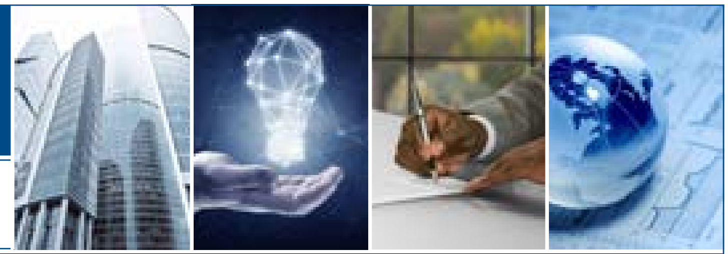

Investment Management ADVISORY ■

MAY 5, 2020

Update on Relief Under the CARES Act for Fund Managers

On April 24, 2020, the Small Business Administration (SBA) released the Interim Final Rule on Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility, which provides additional guidance on the rules governing the Paycheck Protection Program (PPP). Under the CARES Act, the SBA was granted authority to administer PPP loans under its Section 7(a) loan program. The Interim Rule clarified that, in accordance with existing SBA regulations that determine which businesses are eligible for Section 7(a) loans, "hedge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan." The Interim Rule did not clarify whether fund managers are ineligible for the PPP. Fund managers should carefully consider whether they meet the eligibility criteria and can make the certifications necessary to apply for the PPP.

Limited Safe Harbor to Return PPP Loan

When applying for a PPP loan, applicants, including fund managers, are required to certify that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." The Interim Rule provides for a temporary safe harbor, allowing any borrowers that applied for a PPP loan before the issuance of the Interim Rule on April 24, 2020 to repay the loan in full by May 7, 2020 without penalty.

Disclosure on Form ADV

In the Division of Investment Management Coronavirus (COVID-19) Response FAQs, the SEC's Division of Investment Management provided further clarification on the ability of investment advisers to obtain PPP loans. Noting that all investment advisers are fiduciaries and must make full and fair disclosure to clients of all material facts relating to the advisory relationship, the SEC stated that investment advisers must consider the circumstances leading to a request for a PPP loan and whether the PPP loan assistance constituted a material fact requiring disclosure to clients. The SEC specifically stated that if the proceeds from the PPP loan were used by the investment adviser to pay the salaries of employees that are primarily responsible for performing advisory functions to clients of the investment adviser, disclosure of that fact would be required on the investment adviser's Form ADV, as well as disclosure of any conditions that would be reasonably likely to impair the investment adviser's ability to meet its contractual commitments to its clients.

Public Relations Considerations

Fund managers that are considering applying for, or have already applied for, the PPP loan should note that there has been considerable public backlash toward any hedge funds or other type of fund managers that obtain and keep PPP loans. Of the firms that have either been approved or have already received PPP funding, many are now opting to rescind their applications and return any funds they have received. Any business, including fund managers, should be comfortable with the required certifications and appropriateness of the program for their operations before submitting an application. The PPP was originally intended to assist small businesses that have been impacted by the coronavirus pandemic with their employee salary obligations as well as rent and utility expenses, with a focus on businesses that may otherwise have trouble accessing capital markets to support their operations.

Alston & Bird has formed a multidisciplinary task force to advise clients on the business and legal implications of the coronavirus (COVID-19). You can view all our work on the coronavirus across industries and subscribe to our future webinars and advisories.

You can subscribe to future ***Financial Services & Products*** advisories and other Alston & Bird publications by completing our publications subscription form.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any member of our Financial Services & Products Group.

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