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ASSOCIATION

May 7, 2020

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# AGC of America Action Alert

- Tell the Trump Administration and Congress to fix Paycheck Protection Program (PPP).
  - At AGC's urging, the Trump Administration extended its initial deadline for firms to return their PPP loans from May 7 to May 14.
  - That extension will not, however, protect jobs unless the Treasury Department also clarifies its recent and confusing guidance on eligibility for PPP loans.
  - For its part, Congress should amend the CARES Act to require the SBA to waive its affiliation rules for construction contractors and to give the SBA maximum flexibility to forgive PPP loans.



# Paycheck Protection Program:

Preparing Your Business Today  
for Audits, Oversight, and  
Agency Enforcement and  
Whistle Blower Actions  
Tomorrow

A large, stylized graphic of a virus particle, likely representing COVID-19, is positioned on the right side of the slide. It is rendered in shades of red and orange, with a central blue core. The virus is shown in a 3D perspective, appearing to be on the surface of a larger, textured sphere. The background of the slide is a gradient of red and orange, with a large white curved shape on the right side that frames the virus image.

May 7, 2020

# Agenda

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- Paycheck Protection Program Overview
  - Program Terms
  - Certifications
- Enforcement Players and Mechanisms
  - Audits & OIG
  - Congressional Investigations
  - Suspension & Debarment
  - Department of Justice (civil and criminal)
  - False Claims Act
  - Whistleblowers
- Risk Mitigation

# **Paycheck Protection Program: Overview**

# Paycheck Protection Program

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## Program Terms

- \$659 billion appropriated for forgivable loans to small business concerns and businesses and nonprofit organizations with under 500 employees under new PPP
  - Up to \$10 million, with amount that is 2.5X average total monthly payroll costs , in most cases using calendar year 2019 costs
  - Can be used as working capital to pay payroll costs, rent, utilities and other specified costs
  - Payroll costs determine amount that can be borrowed and forgiven for PPP loans
  - PPP Loans are subject to forgiveness, in whole or in part, for certain “covered expenses” incurred during the 8 week period following the date of the PPP Loan disbursement
  - Any balance of a PPP Loan which is not forgiven must be repaid, with a loan maturity of 2 years after forgiveness and a 1% interest rate

# Paycheck Protection Program

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## Eligibility

- Eligible entities are all determined based on size status in some form
- All applicants must understand how the U.S. Government measures size and applies concept of affiliation
- Avenues of Eligibility
  - 500 or fewer employees
  - Small businesses under SBA size standards using NAICS code for primary industry (generally measured by employee headcount or average annual receipts)
  - Alternative size standard (measured by tangible net worth & average net income)
- What is affiliation?
- Exceptions

# Paycheck Protection Program

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## Certifications

- Applicants (not lenders) bear all risk and liability - do not rely solely on lender's eligibility advice
- The PPP loan application requires applicants to certify to numerous statements, including certifying that:
  - current economic uncertainty makes the loan request necessary to support the ongoing operations of the Applicant;
  - funds will be used to retain workers, maintain payroll or make mortgage payments, lease payments, and utility payments;
  - the eligible recipient does not have an application pending for a PPP loan for the same purpose and duplicative of amounts applied for or received under a covered loan;
  - the Applicant is eligible to receive a loan under the rules in effect at the time the application is submitted that have been issued by the SBA implementing the PPP.



# Necessity Certification

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**“Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”**

- The CARES Act suspended the ordinary requirement that borrowers must be unable to obtain credit elsewhere
- Late-breaking Treasury guidance and Interim Final Rule reinforce that loan request must be “necessary to support the ongoing operations of the Applicant” and provide “safe harbor” for non-compliant recipients to pay back funds by May 7, 2020
  - Advises that applicants 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.”

# Necessity Certification

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**“Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”**

- FAQ #41 (released 5/5/2020):
  - SBA extends the repayment date for this safe harbor to May 14, 2020 – automatic extension which will be implemented through a revision to SBA’s interim rule
  - “SBA intends to provide additional guidance on how it will review the certification prior to May 14, 2020”

# Paycheck Protection Program

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## Certifications (cont'd)

*I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.*

# **Enforcement Players and Mechanisms**

# CARES Act Special IG

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- Legislation and Authority Overview
  - Focused on actions of Treasury in awarding \$500 billion in CARES Act Aid
  - High bar for capability, statute requires “integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.” Largely limits field to former IGs.
  - Has subpoena authority, but President has already expressed questions about full authority of position
- Brian Miller Hearing Lessons/Insights
- Lessons Learned from SIGTARP
- Lessons Learned from Natural Disasters

