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FEDERAL EMERGENCY RELIEF RISK MITIGATION RECOMMENDATIONS

The Coronavirus has had a devastating impact on small businesses. As states ban so-called "non-essential" commercial activity, businesses have been forced to shutter their operations. This has resulted in a sudden cessation of revenue flows, but not expenses. Debts, rent, and other liabilities must still be paid. Some relief is available through a hodge-podge of state resources, deferment agreements with creditors, and the ingenuity of business owners in adapting to the current crisis. Additionally, a variety of federal relief programs have recently become available, and more are expected to come on line in the near future. While these programs can provide a much-needed lifeline, they also present risks; businesses need to be aware that any misrepresentation made in connection with an application for these relief programs can give rise to potential liability, even including criminal liability.

FEDERAL RELIEF PROGRAMS

The federal government is currently offering relief to affected businesses through the SBA disaster relief loan system. To be eligible for an SBA disaster loan to address economic injury suffered due to the Coronavirus crisis, a business must first qualify as a "small business." This determination is based on factors like numbers of employees and annual revenue. In addition, the business must show it has suffered a "substantial economic injury." The factors used to determine injury include a decrease in operating income or income insufficient to satisfy loan obligations or operating expenses. A qualifying small business can obtain low-interest loans through this program which can be used to pay certain expenses.

The federal government is also expected to make more relief funds available as part of pending legislation being negotiated in the Congress. This legislation could create a multi-billion-dollar small business business-interruption fund. This fund would be used to issue forgivable SBA loans to companies adversely affected by the Coronavirus through the SBA 7(a) loan system. The amount of the loan would be determined by applying a multiple to certain operating expenses of the applicant company.

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If the company receiving the loan continues to pay its employees' wages over a set period of time, a portion of the loan would be paid off by the Treasury or otherwise be forgiven. While at present it appears that the proceeds of the loan would not need to be used exclusively for payroll, a company would need to continue to make payroll payments in order to be eligible for loan forgiveness. Of course, since these programs are still being negotiated, the terms are not yet final.

RISK MITIGATION

These federal programs could provide a vital lifeline to struggling businesses. But small businesses should be aware that any application for funding will be subject to scrutiny, both at the time of application and in the future.

Indeed, in the past, law enforcement has been keenly interested in ensuring the integrity of similar disaster relief programs, such as those created in connection with 9/11 and Hurricane Katrina. The U. S. Department of Justice and state and local law enforcement committed substantial resources to the investigation and prosecution of false claims and other frauds in connection with those relief funds. The same can be expected here. Thus, a business applying to these programs must ensure the accuracy of its applications, and be prepared to respond to any future investigation relating to those applications.

To mitigate the risk of an adverse enforcement action, a company should ensure that it has documentary support for all representations made in applying to these programs. Businesses should keep a file containing documents substantiating their applications, including payroll and employment records, cash flow statements, ledgers, and balance sheets. Likewise, records of state or local orders requiring business closure or modification should be maintained.

Applicants for relief should also ensure that representations in applications for disaster relief are consistent with other government filings, such as tax returns, government contracts, and licensing forms. One of the easiest ways for the government to initiate a false claims investigation is to contrast contradictory representations in two different government filings.

These risks are exacerbated by the urgency of the situation, which can give rise to innocent mistakes. But from the point of view of the government, an innocent mistake made in the midst of a crisis might appear indistinguishable from fraud. Unfortunately, once an investigation has been initiated, it can be time consuming and expensive to defend. Thus, the best defense is to avoid the problem by utilizing a deliberate and careful process to apply for relief.

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Equally important will be the institution of controls to ensure that federal funds are used for their intended purpose.

Foresight will pay dividends.

To find more information like this and other resources, please visit our COVID-19 Resource Center, **found here**. Our Resource Center includes additional information and guidance from relevant federal, state and local governmental authorities for businesses and individuals which may be impacted by COVID-19. Please continue to check back into the Resource Center often as the page will be updated frequently. If you'd like to be added to future emails, click "Subscribe" on the Resource Center's main page.

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