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CLIENT ALERT - COVID-19: SBA PROVIDES FURTHER GUIDANCE REGARDING GOOD FAITH CERTIFICATION

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As discussed in a prior Client Alert, the SBA previously announced that, in evaluating whether a PPP borrower made the certification that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant" in good faith, it would look at whether the borrower had adequate sources of liquidity. Further, the SBA announced that it would review all loans in excess of $2 million and other loans "as appropriate." Finally, the SBA announced a "safe harbor" period whereby borrowers concerned about the certification could return its loan proceeds in full by May 14, 2020 and thereby be considered to have made the certification in good faith.

With an impending end date for the safe harbor, and little guidance as to what "adequate sources of liquidity" means, many borrowers were left concerned and confused as to whether they were at risk and whether they should take advantage of the safe harbor and return the loan proceeds.

Earlier today, the SBA provided further guidance to aid borrowers in these determinations. First, the SBA announced that any borrower that, together with its affiliates, received a PPP loan with an original principal amount of less than $2 million will be "deemed to have made the required certification concerning the necessity of the loan request in good faith." The SBA concluded that borrowers with loans below the $2 million mark are "less likely to have had access to adequate sources of liquidity in the current economic environment." The SBA also recognized that it has finite audit resources which it must conserve so it will limit the universe of the loans it will review to those that "may yield higher returns."

For borrowers with loans greater than $2 million, the SBA recognized that there may still be an adequate basis for making the required good-faith certification based upon individual circumstances. Unfortunately, the SBA's guidance today did not shed any further light on what circumstances will be deemed adequate. For those borrowers still concerned or in doubt, they may still take advantage of the safe harbor period through tomorrow, May 14. If, however, the loan is not returned by May 14, and the SBA determines in its review that the borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, the SBA "will seek repayment" of the loan and advise the lender that the borrower is ineligible for forgiveness. If the borrower repays the loan after being notified by the SBA, the SBA announced today that, in that circumstance, it "will not pursue administrative enforcement" against the borrower.

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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