

THOUGHT LEADERSHIP**Service**

Banking & Finance

Professionals

JOHN D. MOORE

KANSAS CITY:

816.983.8303

JOHN.MOORE@

HUSCHBLACKWELL.COM

CHRISTOPHER W.

PETERSON

SPRINGFIELD:

417.268.4057

CHRIS.PETERSON@

HUSCHBLACKWELL.COM

LEGAL UPDATES

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A Word of Caution for PPP Loan Recipients with Adequate Sources of Liquidity

WHAT YOU CAN DO TO AVOID INCREASED GOVERNMENT OVERSIGHT

The Small Business Administration (SBA) has reported that, as of April 16, 2020, at least 1,661,367 Paycheck Protection Program (PPP) loans had been made to businesses throughout the country. With the government's refunding of the program on April 24, 2020, more companies will now have the opportunity to further the legislative purpose of the CARES Act, which is to ensure workers remain paid and employed.

Although companies are required to certify in good faith on their PPP application that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant,” recent guidance from the SBA suggests such businesses revisit whether the loan was, in fact, “necessary.” In making this necessity determination, the SBA’s FAQ 31 specifies that all borrowers must make this certification 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. Based on the SBA guidance in FAQs 31 and 37, any borrower with adequate sources of liquidity to support ongoing operations might not be considered to have made the requisite certification in good faith. Additionally, the following types of borrowers may receive increased government scrutiny relating to the certification: public companies, large private companies, portfolio companies of private equity funds and any other company with adequate sources of liquidity to support operations. In addition to the written guidance provided by the SBA, Treasury Secretary

Mnuchin has announced publicly that the SBA plans to conduct a “full audit of every loan over \$2 million.”

Borrowers that had access to liquidity to support operations should first determine whether such access would have been significantly detrimental to the business. If so, then the borrower should compile all documents, correspondence, research and notes that it relied upon in coming to such conclusion. These supporting documents will be integral in the event the government audits the borrower’s loan.

Safe harbor available

Those borrowers that determine, in light of the SBA’s recent guidance, that they had adequate sources of liquidity at the time of application and that accessing such sources would not have been significantly detrimental to the business can return the loan in full by May 14, 2020, in order to “be deemed by SBA to have made the required certification in good faith.” This safe harbor was established to ensure prompt repayment of PPP loan funds that were obtained “based on a misunderstanding or misapplication of the required certification standard.” Furthermore, it binds the SBA.

This safe harbor also provides borrowers with a second chance to otherwise review their eligibility for the PPP loan. Subsequent to the enactment of the CARES Act, the SBA and Treasury have issued guidance interpreting the Act, including affiliation rules and eligibility. Borrowers should review this guidance anew and determine whether a full return of loan funds by May 14 is needed. For a discussion of affiliation rules and eligibility, see our Frequently Asked Questions.

Contact us

If you have further questions or require more information regarding this update, please contact John Moore, Christopher Peterson or your Husch Blackwell attorney.

Comprehensive CARES Act and COVID-19 guidance

Husch Blackwell’s CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.