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CLIENT ALERT: IMPORTANT NEW SBA GUIDANCE RE PPP LOAN CERTIFICATION

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In the roughly six weeks since the Paycheck Protection Program (**PPP**) was launched at the beginning of April, the Small Business Administration (**SBA**) has been frequently supplementing and updating the "Frequently Asked Questions" (**FAQ**) available on its website, which serve as the primary source of guidance for borrowers of PPP loans. On May 13, the SBA published FAQ No. 46, which provides welcome clarification for borrowers of PPP loans with an original principal amount of less than \$2 million – such borrowers will be automatically deemed to have made the certification regarding the necessity of their PPP loan request in good-faith.

This guidance is indeed welcome, as one particular area in which the SBA guidance has been a source of concern and confusion for borrowers is with respect to eligibility and the certifications that applicants are required to make to obtain a PPP Loan. When the PPP first launched, applicants were required to certify in good faith that "*current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant*" – a relatively easy certification for any business to make given the rapid onset of the public health crisis.

In the wake of public outcry in response to the first round of PPP funding running dry and several large and publicly-traded having received sizeable loans, on April 23 the SBA published FAQ 31, which required all applicants making the certification to additionally take "*...into account their current business activity and their ability to access other liquidity sufficient to support their ongoing operations in a manner not significantly detrimental to the business...*" Borrowers were encouraged to reevaluate their certification on that basis and were given until May 7 (now extended to May 18) to repay the loan in full without penalty. The effect of FAQ 31, along with statements by Treasury Secretary Steven Mnuchin that all loans over \$2.0 million would be fully audited and borrowers whose certifications were determined to be untrue would be subject to criminal liability, was to create significant uncertainty and confusion for borrowers, causing many to wonder whether returning their PPP funds might be the smartest and safest option.

FAQ No. 46 expressly provides: "*Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.*" This safe harbor provision should serve to put borrowers' minds at ease to the extent they were concerned that their certification would be scrutinized or potentially determined to be untrue in light of FAQ No. 31. Furthermore, FAQ No. 46 also benefits PPP loan borrowers with loans of \$2.0 million or more in providing that if in the course of the audit, the SBA determines that a borrower lacked an adequate basis for making the necessity certification, the borrower may repay the loan after receiving notification from the SBA, and absent fraud, the SBA will not pursue administrative enforcement or referrals to other agencies for criminal enforcement.

We here at Shapiro, Lifschitz & Schram continue to monitor and stay on top of all issues and developments related to the PPP and other federal, state and local coronavirus laws and programs, and are available to answer any questions you may have and assist with any challenges facing you or your business during the ongoing crisis. First and foremost, we wish and hope for the health, safety and wellness of our clients and their loved ones.