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SBA Clarifies Certification Regarding Necessity of Loan – Companies May Repay Loans by May 7 Without Adverse Consequences

Additional Funding for Paycheck Protection Program

The Senate has authorized an additional \$310 billion for the Paycheck Protection Program (“Program”), and the House approved the legislation on April 23, 2020. The President is expected to sign the bill promptly. The initial authorization of \$349 billion was exhausted in short order.

To obtain a loan, businesses are required to certify that “current economic uncertainty makes this loan necessary to support on-going operations of the Applicant.” It is important to note that a false certification may result in significant civil or criminal liability under the False Claims Act. In rolling out the PPP, the Government did not issue regulations or provide guidance on the meaning of the certification. Some companies and other institutions have been interpreting the language of the certification very broadly.

In the second and third week of April, many stories appeared in the press about large companies with access to capital and about organizations with significant endowments that obtained loans under the Program. These companies have been criticized for obtaining loans that were intended for small businesses.

On April 23, the Small Business Administration (“SBA”) issued [updated FAQs](#), which directly address the meaning of the certification. SBA counsels that “borrowers must certify in good faith that the PPP loan is necessary” and in so certifying “take 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.” Applicants who do not meet this standard are encouraged to withdraw their applications. Borrowers who received a loan but do not meet this standard may repay it in full by May 7 without suffering adverse consequences.

We have advised many clients in connection with the certification. Factors organizations may consider in determining whether it can certify in good faith include:

- Availability of other sources of credit, such as a bank loan or existing line of credit;
- Availability of endowment; and
- Whether a company has experienced a significant decline in business versus whether it is concerned that such a decline will occur in the coming months.

Finally, in considering whether to apply for a loan or to withdraw a pending application, it is useful to remember that the Program was established to keep small businesses from laying off employees and closing their doors. An important consideration is whether your company falls into this category.

Saul Ewing Arnstein & Lehr attorneys are experienced in helping companies determine whether they can make good faith certifications. If you have questions regarding an issue raised in this alert, please contact the authors or the attorney at the Firm with whom you are regularly in contact.

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