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New PPP Loan Availability and Cautionary Guidance Announced

April 24, 2020

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1. The Paycheck Protection Program and Healthcare Enforcement Act: What You Need to Know

On April 24, 2020, the President signed into law the Paycheck Protection Program and Healthcare Enhancement Act (the "Act"), amending the CARES Act to increase funds available to eligible businesses through the Paycheck Protection Program (the "PPP") by approximately $310 billion. The Act replenishes capital available for PPP loans, as market demand had exhausted the program's initial $349 billion appropriation in just 14 days. Of the total $659 billion appropriation for PPP loans, the Act mandates that at least $30 billion be used for PPP loans made by insured depository institutions and credit unions, each with consolidated assets between $10 billion and $50 billion. Another $30 billion is set aside for PPP loans made by even smaller insured depository institutions and credit unions, each with consolidated assets less than $10 billion, as well as "community financial institutions" that promote community development or serve underrepresented populations. The Act also allots approximately $10 billion to the Small Business Administration to administer the PPP.

Notably, the Act does not affect the PPP's fundamental rules related to borrower eligibility, calculation of the loan amount or loan forgiveness.

While the availability of additional PPP funds will receive the most attention, the Act provides other forms of relief. Through this piece of legislation, Congress increases funding and expands eligibility for the Economic Injury Disaster Loan Program, doubling the amount allocated for immediate grants of up to $10,000 from $10 billion to $20 billion and authorizing "agricultural enterprises" with fewer than 500 employees to apply for said grants.

Rounding out the relief package, the Act earmarks $75 billion for hospitals and other health care providers stretched thin by the pandemic and $25 billion to research, develop, manufacture and expand capacity for COVID-19 testing.

2. Additional Paycheck Protection Program Guidance on Borrower Certification that the Loan is "Necessary to Support Ongoing Operations"

The Treasury Department has updated its PPP guidance to further clarify that most public companies and potentially other non-public companies with adequate sources of liquidity are likely not eligible for the program. Excluded companies that have received PPP funds have until May 7, 2020, to return the funds to the SBA.

PPP borrowers are required to certify in good faith that the "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations" of the borrower. In an update to its

FAQ, the Treasury states that it is "unlikely that a public company with substantial market value and access to the capital markets" can make this certification in good faith. In addition to public companies, the new guidance could apply to any company with adequate sources of liquidity for the company's ongoing operations.

Each PPP borrower should carefully assess its economic need for a PPP loan, taking into account not only current business activity levels but also access to capital that could support ongoing operations without significant detriment, and consider returning any PPP funds borrowed to the extent it can no longer make the certification that the loan is economically necessary to support operations. A PPP lender may continue to rely on a PPP borrower's certification regarding the necessity of the loan request.

Updated PPP Loans FAQS (April 24, 2020)

3. New Interim Final Rule on Promissory Notes, Affiliation, and Eligibility

The SBA has issued a new Interim Final Rule that provides additional guidance on a number of PPP issues. Of particular note, and consistent with the guidance offered regarding the eligibility of public and private entities with access to capital, the new IFR recommends that PPP borrowers that are affiliated with private equity funds should carefully evaluate whether they are able to certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations." The IFR also clarifies that hedge funds and private equity firms, in themselves, are ineligible for the PPP because they are business concerns engaged in investment or speculation, which is one of the categories of businesses ineligible for SBA 7(a) loans.

As with the updated guidance for PPP borrowers with access to capital, the IFR provides a safe harbor to encourage those borrowers who may have participated in the program but did not meet the certification standard based on the updated guidance. Per the IFR, any borrower that applied prior to the issuance of the IFR on April 24 but repays the loan in full by May 7 "will be deemed by SBA to have made the required certification in good faith" at the time of application.

Interim Final Rule on Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility (April 24, 2020)