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ATTORNEY GENERAL OF TEXAS

October 20, 2020

The Honorable Donna Campbell, M.D.
Chair, Committee on Veteran Affairs and Border
Security
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. KP-0337

Re: Whether Paycheck Protection Program loans are authorized investments under subsection 2256.009(a)(4) the Public Funds Investment Act (RQ-0349-KP)

Dear Senator Campbell:

You ask whether Paycheck Protection Program loans issued pursuant to the Coronavirus Aid, Relief, and Economic Security Act are authorized investments for local governments covered by the Texas Public Funds Investment Act.¹

In response to the millions of workers and businesses that have been economically harmed by the COVID-19 pandemic, on March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (to be codified in various titles of the U.S.C.). Included in that Act, Congress added the Paycheck Protection Program to the U.S. Small Business Administration's 7(a) Loan Program. *See* CARES Act § 1102 (to be codified at 15 U.S.C. § 636(a)).² The Paycheck Protection Program authorizes billions of dollars in forgivable loans to small businesses to pay their employees during the COVID-19 disaster. *Id.* § 1102(b)(1).³ You explain that the "CARES Act permits the loans to be sold into the secondary

¹*See* Letter from Honorable Donna Campbell, Chair, Senate Comm. on Veteran Affairs & Border Security, to Honorable Ken Paxton, Tex. Att'y Gen. at 1–2 (Apr. 22, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0349KP.pdf>.

²*See* <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

³Congress amended the Paycheck Protection Program on June 5, 2020, through the Paycheck Protection Program Flexibility Act of 2020. *See* <https://www.congress.gov/bill/116th-congress/house-bill/7010/text>. Among other changes, the amendments establish a minimum maturity period for a loan and revise the deferral period for the loans, allowing recipients to defer payments until they receive compensation for forgiven amounts. *See* Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, 134 Stat. 641. We note these changes to point out

market,” and you ask whether those loans are authorized investments under the Public Funds Investment Act such that public entities subject to that Act may purchase the loans in the secondary market. Request Letter at 1–2; *see also* CARES Act § 1102(a)(2)(36)(N) (“A covered loan shall be eligible to be sold in the secondary market . . .”).⁴

At the outset, we observe that federal regulations limit the entities that may purchase Paycheck Protection Program loans in the secondary market to “participating lenders”:

A Lender may sell all of its interest in a 7(a) loan to another Lender operating under a current Loan Guarantee Agreement (SBA Form 750) (“participating Lender”), with SBA’s prior written consent, which SBA may withhold in its sole discretion. *A Lender may not sell any of its interest in a 7(a) loan to a nonparticipating Lender.*

13 C.F.R. § 120.432(a) (emphasis added).⁵ Whether a particular entity qualifies to purchase loans on the secondary market is a threshold question that must be determined under federal law by the public entity in the first instance.⁶ However, to the extent that an entity qualifies under federal law as an authorized investor on the secondary market, we address whether, under State law, the loans in question are authorized investments under the Public Funds Investment Act.

The Public Funds Investment Act governs the ability of local governments, state agencies, and certain other government-affiliated organizations to purchase, sell, and invest funds in authorized investments. TEX. GOV’T CODE § 2256.003(a). The Act lists multiple categories of authorized investments in which entities subject to the Act may invest. *See id.* §§ 2256.009–.016. Relevant to your request, the Act authorizes investments in

obligations, the principal and interest of which are unconditionally guaranteed or insured by, or backed by the full faith and credit of, this state or the United States or their respective agencies and

that the new Paycheck Protection Program is still in a state of development and potentially subject to further modifications.

⁴*See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120) (“A PPP loan may be sold on the secondary market after the loan is fully disbursed. A PPP loan may be sold on the secondary market at a premium or a discount to par value.”).

⁵In addition to selling whole loans on the secondary market, federal law authorizes the pooling of certain Small Business Administration loans. *See* 15 U.S.C. 631. These pools can only be formed by Small Business Administration-approved Pool Assemblers, and the “SBA guarantees to a Registered Holder in an SBA pool security (referred to as a Pool Certificate) the timely payment of principal and accrued interest. SBA’s guarantee of the Pool Certificate is backed by the full faith and credit of the United States.” U.S. SMALL BUS. ADMIN., SBA SECONDARY MKT. PROGRAM & SECURITIZATIONS GUIDE 16 (June 2020), <https://www.sba.gov/sites/default/files/2020-06/Secondary%20Market%20Program%20Guide%20June%202020%20%28508%20Compliant%29.pdf>.

