

Paycheck Protection Program: New Considerations for Public Companies and Private Equity Sponsors

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Interest in the Paycheck Protection Program (“PPP”) has been quite robust. Authorized by the CARES Act and implemented by the Small Business Association (“SBA”) and Treasury, the initial \$349 billion round supported 1.6 million loans and was exhausted by April 16. On April 24, the President signed the Paycheck Protection Program and Health Care Enhancement Act to provide an additional \$310 billion in lending capacity, and the program resumed yesterday. Despite the authorization of a second tranche of lending, two sets of potential borrowers—public companies and private equity-backed companies—may effectively be unable to access the program, even if they meet the applicable size thresholds. This note provides a high-level overview of key implications for these two sets of companies.

Background

- Through the PPP, the SBA provides guarantees for loans to small businesses, generally those with up to 500 employees. Hotels, restaurants and other accommodation and food services businesses are eligible if they have fewer than 500 employees per physical location.
- Neither the CARES Act nor the PPP’s implementing rules and related guidance contain a prohibition on public companies obtaining loans—so long as the company meets the eligibility criteria. Based on public reporting, 234 public companies have received PPP loans totaling approximately \$905 million.

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- A business must count all of its subsidiaries, parent companies and affiliates in determining if it is below the size threshold to be treated as a “small business” and meets the borrowing criteria (“**affiliation rule**”). The affiliation rule is waived for hotels, restaurants and other accommodation and food services businesses, as well as for franchised businesses that appear on a list maintained by the SBA. In practice, the affiliation rule has made (and, unless amended, will continue to make) private equity portfolio companies ineligible for assistance because each portfolio company must generally aggregate its employees with other portfolio companies of the same investment fund.
- Each applicant for a PPP loan must certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant”.

Considerations for Public Companies

- Over the past two weeks, several public companies have received adverse publicity for obtaining PPP loans. Although some of these companies are restaurants and franchised businesses that are eligible for the PPP despite their aggregate size exceeding 500 employees, the criticism has been premised on a view that these companies have greater access to alternative sources of financing than smaller companies that may lack deep relationships with banks and have never accessed the capital markets.
- In response to this publicity, Treasury and the SBA issued guidance on April 23 (“**FAQ 31**”) that could restrict public companies’ ability to obtain PPP loans.
 - FAQ 31 notes that borrowers must make the certification that “current economic uncertainty makes this loan request necessary to support [their] ongoing operations” in good faith, taking into account their ability to access “other sources of liquidity”. Further, the FAQ notes 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 and that any such company “should be prepared to demonstrate to SBA, upon request, the basis for its certification”.

- Any company with these characteristics that does apply for a PPP loan should expect heightened scrutiny from the SBA and may be required to produce documentation substantiating the certification.
- Any borrower that applied for a PPP loan prior to April 23 and repays the loan in full by May 7 will be deemed to have made the required certification in good faith. We expect that any public company that does not voluntarily return its loans will become subject to heightened scrutiny by Treasury, the SBA and, potentially, Congress and the press. This morning, Treasury Secretary Mnuchin announced that the SBA would undertake a “full review” of any PPP loan that exceeds \$2 million.
- Based on public reporting, 15 public companies have already returned PPP loans totaling approximately \$117 million.

Considerations for Portfolio Companies

- Treasury and the SBA have provided modest relief from the affiliation rule that has, in effect, permitted some venture capital-backed companies that are not majority-owned by a fund to obtain PPP loans. Treasury and the SBA, however, have stopped short of providing broader relief for private equity portfolio companies that tend to be majority-owned by a fund. The affiliation rule therefore generally continues to act as a roadblock for these companies to access the PPP.
- On April 24, the SBA published an interim final rule (“**IFR**”) noting that private equity portfolio companies should “carefully review” the required certification that “[c]urrent economic uncertainty” makes the PPP loan necessary to support ongoing operations. Even if a portfolio company may be eligible for a PPP loan despite the affiliation rule, the company’s ability to obtain alternate financing

from the fund sponsor or from banks may create a practical barrier to accessing the PPP.

- In contrast to FAQ 31, the IFR does not expressly state that the SBA will require portfolio companies to substantiate the certification. Still, the SBA has discretion to do so, and the rationale behind the IFR and FAQ 31 are similar, which portends heightened scrutiny for portfolio companies that apply.

FAQ 31 is available [here](#) (p. 11) and the IFR is available [here](#).

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