

PAUL  
HASTINGS

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**CARES Act:  
Recent Developments and  
Litigation Risks**

May 13, 2020

# OVERVIEW: CARES ACT AND REGULATORY GUIDANCE <sup>2</sup>

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## ▪ **Title I**

- Paycheck Protection Program
  - CARES Act, Borrower Application, Interim Final Rules, FAQs
- Economic Injury Disaster Loans

## ▪ **Title IV (to date)**

- Main Street Lending Program
- Airlines
- National Security

## ▪ **Federal Reserve Facilities**

- Primary and Secondary Corporate Credit Facilities
- Commercial Paper Funding Facility
- Term Asset Liquidity Fund

# OVERSIGHT

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## ▪ **Formal Structure**

- Special Inspector General for Pandemic Recovery
- Pandemic Response Accountability Committee
- Congressional Oversight Commission
- Government Accountability Office
- SBA Inspector General
- Banking Agencies' Enforcement
- DOJ

## ▪ **Audit**

- SBA - \$2.0 million in PPP funds
- At Forgiveness Request

## ▪ **It has started . . .**

- DOJ action for PPP Fraud in Rhode Island

# BORROWER OBLIGATIONS

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## ■ PPP Certifications

- Eligibility – at the time of the loan application
  - Activities
    - SBA – Ineligible Activities
  - Affiliation
    - 500 employees (or alternative under SBA rules or CARES Act)
    - Common ownership or control
    - Contractual limits
- Economic Need – current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant
  - Must be made in good faith, taking into account current business activity and ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business
    - Unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to the SBA, upon request, the basis for its certification
- Safe Harbor Repayments

# FORGIVENESS & LENDER OBLIGATIONS

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## ▪ **PPP Forgiveness**

- Use of Proceeds
  - Payroll Costs (75%)
  - Nonpayroll Costs (not more than 25%)

## ▪ **PPP Lender Obligations**

- Reliance
- Forgiveness Review
- AML review
  - Customer risk ratings/transaction monitoring
  - Beneficial Ownership
  - KYC Policies

# ADDITIONAL CERTIFICATIONS

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## ▪ Main Street Certifications

### ▪ Borrowers

- No repayment of other interest/debt unless payment is mandatory, other than under Main Street Priority Program
- No cancellation or reduction of any of its committed lines of credit
- Reasonable basis to believe that, as of the date of origination of the loan and after giving effect to such loan, it has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period
- Will comply with the restrictions under Title IV of the CARES Act for the term of the loan plus twelve months,
  - restrictions on dividends,
  - stock repurchases and
  - executive compensation.
- Borrower is not subject to Section 4019(b) Conflicts, relating to ownership interests by certain government officials and their family members

### ▪ Lenders

- No requirement of existing debt repayment
- No cancellation/reduction of existing debt (except for default)
- Review of Borrowers Adjusted EBITDA methodology
- Review of No Section 4019(b) Conflicts, relating to ownership interests by certain government officials and their family members

# ADDITIONAL CERTIFICATIONS

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- **Primary Market Corporate Credit Facility Issuer Certifications**
  - Unable to secure adequate credit accommodations from other banking institutions and the capital markets
    - Issuers may consider economic or market conditions in the market intended to be addressed by the facility as compared to normal conditions, including the availability and price of credit
      - Lack of adequate credit does not mean that no credit is available
      - Credit may be available, but at prices or on conditions that are inconsistent with a normal, well-functioning market
  
- **Secondary Market Corporate Credit Facility Seller Certifications**
  - US Business
  - Insolvency
  - Conflicts of Interest

# POTENTIAL CONSEQUENCES

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## ▪ **Criminal & Civil Liability**

- 31 U.S.C. § 3729 *et seq.* (False Claims Act)
  - Treble damages
  - Monetary penalties
  - Private cause of action (*qui tam*)
- 18 U.S.C. § 1001 (false statements to federal officials)
- 15 U.S.C. § 645 (misrepresentation of size status)
- 18 U.S.C. § 1014 (false statements to a lending institution)
- 18 U.S.C. § 1344 (bank fraud)
- 18 U.S.C. § 287 (criminal false claims)
- 18 U.S.C. § 1341 (mail fraud)
- 18 U.S.C. § 1343 (wire fraud)
- 18 U.S.C. § 371 (criminal conspiracy)

## ▪ **Reputational**

## ▪ **Repayment**



# FRAUD CONSIDERATIONS

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## ▪ Fraud Risk Considerations

- General – emphasis on updating fraud risk assessments for current change in overall risk environment and impact on risk management
- Approaches for fraud monitoring
- Compliance impacts and considerations
- Fraud risks specific to elements of the CARES Act
  - PPP
  - Main Street
  - Mortgage Forbearance

# SPEAKERS

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