The Risk of Government Investigations and Potential Liability Under the Paycheck Protection Program

Calls for vigorous government investigation under the $659 billion Paycheck Protection Program (PPP) of the CARES Act have begun. This occurs amidst reports that various publicly traded companies have been beneficiaries of the program, whereas many small businesses have not been able to obtain PPP funds. Treasury Secretary Steven Mnuchin recently warned of potential criminal liability if the Small Business Administration (SBA) determines that the borrower was not eligible for PPP funds or that such funds were not "necessary" within the meaning of the CARES Act. He further stated that all PPP loans in excess of $2 million will be subject to audit by the SBA prior to receiving loan forgiveness to confirm borrower eligibility and need, though anticipated guidance regarding the loan forgiveness process has not yet been issued.

This information memo provides additional background regarding the potential exposure for making false certifications in the context of the PPP program, particularly with respect to the required borrower self-certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." As summarized in our recent memo, the SBA has issued guidance stating that, when making this self-certification, borrowers must take into consideration the following: "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." This updated guidance provides a limited safe harbor. If a borrower returns any PPP funds by May 14, 2020, the SBA will deem their prior certification to have been made in good faith. In light of the guidance provided by the SBA, borrowers should take into consideration their current business activity and ability to access other sources of liquidity, to determine whether they are obligated to return PPP funds by May 14, 2020. A borrower that does not qualify for a PPP loan under the statute and the recent guidance but fails to return PPP funds by May 14, 2020 may risk exposure.

Recipients of PPP funds will be well-served to maintain detailed contemporaneous documentation with respect to the basis for their qualification for the loan according to the recent guidance issued by the SBA, in addition to their use of PPP funds, in the event of an audit or investigation which may occur months or even years after the funds were received. We previously posted on the importance of documentation under the PPP program here.

The government has many tools to investigate false statements and fraud under the PPP, including SBA administrative audits and investigations, as well as Department of Justice-led civil and criminal investigations. The PPP application expressly states that knowingly making a false statement to obtain a guaranteed loan from the SBA can subject the loan applicant to criminal liability. The potential for criminal liability cited in the loan application arises under 18 U.S.C. § 1001, which carries the potential for up to five years imprisonment and a fine of up to $250,000 for knowingly making a false or fraudulent statement or representation in any matter within the executive branch of the U.S. government. The loan application also cites 15 U.S.C. § 645, which prohibits false statements in connection with the SBA in particular, carrying potential liability of up to two years imprisonment and a fine of up to $5,000.

But perhaps the federal government's most powerful tool for investigating and punishing fraud under the PPP will be the potential for criminal or civil liability under the False Claims Act (FCA). Under the FCA (31 U.S.C. §§ 3279-3733), any individual or business that knowingly submits (or causes another to submit) a false claim to the government or that knowingly makes a false record or statement to get a claim paid by the government may be liable for making a "false claim." False claims can reach beyond what would typically include fraud on the government, including falsely certifying

compliance with regulatory or statutory requirements. Thus, in light of the SBA's recent guidance, the government may argue that certifying that the loan request was necessary was a false claim where the applicant had other sources of liquidity sufficient to support their ongoing operations in a manner not significantly detrimental to the business. There is also potential liability for a "reverse false claim," where an individual or business knowingly and improperly avoids having to pay money to the government. In the context of the PPP, a reverse false claim may arise in the context of seeking loan forgiveness under the PPP or failing to return funds once the borrower knows that it did not qualify under the PPP.

In order to violate the FCA, the individual or business must have **known** that it was making (or causing another to make) a false claim, a false record or statement to get a false claim paid, or a reverse false claim. Under the FCA, knowledge of the falsity is defined as being: (1) actual knowledge; (2) deliberate ignorance of the truth or falsity of the information; or (3) reckless disregard of the truth or falsity of the information.

The FCA statute allows for treble the amount of the government's damages. In the context of false claims made in connection with the PPP, the government may claim that the entirety of the loan proceeds are the government's damages, which could mean potential liability for up to three times the amount of the loan. The FCA further provides civil penalties of between $11,665 and $23,331 for each false claim, and there is a risk of up to five years imprisonment and a fine up to $250,000 for criminal liability under the FCA. Liability under the FCA may have serious implications for future participation in government contracts, loans or programs.

The FCA also provides for reduced damages where a person or entity responsible for making a false claim self-reports to the government within 30 days, provided that full cooperation is given and the government has not already begun an investigation prior to the self-reporting. But even with self-reporting, the FCA still provides for liability of not less than double the government's damages. In addition, the Department of Justice has issued guidance on the types of activities that will earn "cooperation credit" in FCA investigations.

The FCA also contains a provision that incentivizes whistleblowers to come forward and report false claims. The FCA allows private citizens, including an employee of the entity at issue to file suits on behalf of the government (called "*qui tam*" suits) against those who have defrauded the government. Private citizens who successfully bring *qui tam* actions may even receive a portion of the government's recovery.

With respect to administrative audits and investigations, Section 15010 of the CARES Act also created the Pandemic Response Accountability Committee (PRAC). The PRAC is composed of the inspectors general from relevant agencies, including the SBA, and its purpose is to conduct oversight to prevent and detect fraud and abuse in the programs established under the CARES Act, including the PPP. The PRAC's oversight will augment the SBA Office of Inspector General's (SBA OIG) preexisting authority to conduct audits and investigations relating to programs under its jurisdiction, including the PPP. *See, e.g.*, 13 C.F.R. § 130.830 (establishing SBA authority to conduct audits and investigations). Many SBA OIG investigations are conducted in conjunction with the relevant U.S. Attorney's Office.

If you have any questions regarding this information memo, please contact Suzanne Galbato, John Clopper or Mary Moore. If you have any questions regarding the Paycheck Protection Program, please contact Jeffrey Scheer or the attorney at the firm with whom you are regularly in contact.

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