

May 11, 2020

Virtual Town Hall on PPP Eligibility and Risks For Nonprofit Organization

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AGENDA

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

ELIGIBILITY

- Not All Nonprofits Are Eligible
 - 501(c)(3) (or similar)
 - Faith-based organizations
 - Section 115 non-profit hospitals
 - Veterans organizations
 - Tribal entities
- Affiliation
 - Faith-based organizations – special rules
 - NEW 5/5/20 FAQ 44: size test counts employees of “**U.S. and foreign affiliates**” of applicants (unless exempt)
 - But existing borrowers can rely on prior guidance (FAQ #17)

WHERE ARE WE NOW – CERTIFICATION OF ELIGIBILITY?

- 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 14th

WHERE ARE WE NOW – CERTIFICATION OF NEED “NEED”?

- 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.”
 - Typically nonprofits are not eligible for SBA loan – their inclusion is a CARES Act “add on.”
- 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 nonprofit facilities – state stay at home orders
- Ability of workers to work from home
- Decreased or eliminated regular revenue opportunities
 - Cancellation of programs, performances and mission-related services
- Any tangible benefits in business from COVID-19
- Must be more than just “economic uncertainty”

CERTIFICATION STANDARD

- Is there access to liquidity that is not significantly detrimental to the nonprofit “business”?
- Factors to Consider:
 - Undrawn amount on a revolving credit facility
 - Undistributed cash positions
 - Ability to access endowments
 - UPMIFA
 - Distribution of income v. principal
 - Donor restricted funds v. board restricted funds
 - Special COVID-19 donation appeals

IMPACT OF PPP LOANS ON OTHER CARES ACT OPTIONS

- Employee Retention Credit is not available for employers receiving PPP loans.
- Payroll Tax Deferral program is not available to entities who have had PPP loans forgiven.
- EIDL loans must be non-duplicative of the PPP loans.
- Loan forgiveness guidance has not yet been issued and may have other implications.

BEST PRACTICES – BOARD OVERSIGHT

- Board Approval / Ongoing oversight
- 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

BEST PRACTICES – DOCUMENTATION AND RECORDKEEPING

- Designate a Point Person
- Segregated Bank Account
- Risk analysis – legal and headline risk
- Internal Memo

PRACTICAL RISK ANALYSIS

- **CARES Act Congressional Oversight Mechanisms & Investigations**
- **Regulatory Risk**
 - SBA Audits (\$2m+); SBAIG Investigations; IRS-CI Investigations
- **Potential Civil Liability**
 - False Claims Act: Government- or whistleblower-initiated
 - FIRREA: Certain crimes “affecting a federally insured financial institution”
- **Potential Criminal Liability**
 - Barr Memorandum to U.S. Attorneys (Mar. 16, 2020)
 - Title 18 Criminal Statutes: Bank, mail, wire fraud; false statements to lending institution
 - Leveraging Data Analytics
 - *United States v. Staveley* (D.R.I.)

POTENTIAL EXPOSURE

- **Congressional Oversight**
 - “Name and Shame”
 - Referral to regulators and enforcement agencies: SIGPR, DOJ, SEC...
- **Regulatory**
 - Denial of forgiveness
 - Civil or criminal referral
 - IRS audit or State Attorney General inquiries
- **Civil**
 - FCA: Treble damages (3x loan amount); \$22k per claim statutory damages; costs and attorney fees
 - FIRREA: Civil penalties in amount of loss to government from the fraud; multi-million dollar statutory penalties
- **Criminal**
 - Multi-million dollar criminal penalties

BEST PRACTICES – USE OF PROCEEDS

- **Forgiveness:**
 - “costs incurred and payments made” over 8 weeks from loan disbursement (June 30, 2020 period end)
 - **Payroll costs – Seasonal Employees**
 - **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 use be extended beyond 8 weeks?

QUESTIONS?

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