

CLIENT ALERT: Paycheck Protection Program Update – SBA Adds New Restrictions on Access

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On April 23, 2020, the Small Business Administration (“**SBA**”) issued new guidance apparently intended to severely restrict access to Paycheck Protection Program (“**PPP**”) loans. Although apparently issued in response to large PPP loans made to several publicly traded companies, ***the new guidance is not limited to public companies and applies to all PPP loan applicants.***

The new guidance, set forth in Question 31 of the SBA’s FAQs, requires PPP loan applicants to take 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” as a condition to making the good faith “necessary” certification in the PPP loan application. In particular, the new guidance specifically declares that it is unlikely that “public companies with substantial market value and access to capital markets” will be able to make the “necessary” certification. Thus, despite the specific waiver in the CARES Act of the SBA’s “credit elsewhere” rule, this new guidance seems to impose a version of the “credit elsewhere” rule using a standard that approaches “commercially reasonable.”

The new guidance also focuses on an applicant’s “current business activity.” However, the new guidance does not elaborate on the effect or meaning of this new factor and thus raises further uncertainty for loan applicants that have not yet suffered but are at risk of suffering a downturn in their operations over a still undetermined period of mandatory social distancing.

The new guidance does not shed any light on what steps an applicant should take in support of its “necessary” certification. At a minimum, a prudent applicant should consider first seeking a conventional loan from its regular bank and other customary financing sources and assembling financial projections demonstrating that “current economic uncertainty makes this loan request necessary to support the ongoing operations” of the applicant.

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If a funded borrower can no longer make the “necessary” certification in good faith under the new guidance, the borrower must repay the PPP loan in full by May 7, 2020.

Olshan lawyers from multiple practice groups are working together with clients to address COVID-19-related matters, including the CARES Act stimulus programs (i.e., the PPP and EIDL) and other corporate matters, including contractual analysis and financing, tax, restructuring, employee benefits and employment practices, insurance coverage and litigation.

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