

Dear Client,

President Trump signed the Paycheck Protection Program and Health Care Enhancement Act (“Enhancement Act”) on April 24th. This legislation infuses \$310 billion into the Paycheck Protection Program (“PPP”) with more than \$250 billion in unrestricted funds for the program and an additional \$60 billion allocated specifically for smaller lending institutions.

Numerous recent headlines have shown the spotlight on the distribution of the first round of PPP funds to large restaurant chains including Shake Shack, as well as other prominent public and private companies. Many have questioned the propriety of the eligibility requirements and impugned the integrity and ethics of many organizations that have applied for funding. The decision by Shake Shack to return the \$10 million it received from the PPP, as well other prominent companies to do likewise, has drawn attention to the perceived inequitable distribution of PPP proceeds.

As you may remember, the *Coronavirus Aid, Relief, and Economic Security Act* (“CARES Act”) provided a \$2.2 trillion stimulus package that allocated funding to small businesses through new and enhanced loan programs administered by the Small Business Administration (“SBA”). The PPP was one such program designed specifically to provide eligible small businesses immediate relief if they believe that **“current economic uncertainty” of the COVID-19 pandemic makes such a loan for their business “necessary to support their ongoing operations,”** and were willing to certify to the lender to that effect.

Offering funds covering up to eight weeks of payroll, the program’s purpose is to reduce the growth of unemployment, help small businesses retain employees, and enable them to rebound quickly once the pandemic is under control. **Unfortunately, the initial guidance promulgated by the SBA did not provide any definition or specifics regarding the nature or extent of the required impact to operations or the “current economic uncertainty” that would make the loan request “necessary to support ongoing operations.”** In addition, since the PPP loan has a forgiveness component if a business meets certain conditions, the program has been touted by many as “free money.” Consequently, demand for PPP loans has been unprecedented, exceeded loan availability, and resulted in the SBA having to stop accepting PPP loan applications on April 16.

On April 23rd, the SBA updated its *Frequently Asked Questions Document* to add FAQ 31. The new FAQ provides much-needed clarity regarding program qualifications specific to businesses with access to other sources of liquidity to support their ongoing operations. Any business that received a PPP loan prior to the issuance of this new guidance and who now believes that they do NOT demonstrate the necessity for the loan, can repay the loan in full by **May 7, 2020**. Any business that does so, will be deemed by the SBA to have made the required good faith certification on their PPP loan application.

We certainly understand that there has been a justifiable rush for eligible small businesses to expedite processing of these loans and you may be primed to submit your PPP application, but we do want to caution you as to the potential risks of receiving these funds as these loans will be subject to regulatory and public scrutiny. Loan recipients will not remain anonymous as EINs will be made public. We anticipate heightened government scrutiny will be forthcoming to investigate potential fraud and abuse. Businesses who have received PPP loans and are later found to have not qualified under the eligibility

rules and/or businesses who do not use the funding in accordance with the terms of the program, could be subject to significant legal or regulatory consequences. Further, businesses may experience reputational damage for having pursued these loans.

Given the revised guidance issued by the SBA and the pending May 7, 2020 deadline for returning loan proceeds, we strongly encourage you, your organization's management, and board of directors to carefully and immediately review your company's financial situation and reconsider the relief you may have already received with a PPP loan. Specifically, consider whether your circumstances fall within the spirit and intent of this economic relief program. If you do receive and keep PPP funding, it is critical that you maintain complete and accurate documentation to support your eligibility for such funding, the specific use of these funds, as well as your qualifications for forgiveness under the terms of the program. This documentation will be crucial were your business to be audited and/or investigated. This defensive documentation will greatly minimize your potential exposure to fraud and abuse allegations related to your participation in this loan program.

Many of the factors influencing whether you qualify or should apply for these loans are organization specific. We encourage you to consult with legal counsel if you have questions regarding your organization's eligibility to receive funds.

We recognize that these are difficult times and we remain committed to supporting you. If you would like our assistance with evaluating whether the PPP or other small business loan programs and/or economic relief measures are appropriate for you, please contact us.

Sincerely,

Day Seckler LLP