

May 6, 2020

Virtual Town Hall on PPP Eligibility and Risks: ~~One Last Look~~ Before the Safe Harbor Expires

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AGENDA

- Introduction
- New Employee Size Guidance
- Eligibility & Certification Standard
- ~~May 7th~~ May 14th Safe Harbor
- Best Practices
- Audits
- Practical Risk Analysis

LAST NIGHT'S CHANGE

- NEW FAQ 44: size test counts employees of “**U.S and foreign affiliates**” of applicants (unless exempt)
 - Conforms to CARES Act: “*500 employees*”
 - Conforms to usual SBA test (13 CFR 121.106(b)(2) and 13 CFR 121.301(f)(6))
- Does NOT conform to IFR 1 or FAQ 3:
 - “*500 or fewer employees whose principal place of residence is in the United States*”
- Existing borrowers can **probably rely** on prior standard per FAQ 17
 - Borrowers “*may rely on the laws, rules, and guidance available at the time of the relevant application*”.

WHERE ARE WE NOW?

- Mnuchin: borrowers who improperly certify face:
 - “severe consequences”
 - “criminal liability”
- SBA will review all loans > \$2M (& others “as appropriate”) when borrower applies for forgiveness
- Safe harbor for loans repaid by ~~May 7th~~ May 14th

WHERE ARE WE NOW?

- CARES Act:
 - Waives “no credit elsewhere”
 - Waives personal guaranty from owner(s)
 - Borrowers must certify:
 - “**Current economic uncertainty** makes this loan request **necessary** to support the ongoing operations of the Applicant.”
- SBA & Treasury regulatory guidance (FAQ #31):
 - ~~Current economic uncertainty~~ → “current **business activity**”
 - Must consider “ability to access other sources of liquidity”

CERTIFICATION STANDARD

Has current business activity been impacted?

Factors to Consider:

- Closure of manufacturing facilities
- Ability of workers to work from home
- Interruption of Supply Line
- Cancellation of product or services supply
- Decreased sales opportunities
- Tangible benefits in business from COVID19

Must be more than just “economic uncertainty.”

CERTIFICATION STANDARD

- Is there access to liquidity that is not significantly detrimental to the business?
- Factors to Consider:
 - Undrawn amount on a revolving credit facility
 - Undistributed cash positions
 - Ability to access capital markets
 - Shelf offerings
 - Convertible Debt

BEST PRACTICES

- Designate a Point Person
- Board Approval / Ongoing oversight
- Segregated Bank Account
- Review outstanding debt provisions
 - Is incurring the PPP loan permitted?
 - If returning the PPP loan, is that permitted?
- Accurate and Comprehensive Documentation
- Review Document Retention Policy
- Risk analysis – legal and headline risk
- Internal Memo

BEST PRACTICES – USE OF PROCEEDS

- **Forgiveness** –
 - “costs incurred and payments made” over 8 weeks from loan disbursement
 - **Payroll costs**
 - **Other “payments”** (rent, “utilities,” mortgage interest)
 - **Capped at 25% of forgiveness amount**
 - Prepayments? (Not clear if cash or accrual!)
- **Payroll costs:**
 - 75% of loan **must be used** for payroll costs (even if not seeking forgiveness)
 - Can extend beyond 8 weeks?

RISK CONSIDERATIONS

- **Congressional Oversight Mechanisms & Investigations**
 - Congressional Oversight Commission (CARES Act s. 4020)
 - SIGPR (CARES Act s. 4018)
 - Pandemic Response Accountability Committee (CARES Act s. 15010)
- **PPP Lenders vs. PPP Borrowers**
- **Regulatory Investigations**
 - SBA Audits
- **Potential Civil Liability**
 - False Claims Act
 - FIRREA
- **We've Seen This Movie Before – TARP Redux**
- **Potential Criminal Liability**
 - March 16, 2020, Barr Memorandum to U.S. Attorneys
 - Criminal Fraud Statutes
 - Data Analytics
 - *United States v. Staveley* (D.R.I.)

POTENTIAL PENALTIES

- **Congressional Oversight**
 - “Name and Shame,” reputational risk
 - Referral to SIGPR, DOJ, SEC...
- **Regulatory**
 - Denial of forgiveness
 - Civil or criminal referral
- **Civil**
 - FCA: Treble damages (3x loan amount); \$22k per claim statutory damages; costs and fees
 - FIRREA: civil penalties in amount of loss to government from the fraud; multi-million dollar civil penalties
- **Criminal**
 - Imprisonment, multi-million dollar criminal fines

QUESTIONS?

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