

## **U.S. Treasury Issues New PPP Loan Guidance on Borrower Certifications, Hedge Funds, Private Equity Firms, and ESOPs**

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Yesterday, April 23, 2020, the U.S. Treasury issued additional guidance on the Paycheck Protection Program (PPP) in the form of a new question and answer to the U.S. Treasury's running list of Q&A guidance. The new guidance was likely issued in response to the negative publicity the PPP has been receiving related to the widely reported participation of large corporate borrowers.

The specific question addressed in the guidance is "Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?" The guidance's answer to this question is unlikely, particularly in the context of large public companies with substantial market value and access to capital markets.

The guidance focuses on the requirement in the PPP loan application that the borrower certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." While the guidance does not provide any hardline tests for making this assessment, the guidance advises that borrowers assess 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."

Those borrowers who applied for and received a PPP loan before this new guidance and who now believe their prior certification to be untrue based upon the new guidance are permitted to repay the loan in full by May 7, 2020 and will be deemed by the SBA to have made the prior certification in good faith.

This morning, the U.S. Treasury released an additional interim final rule addressing, among other matters, the following:

- Hedge funds and private equity firms are not eligible to receive a PPP loan.
- Portfolio companies of a private equity fund must apply the affiliation rules set forth in the interim final rule on applicable affiliation rules in the same manner as any other business subject to outside ownership or control. Under those affiliation rules, entities may be considered affiliates based upon factors including stock ownership, overlapping management, and identity of interest.
- A business's participation in an employee stock ownership plan (ESOP) will not result in an affiliation between the business and the ESOP.
- The third interim final rule also re-affirmed yesterday's guidance regarding borrower certifications.

### **ATTORNEYS**

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## RESOURCES

Stone Pigman lawyers are ready and available to assist businesses with navigating these rapid developments and taking advantage of the massive and unprecedented relief measures available to businesses under the PPP.