PAYCHECK PROTECTION PROGRAM – TREASURY FAQ #31: AM I REALLY SUPPOSED TO GIVE MY MONEY BACK?

Posted on May 1, 2020 by Michelle F. Schwerin

Tags: CARES Act, COVID - 19, COVID - Business, Danielle Durban, Michelle Schwerin

This article was published on April 30th and is current as of that date. On May 5, 2020, the Treasury and SBA issued FAQ 43, which extends the repayment date to May 14 for borrowers wishing to fall within the "safe harbor" and that the SBA intends to issue additional guidance concerning certification prior to May 14, 2020.

Paycheck Protection Program Loans Frequently Asked Questions On **April 23, 2020**, the Treasury added FAQ #31 to its ever-growing list of **Paycheck Protection Program Loans Frequently Asked Questions ("FAQs").** A first set of 18 FAQ Questions and Answers, meant to provide guidance to PPP borrowers and lenders, were released on **April 6, 2020**. The Treasury has continued to add to its FAQs and is up to 39 Questions and Answers and as of **April 29, 2020**.

Question #31 specifically asks:

> *"Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?"*

This FAQ was issued in direct response to public outcry against large companies applying for and

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receiving PPP loans. Historically, borrowers under the SBA Section 7(a) loan program (the program under which PPP falls), must certify that they are not able to access credit elsewhere. **Section 120.101-102 of the Code of Federal Regulations** specifically requires that the borrower not be able to obtain credit elsewhere, including from the personal resources of the borrower and/or individuals owning 20% or more interest in the borrower. However, Congress waived the "credit elsewhere" eligibility requirement for PPP loans, prompting businesses (including larger companies) who arguably did not need the funds, to apply.

Understandably, given that larger companies are more likely able to source credit elsewhere **and** the fact that the PPP loan funds, intended to help *small* businesses, dried up quickly (though Congress and President Trump **approved another $310 billion in funding for a second round of PPP**, which began this week), the SBA and Treasury had to respond to public concern.

Regardless of what triggered FAQ #31, the Answer to FAQ #31 is not limited to "large companies," but rather applies to "all borrowers," indicating that the guidance applies to every participating business.

Answer #31 states:

> *"In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application,* ***all borrowers should review carefully the required certification that "urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.*** *For example, it is 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 SBA, upon request, the basis for its certification."*

The FAQ goes on to note that any borrower concerned that it does not meet the standard set forth in Question 31, **may repay the loan in full by May 7, 2020 and be deemed by SBA to have made the required certification in good faith.**

The Treasury's use of the term "all borrowers" indicates that the standard promulgated by FAQ #31 is far reaching beyond the Shake Shack's, Ruth Chris's, and Potbellies of the world.

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So, What's a "Small Business" To Do?

What does FAQ #31 really mean? How is a borrower supposed to judge whether it has liquidity or whether or not it is able to obtain credit elsewhere such that the borrower would be disqualified from participating in the PPP? Does a borrower need to approach every lender in town and receive a letter indicating the lender refuses to extend the borrower credit?

What about trying to sell or lease assets, such as the parking lot outback or one of the restaurant's two pizza ovens? Does an owner of the borrower need to liquidate his or her 401(k) in order to try to make the borrower's payroll? And, if a small business did not go to these extremes before signing a PPP loan application, should it give the loan proceeds back?

The answer really isn't clear. (And, obviously, some of the questions above makes the standard seem absurd.) Moreover, it certainly does not help that the standard articulated in FAQ #31 came about **(i)** *weeks after the PPP became operational*, **and (ii)** *weeks after borrowers' PPP loan proceeds were funded*, **and (iii)** for some, *weeks after some borrowers started spending the PPP loan proceeds*.

The "guidance" set forth in FAQ #31 only adds to the uncertainty surrounding a program in which, on multiple issues, the SBA and Treasury guidance contradicts the plain language of the CARES Act (the "independent contractor" inclusion—or shall we say exclusion—in the definition of "payroll costs" for example?). After all, the CARES Act explicitly waives the "credit elsewhere" requirement for all *applicable small business* borrowers seeking a PPP loan. And the Treasury's own "Fact Sheet" from March 31, 2020, asks and answers: "Do I need to first look for other funds before applying to this program? No. We are waiving the usual SBA requirement that you try to obtain some or all of the loan funds from other sources (i.e., We are waving the Credit Elsewhere requirement)."

