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給与保護プログラム(PPP)—ローン申込時における流動性にかかわる新要件と資金受領後の監査の可能性について

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EXECUTIVE SUMMARY

Companies that apply for Paycheck Protection Program ("PPP") loans should document that "economic uncertainty makes this loan request necessary to support the ongoing operations of" the company, and that the company does not have adequate access to other sources of liquidity from its shareholder(s).

In addition, companies that receive PPP loan funds should be prepared to be audited by the Small Business Administration ("SBA") and defend against potential False Claims Act ("FCA") litigation.

The CARES Act authorizes PPP loan availability for certain small businesses (those that do not employ more than 500 employees) between March 1, 2020 and December 31, 2020.

Treasury and the SBA have been continuously releasing answers to frequently asked questions ("FAQ") that change the interpretation and requirements of the PPP on a frequent basis, sometimes daily. The FAQ specifically state that the FAQ "do not carry the force and effect of law independent of the statute and regulations on which it is based." However, regulations have not been issued, leaving uncertainty in eligibility for the PPP. We anticipate that the regulations will incorporate most, if not all, of the FAQ, even where the CARES Act is silent on some requirements the SBA is imposing in the FAQ.

The FAQ guidance is not clear; to use an American phrase, it is clear as mud for U.S. subsidiaries of foreign owned entities.

The FAQ is requiring a liquidity analysis (see underlined information in Question 31 below) in addition to a good faith analysis that "economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant."

In addition, any received PPP loan of \$2M and above will automatically be audited, and we expect PPP loans for less than \$2M, when there is a foreign owner, will also likely to be audited based upon the underlined information in Question 39 below.

Below are the relevant FAQs and our recommended course of action to document the need for the PPP loan. The complete list of FAQs can be found here: (link)

Question 31: Do businesses owned by large companies, with adequate sources of liquidity to support the business's ongoing operations, qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must 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 manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to the SBA, upon request, the basis for its certification.

Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by the SBA to have made the required certification in good faith.

Question 37: Do businesses owned by private companies, with adequate sources of liquidity to support the business's ongoing operations, qualify for a PPP loan?

Answer: See response to FAQ #31.

Question 39: Will the SBA review individual PPP loan files?

Answer: Yes. In FAQ #31, the SBA reminded all borrowers of an important certification required to obtain a PPP loan. To further ensure PPP loans are limited to eligible borrowers in need, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of \$2M, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application. Additional guidance implementing this procedure will be forthcoming.

Our recommendation to clients is to be prepared to be audited and provide documentation, showing that the required certification for the PPP loan was made in good faith. The documentation could be in the form of a memorandum to file or other document supported by financial information and pro-forma financial statements that support what is essentially a two-pronged test for PPP loan eligibility:

1. "economic uncertainty makes this loan request necessary to support the ongoing operations of the [a]pplicant:" This would be based upon pro-forma income statements, cash flow projections, balance sheet and other financial data showing that but for the PPP loan, the company will need to layoff/not hire back employees.

2. You are not able to "access other sources of liquidity sufficient to support [your] ongoing operations in a matter that is not significantly detrimental to [your] business." For U.S. subsidiaries of foreign owned entities, or entities with shareholders with access to capital, this means you need to document your shareholder(s) unwillingness or inability to provide liquidity to you to hire back/keep your employees on payroll. If your shareholder(s) is willing to provide liquidity to you on terms that are not "significantly detrimental," then you are not eligible for the PPP loan and should return the loan funds by May 7, 2020.

We are working with clients to assist in preparing this documentation.

In addition, an audit is not the only potential concern after receiving a PPP loan. Under the FCA, the U.S. Department of Justice may pursue claims or an individual whistleblower through his or her attorney may file qui tam lawsuits (where the individual plaintiff stands in the shoes of the U.S. federal government). The FCA provides for criminal and civil liability for "knowingly" or acting in reckless disregard and submitting a false claim to the U.S. federal government, including the PPP loan application and the need for the PPP loan. Potential exposure under the FCA includes treble damages, monetary penalties and the payment of attorneys' fees. Thus, preparing the documentation above will also provide evidence against, and assist in litigation against, potential FCA claims. Information concerning companies receiving a PPP loan will become public, and the plaintiff's bar likely will be trying to bring litigation under the FCA because such cases, if successful, can be lucrative.

Please contact Jennifer R. Watson or a member of the Corporate, Finance and Acquisitions Group with any questions regarding PPP loans.