

Additional monitoring of US funds disbursed under the CARES Act announced

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After a flurry of news reports about large companies gaining access to Paycheck Protection Program (PPP) funds, both the Small Business Administration and the Federal Reserve Board (Federal Reserve) issued statements April 23, 2020. The PPP is one of the measures the US Government established under the Coronavirus Aid, Relief and Economic Security (CARES) Act to help small businesses during the COVID-19 pandemic. The SBA's new guidance reiterates that when applying for a PPP loan borrowers must certify in good faith that the PPP loan funds are necessary to support the company's current operations in light of the current economic uncertainty, taking into account the company's current business activity "and their ability to access other sources of liquidity sufficient to support ongoing operations in a manner that is not significantly detrimental to the business." The FAQ specifically notes that a public company with substantial market value and access to capital markets is unlikely to be able to make this certification in good faith.

The new guidance confirms that companies must be prepared to demonstrate to the SBA, upon request, the basis for this certification – and that affiliates of well-capitalized companies, even if eligible, may not be able to meet this test. Recognizing that there may be some companies who have already applied for funds but may not be qualified for them, the Treasury guidance provides an escape: Companies can repay funds already received before this guidance by May 7 and be deemed to have made their prior certification in good faith. While the FAQs do not outline consequences for those that do not repay the funds, False Claims Act liability or the loss of loan forgiveness under the PPP are possible repercussions.

Following the SBA's release of additional guidance the Federal Reserve announced a new monthly report on its website. This report is an attempt by the Federal Reserve to increase transparency and accountability around financial reporting and the policymaking process, and will be updated monthly. The report will provide the names and details of the participants, amounts borrowed and interest rates charged, and overall costs and revenues for each facility offered under the CARES Act.

As a final step the SBA released a new [Interim Final Rule](#) (IFR) this morning clarifying unequivocally that hedge funds and private equity firms primarily engaged in investment or speculation are not eligible to receive a PPP loan. The IFR further emphasizes that portfolio companies backed by private equity are subject to the affiliation rules under 13 CFR § 121.301 in the same manner as any other company. The same section of the IFR strongly cautions portfolio companies to "carefully review the PPP application" that requires a certification that the PPP loan is needed due to current economic uncertainty that makes the application necessary to support any ongoing operations.

The IFR also implements a new safe harbor provision for those companies that applied for a PPP prior to the issuance of the IFR. Under the safe harbor, any borrower that applied for a PPP loan prior to the issuance of the IFR, and repays the loan in full by May 7, 2020, will be deemed to have made the certification in the PPP loan application in good faith. The safe harbor is described as a necessary measure to ensure that borrowers who misunderstood or misapplied the required certification standard can act based on the new guidance and correct any actions taken due to lack of information.

For more information on the PPP, please visit the previously published article/checklist below:

- [US Senator Marco Rubio announces investigation of small business Paycheck Protection Program recipients](#)
- [A Checklist for Lenders Participating in the Paycheck Protection Program](#)



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