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April 26, 2020

Doug Wareham, President & CEO
Kathy Taylor, EVP-General Counsel
Kansas Bankers Association
610 SW Corporate View
Topeka, Kansas 66615-1233

RE: Cash-Basis Law and the Paycheck Protection Program Established by the Coronavirus Aid, Relief, and Economic Security Act

Dear Mr. Wareham and Ms. Taylor:

Because the Small Business Administration will resume accepting Paycheck Protection Program (PPP) loan applications on Monday, April 27, at 10:30 a.m. EDT from approved lenders on behalf of any eligible borrower, you ask whether there is any authority that provides guidance on whether the Kansas cash-basis law, K.S.A. 10-1101 *et seq.*, would prohibit a municipal hospital from accepting federal moneys distributed pursuant to the PPP.

We wish to be of assistance during this very short timeframe. However, please be advised that the information we provide to you in this letter is provided as a public service to enhance public education. This information is not legal advice and is not a formal Attorney General's Opinion authorized by statute; therefore, if you have additional questions or need clarification, please consult with your own legal counsel for assistance or legal advice.

BACKGROUND

Section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)¹ temporarily adds a new product, titled the "Paycheck Protection Program," to the U.S. Small Business Administration's (SBA's) 7(a) Loan Program.² Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP.³ The PPP and loan forgiveness are intended to provide economic relief to small businesses

¹ Pub. L. 116-136.

² See Summary, Interim Final Rule, https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_O.pdf.

³ *Id.*

nationwide adversely impacted under the Coronavirus Disease 2019 (COVID-19) Emergency Declaration issued by President Donald J. Trump on March 13, 2020.⁴ Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness.⁵ The PPP provides small businesses with funds to pay for up to eight weeks of payroll costs including benefits. Funds can also be used to pay interest on mortgages, rent, and utilities.⁶ Put simply, if a borrower applies the PPP loan to authorized expenses, the loan will be 100 percent forgiven.

The original CARES Act, signed into law March 27, 2020, (Pub. L. 116-136) excluded government-owned hospitals from eligibility for PPP funds pursuant to 13 CFR 120.110(j).⁷ However, a subsequent enactment, the PPP and Health Care Enhancement Act (Pub. L. 116-139), was signed by President Trump on Friday, April 24, 2020,⁸ and has temporarily removed the eligibility exclusion for qualified government-owned hospitals. Guidance on the PPP enhancement, also issued on April 24, 2020, provides the temporary eligibility requirements for a government-owned hospital:

Is a hospital owned by governmental entities eligible for a PPP loan?

A hospital that is otherwise eligible to receive a [PPP] loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a [PPP] loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

The Administrator, in consultation with the Secretary, determined that this exception to the general ineligibility of government-owned entities, 13 CFR 120.110(j), is appropriate to effectuate the purposes of the CARES Act.⁹

ANALYSIS

Assuming a municipal (city- or county-owned) hospital is eligible under federal law to receive funds from the PPP enhancement pursuant to the guidance above, the question arises whether the Kansas cash-basis law nonetheless prohibits such municipal hospital from accepting such federal moneys. The cash-basis law states:

Unless otherwise provided in this act, it shall be unlawful after May 1, 1933, for the governing body of any municipality to create any indebtedness in excess of

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.* at 15-16.

⁷ https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=7ae95095f7555819d3fceb099b978e9&ty=HTML&h=L&mc=true&r=SUBJGRP&n=sg13.1.120_1105.sg3.

⁸ [https://www.congress.gov/bill/116th-congress/house-bill/266/all-actions?q={%22search%22:\[%22CARES%22\]}&r=1&overview=closed&s=4&KWICView=false](https://www.congress.gov/bill/116th-congress/house-bill/266/all-actions?q={%22search%22:[%22CARES%22]}&r=1&overview=closed&s=4&KWICView=false)

⁹ <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf>, at 5-6.

the amount of funds actually on hand in the treasury of such municipality at the time for such purpose, or to authorize the issuance of any order, warrant, or check, or other evidence of such indebtedness of such municipality in excess of the funds actually on hand in the treasury of such municipality at the time for such purpose.¹⁰

We will assume for the purpose of this analysis that the cash-basis law applies to municipal hospitals.¹¹ In *State, ex rel., v. Republic County Comm'rs*,¹² the cash-basis law's purpose was articulated by the Kansas Supreme Court as “the systematical, intelligent and economical administration of the financial affairs of municipalities and other taxing subdivisions of the state, so as to avoid waste and extravagance and yet permit such units of government to function so as to supply the governmental wants and needs of the people.” With that judicial guidance in mind, we analyze the requirements of the cash-basis law as applied to enhanced PPP funds. Of course, the enhanced PPP funds are being made available by the federal government to municipal hospitals to assist in meeting payroll and other qualified expenses during this time of extreme economic disruption, which is not “waste and extravagance” but instead will “permit such [hospitals] to function so as to supply the ... needs of the people” during the COVID-19 global pandemic.