But, then, FAQ #31 requires that PPP borrowers must certify–under oath–that their loan request is necessary to support operations, by taking into account their: "ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business." Borrowers might reasonably choose to place weight on this clause. In the example noted above, selling its parking lot and important pieces of equipment would probably be detrimental to a restaurant's long term business prospects. While reasonable minds can differ, there seems to be quite a bit of tension, if not downright conflict, between the standard established in the CARES Act and the guidance issued by the SBA and the Treasury.

Put another way, the CARES Act was intended to put money in the hands of applicable small businesses and to do so quickly, as Senator Marco Rubio expressed on Twitter:

> *Our goal is that as many small businesses as possible will be able to go to their existing bank,if they agree to participate,and get the cash they need to make payroll & business rent/lease & if they use it for that purpose not have to pay it back.*
> *pic.twitter.com/1uML9sVFHa*
>
> *— Marco Rubio (@marcorubio) March 19, 2020*

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Accordingly, Congress waived the historical, and sometimes strenuous, threshold borrowing standard. Guidance that, on its face, walks back such intent by effectively re-imposing the standard (i.e., making it harder for applicable ***small businesses*** to obtain funding) could be said to contradict the legislative purpose of the CARES Act.

More Questions Than Answers

As touched on above, the key might lie in the phrase: "in a manner that is not significantly detrimental to the business"? After all, selling the second pizza oven or running expenses on a credit card accruing interest at 18% most certainly would be "detrimental to the business". However, what if the small business, with additional time and effort, *might* be able to find a line of credit? *This situation is less clear.* Further, what does this mean as small businesses attempt to plan for a future beyond the eight weeks of PPP loan coverage? Will a borrower's subsequent ability to obtain financing to support operations beyond the eight PPP weeks be an indicator to the SBA and Treasury that liquidity was available elsewhere? If so, small business borrowers are stuck between a rock and a hard place in needing to find a way to continue operating beyond the two-month reprieve provided by the PPP loan even though doing so might serve as an admission that the borrower could find cash elsewhere. It is unfair to expect business owners to predict the future during this pandemic.

And, as if deliberately wanting to dig a deeper hole, on **April 28, 2020**, the Treasury issued another FAQ, adding a **Question #37**:

> *"Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?"*
>
> ***The answer?***
>
> *"See response to FAQ #31."*
>
> ***As if that helped the first time…***

Oversight and Enforcement Provisions within the CARES Act At the end of the day, to what extent is the SBA (and/or other investigative entities likely to push this issue against small businesses who otherwise meet the qualifications outlined in the statute and regulations (in other words, are actually small businesses)? At the time we started drafting this blog post, our feelings were that it was probably not very likely.

However, while we were editing, the Treasury came out with **FAQ #39**, commenting on the SBA's anticipated level of review, stating:

> *"To further ensure PPP loans are limited to eligible borrowers in need, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of $2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application. Additional guidance implementing this procedure*

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> *will be forthcoming."*

So What Now?

Small business borrowers are facing a shrinking timeline (eight weeks or less) in which to spend and account for their PPP loan proceeds and a potential May 7 deadline to unwind and pay back their PPP loan. Now adding to this stress, borrowers must seriously consider the new questions of: does my company meet this new standard?; should I return the funds by May 7 (not to mention: do I still have the funds to return?)?; and how do I assure that my loan forgiveness application is accurate?

Note: We are well aware that this blog post raises many more questions than answers. To the extent you have answers, we'd love to hear them. To the extent you have questions, please do not hesitate to reach out. And recall that any borrower that applied for a PPP loan prior to the issuance of FAQ #31 (on **April 23, 2020**) and repays such loan in full by **May 7, 2020**, will be deemed by SBA to have made the required certification in good faith.

As always, we will remain vigilant in updating our understanding and digesting the ever-evolving guidance.

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