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ADDITIONAL TREASURY GUIDANCE ABOUT THE PAYCHECK PROTECTION PROGRAM

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On April 3rd and 7th, the U.S. Treasury Department issued additional guidance about loans under the Paycheck Protection Program (“PPP”). **This new guidance supplements, and in some cases supersedes, our previous understanding of some aspects of the PPP.**

Below are our key takeaways from this additional guidance.

- The loan applicant (not the lender) is responsible for determining the applicant’s eligibility for a loan and the amount of its requested loan. Lenders are expressly allowed to rely on the information submitted by the loan applicant with little or no independent verification of that information. Nevertheless, the SBA retains the right to independently verify the information in a loan application and the eligibility of a loan applicant, and that verification can occur before or after the loan is made. **Submitting false information in connection with an application (including the threshold determination as to whether you are eligible for a loan) carries civil and criminal penalties.** Even if your lender does not require you to provide documentation to support your eligibility and the information and calculations in your application, you need to create and maintain records to support your eligibility and calculations, including as to the existence of “affiliates” (see below).
- For purposes of calculating “payroll costs” to determine a PPP loan amount, the \$100,000 per employee limitation **only applies to annual cash compensation.** Other items such as employer contribution/coverage for health care or retirement benefits, and other non-cash employee benefits (such as stock or token options or grants) to employees are included in determining your monthly payroll costs for purposes of a PPP loan, even if the deemed total compensation to an employee would exceed \$100,000.
- **Only employees whose principal residence is in the United States are included in the determination of whether a business has more than 500 employees.**
- Generally, businesses are not eligible to apply for a PPP loan if their total U.S. employment exceeds 500 employees. In order to determine the total number of employees of an applicant, a determination must be made as to whether other businesses that are owned or controlled by the applicant, or any material equity owners or family members of the applicant, are deemed to be “affiliates.” If those businesses are affiliates, the employees of the affiliates and the applicant are aggregated to determine if the 500 employee test is exceeded. **The SBA applies four different tests to determine affiliation, which look at common ownership, common management, close family relationships (such as parent, child and spouses) and affirmative control or right to control. Any affiliation analysis is highly fact dependent and can be complex and uncertain.** Consultation with legal counsel is strongly suggested on the possible application of these rules to your business. We are available to provide advice on this issue if desired. At a

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minimum, we suggest that you create and retain records to support your good faith interpretation of the affiliation rules.

- Even if a minority investor is found to have impermissible negative control over a company which establishes affiliation, the company’s operative documents (such as its certificate of incorporation, bylaws, shareholders or voting agreements) can be amended prior to submitting a loan application to address this issue. For example, a minority shareholder that irrevocably waives or relinquishes its control rights is no longer considered an affiliate (assuming there is no other relationship that triggers the affiliation rules).
- Employees of an applicant whose wages are paid through a third-party payer such as a payroll provider or Professional Employer Organization (a “PEO”) are considered employees of that applicant, even if state laws require the third party payer to report wage and other data under its own EIN. Accordingly, payroll costs paid through a PEO should be eligible as allowed payroll costs of the business.
- The full text of the April 3rd and April 7th Treasury Department guidance can be found at the following links:

<https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf>

<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>