More specifically, as set forth above, the cash-basis law prohibits certain “indebtedness” but does not define that term. In the absence of a statutory definition, Kansas courts give terms their ordinary meaning.¹³ The ordinary meaning of “indebtedness” is “something (such as an amount of money) that is owed”.¹⁴ Although the PPP is referred to as a “loan,”¹⁵ it is our understanding that so long as the recipient uses the PPP funds exclusively for the purposes established by the federal program (e.g., payroll) the “loan” is in fact fully forgiven and never need be repaid – thus rendering it the functional equivalent of a grant,¹⁶ which is the transfer of money for a particular purpose that does not require repayment.

¹⁰ K.S.A. 10-1112.

¹¹ We are uncertain what local entity would in fact be the recipient of the enhanced PPP funds. Of course, cities and counties are included within the cash-basis law’s definition of municipality in K.S.A. 10-1101(a) and their respective governing bodies are included within the definition of “governing body” in K.S.A. 10-1101(b). But the cash-basis law may not apply to the board of trustees of a city- or county-owned hospital. See Attorney General Opinion No. 79-126 (concluding the hospital board of trustees or a city-owned hospital is not a “municipality” under the cash-basis law); see also K.S.A. 19-4611(h) (providing that “[t]he [county-owned hospital] board [of trustees] is not subject to the cash-basis law.”

¹² 148 Kan. 376, 381–82, 82 P.2d 84 (1938).

¹³ *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918 (2013), quoting *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 564–65 (2012) (internal citations omitted).

¹⁴ <https://www.merriam-webster.com/dictionary/indebtedness>, accessed on April 25, 2020.

¹⁵ “Government loans serve a specific purpose such as paying for education, helping with housing or business needs, or responding to an emergency or crisis. Loans are different than grants because recipients are required to repay loans, often with interest.” <https://www.usa.gov/grants#item-37017>, access on April 26, 2020.

¹⁶ <https://www.merriam-webster.com/dictionary/grant>, accessed on April 26, 2020 (A grant is “something granted especially: a gift (as of land or money) for a particular purpose”). <https://www.merriam-webster.com/dictionary/gift>, accessed on April 26, 2020 (A gift is “something voluntarily transferred by one person to another without compensation.”)

If PPP aid is not to be repaid, then it seems to us reasonable to conclude that acceptance of PPP aid does not “create any indebtedness” that would be governed by the cash-basis law. Thus, the cash-basis law would not be violated by a municipal hospital accepting federal PPP aid in the form of a 100 percent forgivable “loan” because no “indebtedness” would be created, provided that all conditions for full forgiveness are and remain satisfied and the loan is never required to be (and in fact is not) repaid. That conclusion is consistent with the purpose of the cash-basis law, which “is designed to have [municipalities] ... not to spend money they do not have, or incur obligations they cannot meet promptly”¹⁷ because accepting the PPP aid would not incur *any* obligation for repayment, much less one that the municipal hospital “cannot meet promptly” nor would municipal hospitals be “spend[ing] money they do not have.” That conclusion also allows the general requirements of the cash-basis law to be in harmony¹⁸ with specific statutes that authorize public agencies to accept federal aid¹⁹ without violating the budget law and that authorize county hospitals in particular to accept federal aid.²⁰ And because the PPP aid would be received and then expended by the municipal hospital, the hospital is at no time incurring indebtedness in any amount which exceeds those funds which are actually on hand.²¹

We trust this information is useful.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL
DEREK SCHMIDT

/s/ Athena E. Andaya

Athena E. Andaya
Deputy Attorney General

cc: Steve Poage, Kansas Hospital Association

¹⁷ *State v. Bd. of Educ. of City of Topeka*, 137 Kan. 451, 21 P.2d 295, 301 (1933).

¹⁸ *See Shouse v. Board of County Comm’rs of Cherokee County*, 151 Kan. 458 (1940) at headnote 1 (Cash-basis law and budget law “have a common basic purpose and must be construed together.”).

¹⁹ K.S.A. 12-1662 and K.S.A. 12-1663.

²⁰ K.S.A. 19-4608(b).

²¹ *See generally*, Attorney General Opinion No. 89-28; *see also Shouse*, 151 Kan. 458, 99 P.2d 779, 784 (“The purpose of the cash–basis law and the budget law is to prevent a deficit in the funds of the municipality at the end of the fiscal year.”).