LAW ALERT

April 30, 2020

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SBA Publishes Additional Guidance and FAQ's on Eligibility for Paycheck Protection Program

Businesses reeling from the impact of the COVID-19 pandemic immediately utilized the initial resources committed to the Payroll Protection Program ("PPP"). Due to the demand for the resources, an additional $484 Billion in COVID-19 relief, including $320 Billion for the PPP, passed with bi-partisan support, and was signed into law by President Trump. However the Administration, Congress and the Small Business Association ("SBA") faced significant backlash over reports that many large, and in some cases publicly held organizations qualified for and obtained PPP funds, while many small businesses struggled to get applications filed and/or were shut out of the PPP entirely.

To address these and other issues that arose in the initial roll out of the PPP, on April 24, 2020, the SBA released an update to its interim rules and FAQ's relating to the PPP.

Hedge Funds-Private Equity

Pursuant to the interim rule, hedge funds and private equity firms are primarily engaged in investment or speculation, and are therefore ineligible to receive PPP loans. However, a portfolio company of a private equity fund may be eligible for a PPP loan if it otherwise qualifies. The affiliation rules under 13 CFR 121.301(f) apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control. However, the PPP waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

Enhanced Scrutiny of PPP and Limited Safe Harbor for Return of PPP Funds

Public reaction to the administration of the PPP, as well as revelations that organizations that were not in distress or had other access to capital may have benefitted from the program to the exclusion of smaller, struggling enterprises, will result in enhanced scrutiny of the program.

The Borrower Application Form requires PPP applicants to certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." FAQ 31 provides that when making the "good faith" certification of necessity, borrowers must take into account their current business activity and their ability to access other sources of liquidity sufficient to support the ongoing operations of the company that is not detrimental to the company. Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020, will be deemed by SBA to have made the required certification in good faith.

Impact of Bankruptcy Proceedings on Eligibility for PPP

Having determined the risk “unacceptably high”, the interim rule provides that a debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, is ineligible to receive a PPP loan. Further, the interim rule provides that if the owner of the applicant becomes a debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant’s obligation to notify the lender and request cancellation of the application. If the owner fails to notify the lender, it will be deemed an unauthorized use of PPP funds.

Public Hospitals

A public hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization is eligible for a PPP loan if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

Legal Gaming Enterprises

The interim rule provides that 13 CFR 120.110(g) is inapplicable to PPP loans. As such, legal gaming enterprises are eligible for a PPP loan. Not surprisingly, businesses that received illegal gaming revenue remain “categorically” ineligible.

Employee Stock Ownership Plans (ESOPs)

The interim rule provides that a business’ participation in an ESOP (as defined in 15 U.S.C. § 632(q)(6)) does not result in an “affiliation” between the business and the ESOP and the business may be eligible for PPP loans.

For additional information, please contact
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