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New PPP Funding Ups Ante for Compliance Failure—Audits on the Horizon

Last week, Congress passed an additional $484 billion in stimulus funds primarily designed to supplement the Paycheck Protection Program (PPP), which had quickly run out of its initial funding as businesses across the country competed to get access to much-needed funds to stay afloat. Approximately $310 billion of these new funds are specifically allocated for the PPP program, $60 billion of which is earmarked for community banks and lenders to improve access to these loans for businesses that do not have established banking relationships. The bill further provides $60 billion for the Small Business Administration's (SBA) disaster relief fund and $100 billion to the Department of Health and Human Services, with $75 billion allocated to hospitals and $25 billion to improve and expand COVID-19 testing.

Although the bill comes with no new enforcement-related provisions, U.S. Treasury Secretary Steven Mnuchin recently announced that all companies receiving more than $2 million in PPP funding will undergo a full audit by the SBA before having their loans forgiven, and companies that made false certifications in their loan applications will face criminal liability. This announcement comes in the wake of public backlash following reports that numerous publicly traded companies and larger private companies received large PPP loans as many smaller businesses that were the intended beneficiaries of the program missed out on funding.

As a result, the SBA released guidance noting that borrowers must certify "in good faith" that "current economic uncertainty makes this loan request necessary to support the ongoing operations" of the borrower's business. The SBA further noted 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 [the] SBA, upon request, the basis for its certification." Borrowers that applied for a PPP loan before the issuance of this guidance who no longer meet the eligibility guidelines may repay the loan in full by May 7, 2020, at which point they "will be deemed by [the] SBA to have made the required certification in good faith."

Public scrutiny of these stimulus funds shows no sign of slowing down, increasing pressure on law enforcement and regulators alike to take action. In addition to Secretary Mnuchin's announcement that companies will face criminal liability for false certifications related to the funds, Senator Elizabeth Warren wrote a letter to the inspector generals of the Treasury Department and SBA requesting "an investigation into the implementation of" PPP funds and accusing large banks of treating its larger commercial customers more favorably than smaller customers. The result, Warren wrote, was that "mom and pop businesses did not proportionally benefit from the program."

These developments are a reminder that all entities seeking and receiving stimulus funds must be prepared for public and agency scrutiny and potential audits into the certification, receipt, and use of these funds. This includes banks that process PPP loan applications. At no time has it been more important to comply with best practices to mitigate the risks associated with participating in this novel program.

Alston & Bird has formed a multidisciplinary task force to advise clients on the business and legal implications of the coronavirus (COVID-19). You can view all our work on the coronavirus across industries and subscribe to our future webinars and advisories.

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