⁶The Public Funds Investment Act governs public entities comprising local governments, state agencies, non-profit corporations acting on behalf of a local government or state agency, and investment pools acting on behalf of two or more local governments, state agencies, or a combination of those entities. TEX. GOV’T CODE § 2256.003(a)(1)–(4). In contrast, a lender approved by the Small Business Administration to make and therefore purchase Paycheck Protection Program loans must have the necessary qualifications to process, close, disburse and service loans made with the guarantee, thus possessing the nature of a financial or banking institution rather than a governmental unit. *See* 15 U.S.C. § 636(a)(36)(F)(ii)(I).

instrumentalities, including obligations that are fully guaranteed or insured by the Federal Deposit Insurance Corporation or by the explicit full faith and credit of the United States.

Id. § 2256.009(a)(4). Answering your question requires analyzing whether the Paycheck Protection Program loans qualify as authorized investments under this subsection.

To qualify as an authorized investment under subsection 2256.009(a)(4), obligations must be “unconditionally guaranteed or insured by, or backed by the full faith and credit of, this state or the United States or their respective agencies” *Id.* “Loans guaranteed under the Paycheck Protection Program [are] 100 percent guaranteed” by the Small Business Administration. 85 Fed. Reg. 20811, 20812 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120); *see also* 15 U.S.C. 636(a)(2)(F); CARES Act § 1102(a)(1)(B) (providing that the Small Business Administration’s participation in guaranteeing loans under the Payment Protection Program “is 100 percent”). The Small Business Administration is an agency of the United States. *See* 15 U.S.C. § 633(a) (creating the Small Business Administration as a federal agency “under the general direction and supervision of the President”). Thus, as a general matter, Payment Protection Program loans fully guaranteed by the Small Business Administration satisfy the statutory requirements of subsection 2256.009(a)(4).

The Public Funds Investment Act also requires entities subject to it to invest “in compliance with investment policies approved by the governing body and according to the standard of care prescribed by section 2256.006.” TEX. GOV’T CODE § 2256.003(a). The standard of care in section 2256.006 provides:

Investments shall be made with judgment and care, under prevailing circumstances, that a person of prudence, discretion, and intelligence would exercise in the management of the person’s own affairs, not for speculation, but for investment, considering the probable safety of capital and the probable income to be derived. Investment of funds shall be governed by the following investment objectives, in order of priority:

- (1) preservation and safety of principal;
- (2) liquidity; and
- (3) yield.

Id. § 2256.006(a). Whether any specific investment satisfies this standard of care must be determined by the investing entity in the first instance, after reviewing the entity’s policies and the specific investment under consideration. *See* Tex. Att’y Gen. Op. No. KP-0220 (2018) at 4 (explaining that the governing body making the investment decision is in the best position to know and consider the probable income from the investment and whether the risk and return objectives are reasonably suited to the investment).

S U M M A R Y

To qualify as an authorized investment under subsection 2256.009(a)(4) of the Texas Public Funds Investment Act, an investment must be “unconditionally guaranteed or insured by, or backed by the full faith and credit of, this state or the United States or their respective agencies.”

The federal Paycheck Protection Program authorizes loans to small businesses to pay their employees during the COVID-19 disaster. The Small Business Administration currently guarantees 100 percent of those loans, and they are available for purchase on the secondary market. Thus, Paycheck Protection Program loans fully guaranteed by the Small Business Administration generally satisfy the statutory requirements of an authorized investment under subsection 2256.009(a)(4).

Section 2256.006 requires that public investments “be made with judgment and care, under prevailing circumstances, that a person of prudence, discretion, and intelligence would exercise in the management of the person’s own affairs, not for speculation, but for investment, considering the probable safety of capital and the probable income to be derived.” Whether any specific investment satisfies this standard of care required in the Public Funds Investment Act must be determined by the investing entity in the first instance, after reviewing the entity’s policies and the specific investment under consideration.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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