less.

How are employees counted for purposes of the PPP?

The new guidance clarifies the distinction of counting employees for purposes of PPP eligibility versus for purposes of forgiveness. For purposes of eligibility, the calculation is based on the headcount of employees, including part-time employees to the same degree as full-time employees. For purposes of the forgiveness component of PPP, the calculation continues to be based on the standard of the "full-time equivalent employee," however no further clarity is provided concerning what constitutes a full-time equivalent.

Additional guidance for calculating maximum loan amounts

Additional guidance describing [how to calculate the maximum loan amount and payroll costs](#) was issued April 24. In general, this guidance provides examples of the calculation based on different business scenarios but does not alter prior guidance or instructions concerning the calculation. The guidance does identify the

documentation that should be used (including specific tax form lines where applicable) and provided to a lender during the application process.

One particularly relevant clarification in the new guidance is that limited liability companies should follow the calculation methodology determined by their specific tax filing situation as a sole proprietorship, partnership or corporation.

For more information on the Paycheck Protection Program, the Emergency Economic Injury Disaster Loan program and other financial assistance available to businesses under the CARES Act, please contact [Shannon Kuhl](#), [Becky Moore](#), [Jared Tully](#), or any attorney in Frost Brown Todd's [Finance](#) practice group.

Other Paycheck Protection Program (PPP) and Emergency Economic Injury Disaster Loans (EIDL) articles:

- [Comparing Paycheck Protection Program and Emergency Economic Injury Disaster Loan Options for Small Business under the CARES Act](#)
- [Determining the Forgiveness Amount of Your Paycheck Protection Program \(PPP\) Loan](#)
- [Additional Funding Coming to the Paycheck Protection Program and the EIDL Program](#)
- [SBA Issues Additional Guidance for Self-Employed Individuals and Clarifies Eligibility Requirements for Legal Gambling Business and PPP Lenders](#)

*To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a **Coronavirus Response Team**, including a SBA lending team. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.*

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