

More Money More Problems? The Sequel: Should My Company Return The Money It Received from the CARES Act?

May 4, 2020

On April 24, 2020, and again on April 28 and 29, the Small Business Administration issued new guidance and responses to frequently asked questions relating to who should receive and retain CARES Act funds[1].

The SBA's new guidance has caused borrowers to ask an important question: Should my company return the money?

So far, companies including Shake Shack, Sweet Green, and the Los Angeles Lakers have all elected to do just that.

SBA FAQ 31 states as follows:

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

Answer: 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)

While the SBA has still "suspended" the requirement that borrowers must be unable to obtain credit elsewhere, such that the actual language of the guidance is not much different than previous guidance, it does seem to show a shift, or at least a clarification of the agency's expectations. Companies, especially well-capitalized private and large public ones, are now officially on notice that they will have a difficult time meeting their loan application's "necessity" standard under the "good faith" requirement[2].

On April 29, 2020, the SBA issued Question/Answer #39 stating, "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."

If a borrower is concerned that it may no longer meet the "necessity" standard required for its good faith certification in its loan application, it can receive amnesty from potential scrutiny if the borrowed funds are repaid in full by May 7, 2020. Any borrower who returns the money by then will be "deemed by the SBA to have made the [necessary] certification in good faith."

While additional guidance implementing the forgiveness application procedure is forthcoming, borrowers who plan to keep their PPP loan will want to carefully assess and document the "economic uncertainty" the business was facing at the time of the loan application certifying the loan was "necessary to support the ongoing operations." These factors may include business interruptions, stability of workforce, delinquency on accounts receivable, liquidity of cash reserves, access to other credit and related loan covenants.

If you have questions about applying for, receiving funds, returning funds, or ensuring compliance to the CARES Act, please contact Susan Gaertner, Jackson Hobbs, Daryn McBeth, Litigation and Dispute Resolution Practice Group Chair Matthew Jacober, or your regular Lathrop GPM contact. Our White Collar Group also focuses on False Claims Act litigation, responding to State Attorney General investigations, and a variety of other compliance work.

[1] A link to the SBA FAQs can be found at <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

[2] All Paycheck Protection Program loan applications require a good faith certification, among other items, that "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant." Small Business Administration, 13 C.F.R. Part 120, Interim Final Rule, April 15, 2020, accessed at https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf