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PPP loan forgiveness: How SBA FAQ 46 affects safe harbor amid deadline panic

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Just before extending the deadline for returning Paycheck Protection Program money to May 18, the U.S. Small Business Administration and the Department of Treasury released FAQ 46 to provide a safe harbor for businesses that accepted smaller loans.

PRO COMPUTER SERVICE
"I think the whole thing is crazy," Anthony Mongeluzo of Pro Computer Service says of the constantly updated guidance for PPP.

While experts see this latest rule clarification as a plus, some Philadelphia-area businesses still have concerns about PPP's constantly changing guidelines to gain loan forgiveness and how much help it will ultimately provide.

In the answer to Question 46 in its constantly updated online FAQ sheet, Treasury now states that any business receiving less than $2 million in PPP money will automatically be deemed to have made a good faith certification regarding the necessity of the loan request.

Prior to this latest guidance, companies were worried about civil and criminal penalties for failing to prove they had a legitimate need for the funding. When filling out a PPP application, each business must certify that, among other things, “current economic uncertainty makes this loan request necessary” to support ongoing operations.

Daniel Marques of Philadelphia accounting firm Drucker & Scaccetti said the latest guidance does not preclude Treasury from making further changes, or from reviewing the loan for other aspects such as payroll calculations and whether the money was used for the program's intent — maintaining payroll, utilities, rent and mortgage interest.

Marques said many PPP recipients became fearful after Treasury released FAQ 31 on April 23 that stated businesses with substantial access to liquidity may not qualify for the loans, prompting several larger companies to return their PPP funds.

Five days later, amid public outcry over public companies such as AutoNation, Ruth's Chris Steakhouse and Shake Shack receiving PPP loans, Treasury Secretary Steven Mnuchin said that the SBA would review all loans in excess of $2 million to make sure borrowers' self-certification for the loans was appropriate.

Those planned audits will continue and while many larger companies have returned the loans, some smaller firms have followed suit. After Mnuchin's edict, Treasury and the SBA gave businesses an extra week to decide whether to return their PPP loans — pushing the deadline from May 7 to May 14. Late Wednesday, the Treasury extended the deadline again, this time to May 18.

Two local accountants said their clients have been a bundle of nerves trying to figure out what to do.

"I think that FAQ 31 caused unnecessary angst for businesses," Marques said. "They started asking whether they had to show that their business would have had to shut down without the money. It made them question whether they really needed the money, but they all applied because they thought they needed it. And prior to that FAQ being issued, they had been documenting why they thought they needed the money when they applied and the circumstances that have unfolded since then, which are worse in most cases. And you can take all of that and create a narrative for forgiveness."

Marques advised clients that regulators will be looking at what they knew when filling out the application, projecting revenue and cash flow and the status of the company before Covid-19. Companies must make sure to document how the pandemic impacted their business.

"Documentation will tell you if you should keep the loan," Marques said. "FAQ 31 caused fear. You need to try and remove that fear, because that will send you down a path where you are looking for reasons not to keep the money. You need to look at the reasons why you should keep the money."

Mitchell Gerstein of Bala Cynwyd's Isdaner & Co. said while small businesses won't be challenged on whether their applications made an accurate certification about the degree to which Covid-19 impacted their companies or whether they had other ways to raise money, they still need to prove the money was used for legitimate expenses.

"You very well could still be subject to an audit," Gerstein said. "I wouldn't advise putting the money in your bank account or buying a car. But everyone is panicking. Thousands of businesses are talking to their CPAs, lawyers and bankers about returning the money. And most of them don't need to worry."

Many businesses have already returned the PPP loans, not due to audit fears but because they didn't think the program would help them while their operations were closed. PPP is supposed to cover payroll for eight weeks, but many businesses fear they will be shuttered for much longer than that. Gerstein has one such client who owns a local movie theater.

"He rushed out to get PPP thinking he would be OK after two months," Gerstein said. "But movie theaters are in trouble. They might go out of business. So what purpose does it serve him to take his employees off furlough if he's just going to have to lay them off after the eight weeks are up. That's not the spirit of the program."

Congress is considering some potential changes to help shuttered businesses faced with a longer timeline for reopening by increasing the length of the loan period and reducing the percentage of money that needs to be used for payroll from the current requirement of 75%.

Wendy Verna, owner of Bella Vista-based marketing firm Octo Design Group, received her $42,000 PPP loan on April 17 and that has allowed her to keep her three employees on the payroll. She plans on keeping the money but noted that revenue has declined drastically and she wonders whether the economy will have reopened before the funds expire.

“I know my current pipeline [of business] will not last forever and I’m going to need more money,” Verna said. “And if the economy is not fully opened, I might not need all my staff but you have to use 75% of the loan on payroll.

“Everyone thought this was a great deal but now some don’t want the loan debt because they don’t know when they can bring all of their people back. The fact that this has been going on for so long is a real issue. We’ve had some revenue coming in so this was perfect for us. I think it’s the businesses that are shut down that are having a problem.”

Anthony Mongeluzo, CEO of Moorestown, New Jersey-based Pro Computer Service, which provides outside CIO and help desk services to businesses and nonprofits, also plans to keep his PPP loan. His biggest concern about the program came on April 30 when the IRS said that forgiven PPP loan amounts would not be deductible in 2020 tax returns.

Legislation was introduced last week in the Senate to overrule the IRS and clarify that ordinary expenses funded by PPP loans are deductible. Mongeluzo estimated that while his $1.8 million loan will be forgiven, he will wind up paying $700,000 in extra taxes this year for it.

“I think the whole thing is crazy,” Mongeluzo said. “If you talk to a CPA or an accountant, they will tell you there’s no way to keep track of everything.”

Ami Kassar, CEO of Multifunding, an Ambler-based company that connects small businesses with financing, said PPP has become a political issue, which has changed the calculus for those who acted in good faith when applying.

“There are businesses that are not doing anything wrong but now they are going to be accused of taking the money when they didn’t need it,” Kassar said. "I would say that if it’s keeping you up at night and giving you agita, then give the money back and move on.”

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