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New SBA Guidance: Private Equity Eligibility, Debtors in Bankruptcy, and a Safe Harbor

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Shortly after the passage of a bill injecting an additional \$310 billion into the Small Business Administration's Paycheck Protection Program, the SBA has issued [another supplemental Interim Final Rule \(IFR\)](#) providing new guidance on several issues, including eligibility for hedge funds, private equity firms and portfolio companies, and has also answered questions about businesses in bankruptcy proceedings. This guidance incorporates [information from a new set of FAQs just issued](#) by the SBA, which emphasized the need for borrowers to certify in good faith that the PPP loan is necessary and provides a safe harbor for the borrowers to avoid liability.

As to hedge funds and private equity firms, the new guidance explicitly states that they are not eligible given that they are "primarily engaged in investment or speculation" -- a category of business that is not eligible for SBA loans under pre-pandemic regulations.

As to portfolio companies the new IFR reiterates that the SBA's affiliation rules apply, and makes clear, except in the case of borrowers receiving financial assistance from an SBA-licensed Small Business Investment Company, that "[t]he affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership and control." In this regard, whether a business is an affiliate of another for purposes of the PPP depends upon a fact-specific inquiry taking into account the structure and nature of the entities' relationships and whether the borrower is controlled by, or under common control with, another entity.

Notably, the IFR reminds all borrowers to "carefully review the required certification on the Paycheck Protection Program Borrower Application . . . stating that '[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.'" Direction from the SBA on the meaning of this certification has until now been nonexistent, but in separate guidance issued on April 23, and likely in response to headlines about numerous public companies taking large PPP loans, the SBA stated that 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.” Given that this guidance was issued weeks after the PPP program went live, with nearly 2 million loans already issued, the SBA has provided companies concerned about the accuracy of the certification a safe harbor: if they pay the loan back in full by May 7 the certification will be deemed to have been made in good faith.

Finally, the new IFR addresses the eligibility of business involved as a debtor in bankruptcy proceedings. It provides that if the applicant, or the owner of an applicant, is a debtor in bankruptcy either at the time it submits the application or before the loan is disbursed, the applicant is ineligible for a PPP loan. This leaves open the question of how companies *contemplating* bankruptcy should proceed -- a question that should be answered, in consultation with bankruptcy counsel, based upon a variety of borrower-specific factors.

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