

From SLMA's tax counsel at Gomel, Davis & Watson, LLP:

New Paycheck Protection Plan Guidance

In recent days, there has been an outcry in the media about some companies receiving PPP loans although they didn't need the funds. To qualify for a PPP loan, a borrower must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

On April 23, the SBA updated its Frequently Asked Questions guidance to state that "...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." Then, on April 28, the guidance was further revised to apparently bring private companies within the grasp of this standard.

The guidance provided a method for such companies to exit the program without penalty: "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."

Also on April 28, Treasury Secretary Mnuchin said the Treasury will audit all loans over \$2 million, and warned that if it turns out a company did not truly need the money, it will not have the loan forgiven, and could even face criminal liability.

This understandably has made many borrowers uneasy about whether to keep the funds or return them by May 7.

Our firm's current views are as follows:

- Given the constantly changing guidance and officials' comments on this issue, we expect additional clarification, and (hopefully) more objective criteria, will be issued prior to May 7.
- The language of the actual statute should be kept in mind. It only requires that at the time of the application, the borrower certify in good faith that *due to the uncertainty of current economic conditions*, the loan request is necessary to support ongoing business operations (emphasis added). For those applying for loans in the initial wave after April 3, given what was known at the time, and considering the level of hysteria, it would be fair to say that almost every small business owner in the country could honestly answer that question "yes." With due respect to Secretary Mnuchin, it is grossly unfair to change the standard to say that, in hindsight, if it turns out that you didn't really "need" the money, you committed fraud. Offhand comments now about criminal prosecution are not helpful, especially when many businesses participated in the PPP in order to keep their workers off the unemployment rolls, thereby mitigating

the economic catastrophe caused by the virus and meeting the intended goal of the CARES Act.

- With the above in mind, each business that is participating in the PPP should consult with its own attorneys and other advisors about how best to proceed.

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