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Companies Face Fraught Choice On PPP Return Deadline

By **Elise Hansen**

Law360 (May 18, 2020, 8:20 PM EDT) -- Companies faced a difficult decision leading up to Monday's deadline to return Paycheck Protection Program loans, and attorneys say for those who decided to keep the money, good record-keeping is the key to ensuring smooth sailing down the road.

Monday marked the end of a limited safe harbor established by the Small Business Administration for companies that may have improperly taken out loans through the Paycheck Protection Program. The $660 billion loan program was set up by the Coronavirus Aid, Relief and Economic Security, or CARES, Act to help small businesses avoid layoffs during the coronavirus pandemic.

But reports of well-known companies such as Shake Shack and the Los Angeles Lakers basketball team receiving loans, as well as the fact that the program burned through its initial $350 billion in less than two weeks, helped spur a range of guidance from the Small Business Administration and the U.S. Department of the Treasury warning certain businesses away from the loans.

The SBA in April assured companies that applied for a PPP loan before April 23 that they wouldn't be dinged for taking out the loan in bad faith if they returned it in full by Monday.

By midafternoon on Monday, publicly traded companies had returned roughly 65 PPP loans worth a combined $425 million, according to analytics company FactSquared. The analysis looks at companies that reported receiving PPP loans — and disclosed their return — to the U.S. Securities and Exchange Commission.

But public companies kept nearly $1 billion of the loans, according to the analysis. Similar data for private companies was not immediately available, although FactSquared's data indicate that private companies so far make up the bulk of the borrowers.

The evolution of federal guidance affected the cost-benefit calculation for both public and private companies seeking the loans, attorneys who advised PPP borrowers told Law360.

"Initially, there weren't a lot of questions," said Kathleen McGee, counsel at Lowenstein Sandler LLP.

"Although from the start we were advising clients that … you did have to show need and you had to establish that need was immediate need."

Then came the questions from technology and venture-backed companies, which had to navigate the SBA's rules regarding ownership and affiliation in order to qualify, McGee said.

Then, in late April, the SBA issued the guidance that forced a closer reckoning. "It is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification [that the loan is necessary] in good faith," the administration said.

"That's when people really started to, I would say, panic," McGee said.

Since then, many companies have had to re-evaluate not only whether they qualified for the program, but also whether they are willing to risk the costs of an audit or an investigation, Covington & Burling LLP partner Daniel Suleiman said.

Treasury Secretary Steven Mnuchin in late April promised special reviews for all PPP loans over $2 million. Later SBA guidance said that the good-faith certification was unlikely to receive much scrutiny for companies that took out loans worth less than $2 million.

"An important question that companies are trying to deal with is, essentially, what does the changing guidance coming out of the SBA mean for them?" Suleiman said. "The backdrop is, to what extent will they be investigated or audited over the basis for the certification that the economic uncertainty made their loan necessary?"

"When you're actually investigated, that comes with a lot of costs and disruption and aggravation, frankly," Suleiman added.

In the absence of a clearly defined standard for a business' need for a PPP loan, careful documentation can help prepare clients to face an audit or a prosecutor down the road, Venable LLP partner Allyson Baker said.

Companies should keep track of projections they made before deciding to take out a loan, such as expected revenue, other sources of available liquidity, and the likely extent of their payroll needs, Baker said.

"All that analysis that gets done as part of the ordinary course of decision-making: you want to memorialize this," she said.

Amanda Kramer, a partner at Covington & Burling LLP, also emphasized that point, saying that business decisions could be difficult to evaluate years down the road.

"Keep a record of what the forecast was for [your] business: the day they applied for the loan, the week before that, and maybe the week before that," Kramer said. What companies don't want, she said, is "going back and trying to recreate a situation that might not have actually played out in the manner they were forecasting it to on April 4. Now is the time to prepare."

And companies with loans under $2 million could still face scrutiny even if the SBA doesn't question their good-faith certification, McGee noted. A large number of False Claims Act cases originate with whistleblowers, and news reports could also bring to the surface some questionable borrowers, she said.

"Just because the SBA is not going to be reviewing applications and loans under $2 million and thereby not making referrals to the Justice Department, does not mean the Justice Department won't get cases other ways," McGee said.

There are other aspects of the program besides the good-faith certification that could also expose companies to an enforcement action, Baker said. The program requires that a certain portion of the funds be spent specifically on payroll, while the rest can go to other specific costs such as utilities and rent, and companies must make certain certifications about their bankruptcy or criminal history, Baker noted.

And investigators don't have to stop at PPP loan certifications, Suleiman said.

"Once an investigator starts looking around, while they may be focused on one particular question, if something catches their eye ... there's nothing that really prevents them from [exploring further]," he said.

"I think we haven't seen the last of this situation," Suleiman said. "I think we're maybe going to see additional guidance or additional public reaction. We're going to see more Congressional activity, and to the extent that there's any sense that companies that didn't really need the funds took advantage of the program, we're going to see some consequences."

--Additional reporting by Andrew Kragie, Zachary Zagger and Jon Hill. Editing by Emily Kokoll.