



ATTORNEYS AT LAW

FAQ #31: THE PPP PANDORA'S BOX
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On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act ("CARES Act") was signed by President Trump. The CARES Act created a new Small Business Administration ("SBA") loan program known as the Paycheck Protection Program ("PPP") which has provided billions of dollars in potential forgivable loans to businesses for purposes of maintaining and restoring jobs to their employees. To date, millions of PPP loans have been approved and funded to qualifying businesses, with \$349 billion funded in a matter of weeks and another \$310 billion in additional funding on its way.

In order to obtain a PPP loan, applicants must provide several certifications as part of the application process. One such certification is that ***"current economic uncertainty makes this loan request necessary to support ongoing operations of the Applicant."***

On April 23, 2020, the SBA, in consultation with the Department of Treasury, provided additional guidance to address questions concerning the economic need of the applicants. Specifically, newly published FAQ #31 asks ***"Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?"*** The answer provided 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 "[c]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. Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith."* [Emphasis Added]

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FAQ #31 has certainly created reason to pause for those borrowers who relied on the certifications in the SBA Form 2483 application in borrowing under the PPP. While the language in the application and the early SBA and Treasury guidelines seemed to provide the applicants with much discretion in determining whether the loan was required to support the applicant's ongoing operations, FAQ #31 now indicates that if a borrower had other means of liquidity to support its ongoing operations, in a manner that would not be significantly detrimental to the borrower's business, the original application certification may not be deemed made in good faith thereby putting the borrower at risk for some sort of liability.

The impact of FAQ #31 can certainly be significant in light of the hundreds of billions of dollars already funded under the PPP. While borrowers relied on the language on the SBA Form 2483 application and the original SBA and Treasury guidance, borrowers are now contemplating whether the applicable rules have changed and whether they should repay their loans by the May 7, 2020 safe harbor date. Further, FAQ #31 provides no guidance as to what the consequences may be to those borrowers the SBA deems may not have acted in good faith, beyond the penalties and potential criminal exposure identified in the SBA Form 2483 application, which only sets forth the "necessary to support ongoing operations" standard.

In addition, clarity is being sought by borrowers as to the standards regarding what is considered significantly detrimental to a borrower's business with respect to the other means of liquidity. Many borrowers are now asking questions about their original good faith certifications before the introduction of the liquidity element as a result of FAQ #31. Such questions include:

- What if the borrower received a PPP loan while they had reserves or working capital balances on hand that could have been used to fund payroll or other expenses?
- What if account receivables were factored and the borrower received funding from the factor in addition to PPP loan proceeds?
- What if the borrower paid out dividends or made distributions to its owners from its operating capital immediately before or after a PPP loan was received?
- What if the borrower had access to a line-of-credit at the time of applying for a PPP loan?
- What if the principals of the borrower are high net worth individuals who could have met a capital call or provided a loan to the borrower to support ongoing operations?
- As the SBA affiliation rules apply to PPP applicants in determining whether the applicant is a small business concern, could the affiliation relationships be considered the means for a source of liquidity for the applicant based on the financial resources of the affiliate?

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These are only a few of the legitimate questions that will certainly open the floodgates of confusion for PPP borrowers. We believe that application of the business judgment rule will be critical in borrowers demonstrating that they applied for PPP loans in good faith on the reasonable belief that such funds were necessary to support ongoing operations.

Although it remains fairly clear that the typical SBA requirement that an applicant must demonstrate that it is not able to obtain credit elsewhere has been waived under the PPP, the introduction of the liquidity element in FAQ #31 certainly merits further discussion with the borrower's advisors and professionals to understand the potential ramifications on the borrower's obtaining of a PPP loan.

About the Author:



About Anthony J. Vizzoni, Esq.:

Anthony is co-chair of the firm's Transportation Group and a member of the Firm. He primarily focuses his practice on corporate transactional matters, complex financing transactions and commercial real estate. Mr. Vizzoni has over 30 years' experience in the practice of law and the area of financing.

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