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## **NEW ELIGIBILITY REQUIREMENT UNDER THE PAYCHECK PROTECTION PROGRAM THAT APPLIES TO ALL BORROWERS**

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Yesterday the U.S. Department of the Treasury (“**Treasury**”) published new guidance concerning its Paycheck Protection Program (“**PPP**”). **The guidance effectively creates a new eligibility test for PPP loans based on an applicant’s actual or potential access to cash.** This “liquidity” test is being imposed on new applications as well as loans that have already been approved and/or funded. If you are in the process of applying for a PPP loan or if you have already been approved for, or received, a PPP loan, you may need to reconsider your eligibility to receive a PPP loan. The full text of this new guidance is at the end of this alert.

Prior to yesterday’s publication, there was no guidance available concerning how an applicant should interpret and apply the PPP’s eligibility requirement that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant”. The consensus view of practitioners was that the phrase should be interpreted in light of the PPP’s goal of encouraging businesses to rehire and/or retain their employees in the face of uncertainty and not in light of a business’ available financial resources. However, this new liquidity consideration seems to us to be a means test. Further, the guidance itself is brief and general in nature, raising new questions of interpretation and application to the specific facts of applicants’ and borrowers’ situations.

We are in the process of evaluating this new guidance and consulting with other practitioners and lenders and expect much more will be written about this guidance. We see the following practical implications:

- **This liquidity test applies to all PPP applicants**, not just public companies or “large” companies.
- **If you have an existing SBA approval or have already received your PPP loan proceeds, and decide you cannot satisfy this new test, you must repay your existing loan by May 7, 2020.**
- We note that the updated guidance reiterates that an SBA lender is entitled to rely on an applicant’s certification regarding the need for a PPP loan. Lenders may nonetheless feel the need to investigate an applicant’s liquidity and cash resources, including whether the applicant could borrow from the lender itself. Lenders with a pre-existing lending relationship with an applicant may feel especially obligated to conduct deeper diligence given their familiarity with the applicant’s circumstances. You should be prepared for the possibility of your lender requesting information relating to this new test.
- This guidance affects existing loans and approvals, as well any new applications submitted after April 23<sup>rd</sup>. It is unclear if applications previously submitted to an SBA lender, but not yet transmitted to the SBA as of April 23, 2020, will be re-evaluated by that lender to determine if the

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liquidity test was satisfied or if supplemental information is necessary. In any event, applicants should evaluate whether they can satisfy this test.

- Best practices regarding compliance with this test will eventually emerge. This may include creating contemporaneous business records to document the various factors you considered as to the potential application of this new test to your business and financial condition. You may also want to obtain written legal or accounting guidance (if available) as to the application of this new test to your circumstances.
- Although we suspect the validity and enforceability of this new test may eventually be challenged in court either by lenders or borrowers, disregarding or ignoring this test is at an applicant's peril. Making false statements in an application for a PPP loan carries civil and criminal penalties. Those penalties are highlighted on page 2 of the SBA Form PPP application (which can be found at <https://home.treasury.gov/system/files/136/PPP-Borrower-Application-Form-Fillable.pdf>).

If you have questions or concerns, please contact us. We are available to discuss whether the new eligibility requirement impacts your ability to obtain a PPP loan or creates an obligation to immediately repay a PPP loan that you have already received.

The following is the entirety of the new guidance related to this test (with emphasis added). The full guidance can be found at <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.

**Question:** Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

**Answer:** In addition to reviewing applicable affiliation rules to determine eligibility, **all borrowers must assess their economic need for a PPP loan** under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” **Borrowers must make this certification in good faith, 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.** For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

Lenders may rely on a borrower's certification regarding the necessity of the loan request. **Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.**