BERGER SINGERMAN
FLORIDA'S BUSINESS LAW FIRM

CLIENT ALERT - COVID-19: THE CARES ACT CREATES PAYCHECK PROTECTION PROGRAM

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Economic Resources for Businesses Impacted by COVID
Sec. 1102 of the CARES Act: Paycheck Protection Program

Upon the passage of the Coronavirus Aid, Relief and Economic Security ("CARES") Act, business owners struggling to maintain operations and fulfill payroll during the Coronavirus-induced economic downturn may have viable resources to sustain the ongoing crisis and retain a workforce. Among the litany of provisions in the CARES Act is the creation of a $349 billion "paycheck protection program" (the "Program"), guaranteed by the U.S. Small Business Administration ("SBA") in partnership with private lenders, and designed to primarily assist small businesses (fewer than 500 employees) impacted by the COVID-19 pandemic by providing 2.5 months of cash-flow assistance to cover payroll costs, health insurance, salaries, mortgage payments, rent, and utilities through 100 percent federally guaranteed loans. The Program, which amends and expands section 7(a) of the Small Business Act, provides a formula by which the eligible loan amount is tied to payroll costs incurred by the business up to a maximum of $10 million. Further, and in addition to reducing the costs of participation in the program for both borrowers and lenders by providing fee waivers, a six month to one year deferment of loan repayment, and no prepayment penalties, the program includes terms by which borrowers may be eligible for loan forgiveness in an amount equal to the amount expended by the borrower during an eight-week period after the origination date of the loan on enumerated categories of costs related to the operation of the business.

Applicable Loan Period
The applicable or covered loan period is defined in the CARES Act as February 15, 2020, through June 30, 2020 ("Covered Period"). During the Covered Period, which is applied retroactively, the SBA will waive its borrower and lender fees and will not require a personal guarantee or collateral to obtain a loan under the Program.

Eligibility to Apply
The Program covers businesses, certain nonprofits and veterans organizations with fewer than 500 employees, inclusive of part-time workers, or, if greater, the number of employees established by the current SBA size standards pertinent to the industry "in which the business concern, nonprofit organization, or veterans organization operates." The Program includes eligibility for sole proprietors, independent contractors and other self-employed individuals, provided they submit payroll tax filings reported to the IRS.

For businesses that operate multiple physical locations or offices, the fewer than 500 employee small business standard for eligibility applies to each location (rather than in the aggregate), so long as the applicant has an assigned NAICS code beginning with 72 at the time of disbursal of the loan proceeds.

In evaluating the eligibility of a borrower for a loan under the Program, the lender shall consider whether the borrower was in operation on February 15, 2020, and whether it employed workers for whom the borrower paid

wages and payroll taxes or, alternatively, paid independent contractors. Consistent with this vetting process, eligible borrowers would be required to certify, in good faith, that they have been affected by COVID-19 and will use funds to retain workers and maintain payroll and comply with other debt obligations.

Determining the Amount a Small Business May Borrow

The amount of each loan is generally limited to the lesser of the average total monthly "payroll costs" incurred by the borrower for the one-year period ending on the date the loan is issued, multiplied by 2.5, and $10,000,000. If the borrower was not in operation in 2019, the loan amount will be calculated based on monthly payroll between January 1 – February 29, 2020.

Covered "payroll costs" include salaries, wages, commissions, payments of cash tips, payments for vacation, family, medical or sick leave, and retirement benefit payments. The term specifically excludes compensation for any employee in excess of $100,000 per year as well as any compensation of an employee whose principal place of residence is outside of the United States.

Also excluded from "payroll costs" are payments to employees for qualified sick leave wages or qualified family leave wages pursuant to sections 7001 and 7003, respectively, of the recently-enacted Families First Coronavirus Response Act.

Permitted Use of the Loan Proceeds

The allowable uses of covered loan proceeds include: a) payroll costs; (b) costs related to maintenance of group health care benefits including insurance premiums; (c) employee salaries, commissions, or similar compensation; (d) payments of interest on any mortgage obligation incurred prior to February 15, 2020; (e) payment of rent on any lease in force prior to February 15, 2020; (f) payment on any utility for which service began before February 15, 2020; or (g) interest on indebtedness incurred prior to February 15, 2020.

Loan Repayment and Forgiveness

The loan carries a maximum interest rate of four percent (4%); however, during the Covered Period, lenders are required to provide borrowers whose businesses were operational on February 15, 2020, complete payment deferment relief, including principal, interest, and fees, for a period between six months and one year, the difference will be determined by the lender.

Borrowers may have a portion of the loan principal forgiven in an amount equal to their payroll costs (not including costs for individuals compensated above $100,000 annually), interest payments on mortgages, rent payments, and utility payments during the 8-week period beginning on the date of the origination of a covered loan. Any portions of loans used for other purposes are not eligible for forgiveness. To seek forgiveness, a borrower must submit to the lender an application that includes documentation verifying the number of employees and pay rates, as well as cancelled checks or payment receipts showing mortgage, rent, or utility payments, if applicable. The borrower must also certify that the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments. The lender shall render a decision on the amount of forgiveness afforded to a borrower within 60 days of receipt of the application.

Where a borrower reduces its workforce consisting of the average number of full-time employees during the Covered Period when compared to other periods in 2019 or 2020 (i.e. February 15, 2019 – June 30, 2019; or January 1, 2020 – February 29, 2020), or reduces the salary or wages of any employee during the Covered Period by 25% or more of the employee's compensation during the most recent full quarter prior to the Covered Period, and provided the employee earned less than $100,000 annualized in 2019, the amount of loan forgiveness shall be reduced in proportion to the reduction in full-time employees or the reduced compensation, respectively. An exemption to this rule is provided where the employer rehires or increases the employee's pay by the conclusion of the Covered Period – June 30, 2020.

Any balance remaining on a covered loan after reduction based on loan forgiveness will be guaranteed by the

SBA and shall have a maximum term of 10 years from the date on which the borrower applies for loan forgiveness.

Exclusions
A borrower that receives a loan under the SBA's economic injury disaster loan program ("EIDL") which loan proceeds were received on or after January 31, 2020, and were made available for the same purpose as a loan covered under the Act (payroll costs, etc) may not receive loan funds under this Act.

Application Process
As the administrator of the Program, the SBA will dictate the terms of the application process. The Act provides the Treasury and the SBA up to 15 days after enactment to promulgate administrative processes, underwriting guidelines and other implementing policies and procedures. Though we will need to wait for additional guidance on the time-frame for application through approval, it is anticipated that applicants will be required to provide documentation including payroll, to substantiate the requested loan amount. In addition, the applicant shall submit a good faith statement certifying that the loan is necessary due to the uncertainty of current economic conditions caused by COVID-19; they will use the funds to retain workers and maintain payroll, lease, and utility payments; and are not receiving duplicative funds for the same uses from another SBA program.

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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