# Audits & OIG

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- SBA/Treasury: “To further ensure PPP loans are limited to eligible borrowers in need, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender’s submission of the borrower’s loan forgiveness application.”
- SBA OIG
  - Certain “full audit” of PPP loans greater than \$2M
  - SBA Inspector General briefed Congress on oversight and plan to review PPP loan funds
- Pandemic Response Accountability Committee

# Congressional Investigations

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- Congressional Oversight Committee
- House Select Committee on Coronavirus Crisis

# Suspension & Debarment

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- Discretionary actions to prevent further receipt of government contracts or other federal assistance
- Generally for a period of three years
- Based on the concept of “present responsibility”



# Department of Justice

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- DOJ Fraud – Civil and Criminal
  - Civil False Claims Act
  - False Statements – federal criminal statutes
- U.S. Attorney General’s offices on Coronavirus and PPP
  - AG Barr directed all USAOs to prioritize pandemic related misconduct
  - Every USAO has designated a Coronavirus Fraud Coordinator
  - AAG Benkowski announced that all PPP enforcement efforts will be overseen by DOJ Criminal Fraud Section’s Market Integrity Unit and coordinated with USAOs.

# False Claims Act

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## Overview

- Creates liability for any person who, *inter alia*, presents or causes to be presented a false or fraudulent claim for payment to the government, or knowingly avoids an obligation to pay money to the government.
- Specific intent not required
  - Liability for reckless disregard, deliberate ignorance, or actual knowledge
- Damages and Penalties are severe
  - Treble damages
    - Actual damages can be valued at the *full* amount paid by the government under certain circumstances, including when a recipient of government funds misrepresents its eligibility for those funds
  - Statutory penalty b/w \$11,181 - \$22,363 *per* false claim/statement
- Collateral consequences of an FCA settlement / judgment
  - e.g., Exclusion and reporting/disclosure requirements

# False Claims Act

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## Enforcement and Players

- Department of Justice
- Whistleblower Actions
  - Hotline and Fraud Reporting Portals
  - Whistleblowers
  - Relator's / Plaintiff's Bar
- False Claims Act and false statement risk
  - Likelihood that a complete list of PPP loan recipients and possibly loan amounts will be released – increases risk

# False Claims Act

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## Whistleblowers and the Plaintiff's Bar Are Getting Ready

- A whistleblower organization has already requested that DOJ establish a special task force to separately investigate possible misuse of CARES Act funds, and has encouraged whistleblowers with knowledge of potential fraud to come forward
- DOJ has extraordinary authority to investigate qui tam suits while they are under seal, and can issue Civil Investigative Demands (“CIDs”) requiring providers named in such suits to produce documents, to answer questions and to have its employees submit to depositions;
- Whistleblower lawyers are already looking for ways to press DOJ into accelerating these investigations.

# **Risk Mitigation**

# Risk Mitigation Strategies

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- Conduct full and comprehensive review of eligibility
  - Careful application of PPP terms and affiliation analysis
  - Detailed review of accuracy of all statements and certifications on the application, as well as any supporting documents requested by lenders
- Keep records of basis for eligibility determination
  - Document lost revenues, lack of liquidity, and other conditions which make loan request “necessary” to support ongoing operations
- Document and track all loan fund expenditures
  - Keep funds in a separate account
  - Create new general ledger accounts for foregone revenues and expenditures associated with funds received through the PPP

# Risk Mitigation

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## But What happens If....

- We were told funds would run out, and we rushed our application?
- We realize, in hindsight, we may have challenges with eligibility criteria?
- Guidance has changed and what was gray is now more clear, and we may not qualify?
- We do not have documentation of our analysis?
- We relied on other service providers, not attorneys, and may have received incomplete advice?
- We are a larger business similar to those in the news being questioned for obtaining stimulus funds? Or we are involved in excluded industries and may not be eligible?
- We do not qualify and cannot repay the loans?

# Risk Mitigation

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## What Are Next Steps?

- If analysis was not contemporaneous or complete, conduct it now
- If documentation is not complete, complete it now (making clear the date the documents were created even if there is a gap)
- Seek counsel for any questions about eligibility
- Discuss with counsel whether to:
  - Clarify with the government your evolving understanding
  - Repay loans
  - Seek forgiveness of the loans



# Questions?

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