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CARES Act: Paycheck Protection Program (PPP) Additional Guidance and Additional Funds

Following extensive publicity regarding large and publicly-traded businesses that have received loans under the Paycheck Protection Program (the "PPP"), on April 23, 2020, the Small Business Administration (the "SBA") added additional guidance with Question 31 to its Frequently Asked Questions ("FAQs", and Question 31, "FAQ No. 31"). On April 24th, President Trump signed into law a bill approving $484 billion in additional coronavirus relief, of which $310 billion will go toward commitments for general business loans through the PPP ($60 billion of which is specifically allocated to smaller lenders to help inject federal funds into rural areas). Congress also directed $50 billion to the Disaster Loans Program Account, $10 billion to Emergency EIDL Grants, $75 billion to health care providers and $25 billion to coronavirus testing.

Background

The PPP opened for applications on April 3rd, and the rollout since that time has reportedly encountered many challenges and faced critiques from lenders and applicants. The initial $349 billion in federal funding allocated for the PPP ran out in two weeks, and initial reports indicate the additional $310 billion is already spoken for based on applications that are already pending. Reports suggest that banks that became overwhelmed by the process and confused by government guidance favored existing, often larger, customers. It has also been widely reported that companies with the fewest resources have faced the greatest difficulty in accessing the PPP loans.

The SBA has reported certain information about the PPP loans it had approved as of April 16, 2020, with the first outlay of federal funds. Through 4,975 lenders across the country, the SBA had approved a total of 1,661,367 loans amounting to about $342 billion in federal funding. Of those loans, 1,229,893 loans were made in amounts of $150,000 or lesser, but only 17% of the dollar amount of federal funding went to that group. About 24% of federal funding dollars went to loans approved in amounts between $350,000 and $1 million, and about 19% went to those loans between $2 million and $5 million. Securities and Exchange Commission filings show that about 70 publicly traded companies have received PPP funds.

The "Necessity" Guidance: FAQ No. 31

In the context of the above background, the SBA responded by publishing additional guidance on April 23 to help direct implementation of the PPP with new FAQ No. 31 (linked above). Since its initial rollout, the PPP loan application has required applicants to certify that "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." And while the new bill approving additional funding does not alter the technical requirements for applying for a PPP loan (including the waiver of the SBA loan requirement for non-PPP loans that applicants seek alternative sources of credit before applying for a loan), FAQ No. 31 may alter their interpretation. The new guidance in FAQ No. 31 addresses the "necessity" certification in the PPP loan application by specifying that, in certifying in good faith that the loan request is necessary to support the ongoing operations of the borrower, the borrower must 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." The guidance provides that "a public company with substantial market value and access to capital markets" would be unlikely to be able to make the required certification in good faith, and "such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification." Importantly, a note in FAQ No. 31 provides that any borrower that applied for a loan prior to the publishing of FAQ No. 31 will be deemed to have made the necessity certification in good faith if the loan is repaid by May 7, 2020.

While the new guidance from the SBA does not alter the basic standards for applying for a PPP loan, the context of the guidance, including the addition of a "no fault" return policy, may alter how applicants consider their eligibility for PPP loans and for loan forgiveness going forward.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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