

**Featured Professionals**

Marguerite J. Ahmann

Caitlin B. Houlton Kuntz

Levi J. Smith

Erik A. Splett

## Additional PPP Funding Available Soon and More SBA Clarifications

**Legal Update**

04.24.2020

**Increased funding**

President Trump recently signed into law a bill providing additional funding for the SBA's 7(a) Paycheck Protection Program (PPP) after the initial PPP funding of \$350 billion under the CARES Act was exhausted on April 16. The bill increases the PPP commitment amount under Section 1102(b)(1) of the CARES Act to \$659 billion, an increase of \$310 billion.

The bill also increases the SBA's Economic Injury Disaster Loan (EIDL) Emergency Grant appropriation authorization to \$20 billion, an increase of \$10 billion. The bill clarifies that agricultural enterprises with not more than 500 employees may apply for EIDL loans and grants.

**Earmarks for insured depository institutions, credit unions, and community financial institutions**

The bill earmarks a total of \$60 billion of the additional PPP funding for insured depository institutions, credit unions and community financial institutions. At least \$30 billion is reserved for insured depository institutions and credit unions with consolidated assets of at least \$10 billion but less than \$50 billion. The other \$30 billion is reserved for:

1. community financial institutions, and
2. insured depository institutions and credit unions with less than \$10 billion in consolidated assets.

**Clarification on Borrower's "Economic Need" for PPP Loans**

The SBA and Treasury Department recently released clarification in the form of a new FAQ stressing that borrowers should carefully review the good faith certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." The guidance reiterates that borrowers must make the certification in good faith, taking into account their current business activity and ability to access other sources of liquidity sufficient to support their ongoing

operations in manner that is not significantly detrimental to the business. Lenders may rely on a borrower's certification regarding the necessity of the loan request. The guidance further clarifies that it is unlikely that a public company with substantial market value and access to capital will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to the SBA, upon request, the basis for its certification. Notably, borrowers that applied for a PPP loan prior to the recently released guidance and who *repay the loan in full* by May 7, 2020, will be deemed to have made the required certification in good faith.

We note that the guidance references "businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations" with respect to making this good faith certification. Based on a new Interim Final Rule posted by the Treasury Department on April 24, however, all borrowers are encouraged to carefully review this required certification. Under the Interim Final Rule, the May 7, 2020, repayment date will be a regulatory safe harbor for **any** borrower who applied for a PPP loan prior to the issuance of this Interim Final Rule, indicating that the safe harbor is "necessary and appropriate to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard."

## Additional Clarifications

This latest Interim Final Rule clarifies eligibility requirements for certain types of businesses, including:

### Hedge funds and private equity firms

The Interim Final Rule notes that hedge funds and private equity firms are not eligible to obtain PPP financing. Businesses primarily engaged in investment or speculation are generally ineligible for section 7(a) loans under existing SBA regulations, and the SBA Administrator does not believe it was the intent of Congress to include such businesses. Regarding portfolio companies, the Interim Final Rule notes that the affiliation rules apply in the same manner as "any other business subject to outside ownership or control" and borrowers should carefully review the need certification discussed above.

### Government-owned hospitals

The Interim Final Rule provides an exception to the general ineligibility of government-owned entities under 13 CFR 120.110(j), noting that "[a] hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50 percent of its funding from state or local government sources, exclusive of Medicaid."

## **Additional PPP Funding Available Soon and More SBA Clarifications**

The Interim Final Rule also clarifies eligibility for legal gambling businesses and businesses presently involved in bankruptcy proceedings, as well as the application of affiliation rules for businesses participating in employee stock ownership plans.