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CLIENT ALERT - COVID-19: GOOD FAITH CERTIFICATIONS UNDER THE PAYCHECK PROTECTION PROGRAM

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By now, many if not most businesses interested in a loan under the Paycheck Protection Program (PPP) have already applied for and may have already received a PPP loan. As part of the application process, each borrower/applicant was required to make specific certifications. Included in those required certifications was a certification that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant." Additionally, borrower/applicants were required to certify that the loan proceeds would "be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments." Subsequent guidance issued by the SBA make clear that, with regard to the second certification, the use of loan proceeds would adhere to the 75%/25% restrictions. Borrowers will, likewise, be required to make certifications when they apply for loan forgiveness.

The potential penalties for these certifications being untrue can be significant. For example, knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than $5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than $1,000,000. Further, knowingly using the loan proceeds for unauthorized purposes could lead to charges of fraud.

The SBA has made clear that lenders need simply confirm receipt of the borrower's certifications, and may rely on those certifications regarding the necessity of the loan request.

Yesterday the SBA issued additional guidance that has sent chills down many a borrower's spines. Specifically, the SBA advised borrowers to "review carefully the required certification" regarding economic uncertainty making the loan request necessary, and cautioning borrowers to "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 manger that is not significantly detrimental to the business." And while lenders are not required to verify borrower's certifications, the SBA indicated in its guidance yesterday that it may do so. While this most recent guidance was primarily aimed at publicly-traded companies, it gave many businesses pause.

But let's all take a collective deep breath. Keep in mind that yesterday's guidance was referring to the certification made at the time of application. While for most it was only a matter of weeks ago, the rapidity of the changing economic environment over that time period cannot be underestimated. At the time most businesses were preparing their applications, "stay-at-home" orders were just being issued and many businesses were being forced to close offices and send workers home. As a result, sales and productivity were, at that point, down. We were ascending the COVID-19 "curve" with predictions of its impact on individuals, businesses, the country and the world varying widely. Scientist and politicians, let alone businesses, lacked a crystal ball to enable them to predict the ultimate impact of the pandemic either in terms of magnitude or duration. Therefore, businesses applying for PPP loans at that point in time were most certainly facing "economic uncertainty" and, unable to predict how significantly their businesses would be impacted, likely believed, in good faith, that the loans being requested in that economic environment were necessary to support their ongoing operations.

But many businesses adapted by cutting costs, shifting workers, and a myriad other creative alternatives to keep their businesses going. So what happens if the result of all of those efforts is that the business is not as severely impacted as feared at the time of application or is possibly looking at financially rebounding? Can the SBA now come back and, in hindsight, view my certification as having been made in bad faith? While we do not yet know how this guidance will ultimately be applied, logic suggests that under such circumstances, the prior certifications are likely to meet the "good faith" standard. Clearly, the certification and the determination of an applicant's "good faith" in making it can only be judged by the circumstances at the time the certification was made. Collect and retain documentation from that time period to establish the basis for your economic uncertainty: dates of closure orders, drops in sales and productivity, etc. Remember, the overarching goal of the PPP was to keep workers paid and employed. If a business, having faced down the initial crisis, found a way to retain employees that it might otherwise have let go arguably acted in good faith when signing the certification. Further, it is logical to conclude that any business that reasonably expected a downturn and took actions to try to reduce the impact of the virus would seem to have acted not only within the scope of the certification but also the spirit of the PPP.

To the extent any borrower is concerned about possible scrutiny of its prior certification regarding its economic insecurity, the SBA issued a new interim rule today which, among other things, provides a "safe harbor" whereby borrowers who repay their PPP loans in full by May 7, 2020 shall be deemed to have made their certification in good faith.

The COVID-19 pandemic is creating rapidly-changing issues for businesses, and government aid processes and measures designed to assist businesses may also change materially from when this Client Alert is issued. We therefore encourage you to monitor our website, review our future Client Alerts and generally remain alert for additional updates or modifications to laws and regulations.

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