



May 1, 2020

BY ELECTRONIC TRANSMISSION

The Honorable Steven Mnuchin,
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20005

The Honorable Jovita Carranza,
Administrator
U.S. Small Business Administration
409 Third St., S.W.
Washington, D.C. 20416

RE: CARES Act – Paycheck Protection Program (PPP) Interim Final Rules (SBA-2020-0021)

Dear Secretary Mnuchin and Administrator Carranza:

On behalf of its membership, the Small Business Investor Alliance (“SBIA”) acknowledges the tremendous commitment by both the U.S. Small Business Administration (“SBA”) and the Treasury Department (“Treasury”) to stand up quickly with regulations and supplemental guidance the PPP loan program under the CARES Act.¹ These are very difficult circumstances and new information is learned every day. The PPP loan program is unique because its rulemaking process will be completed after the program has been fully implemented and hundreds of billions of dollars have been deployed, so it is critical that small businesses can rely on a plain reading of the statute and not subsequent and often conflicting public statements or shifting FAQs.

The PPP was designed to subsidize and encourage behavior that would be otherwise economically irrational; specifically, keeping employees paid with benefits despite the pandemic-induced economic shutdown. With PPP money, small businesses can protect the economic security of their low and moderate wage employees, keep them employed rather than move them to the public rolls of the unemployed, and maintain a workforce that will allow the businesses to quickly restart operations when the economy is reopened. Without the PPP funds, small businesses would be forced to reduce expenses by laying off workers, regardless of access to liquidity because it is not only bad economics, but bad business to burn capital and increase debt when economic activity and productivity are frozen.

Changing Guidance for Access to Capital for Small Businesses is a Problem

SBIA has consistently taken the position that all small businesses must live up to both the spirit and the letter of the law and therefore should first do the best they can with the resources available to them individually. PPP resources are limited, and care must be taken so as not to crowd out other small businesses for whom PPP is their only lifeline. We agree with the Administration that, for example, professional sports franchises that pay millions to their rosters of superstars per year should have never taken a PPP loan, not because they did not legally qualify, but because any sense of decency should have made clear the absurdity and greed of their application.

However, the creation of an ambiguous “liquidity elsewhere” test announced by federal officials and interpretive FAQ guidance, as now applied to private small businesses, runs counter to the plain reading of the statute and runs counter to the PPP loan program’s core premise of bridging non-economic behavior by

¹ Pub. L. 116-136 (March 27, 2020).

small businesses to keep low- and moderate-wage employees and small businesses intact.² We share your desire to prevent abuse of the PPP loan program, but without further guidance and with threats of criminal penalties at stake, small businesses that have obtained loans and plan to use them to maintain payrolls have been left in an impossible position. The insertion of the liquidity elsewhere test by Treasury and SBA unties the critical feature of the CARES Act.

PPP program rules and FAQs should be clarified to make clear that, consistent with the statute, small businesses that have been harmed by the impacts of Covid-19 and the related economic shutdowns are permitted to access PPP loans to pay their low- and moderate-wage employees and to keep their small businesses fully operational. The statute did not require as a precondition of PPP loan eligibility that small business borrowers face risk of bankruptcy; face risk of ceasing to be a going concern; breach the fiduciary obligations of capital providers with an interest in the small business; or overcome any form of a credit elsewhere or liquidity elsewhere test. To the contrary, Congress contemplated this and removed the credit elsewhere test as applied to 7(a) loans from the PPP loan program.

Congress wrote the PPP loan program broadly to counter the negative impacts of Covid-19, and federal regulators must apply guidance and rules that match the plain reading and statutory intent of Congress.

The statute is clear, but absent matching clear, steady, and consistent articulation of the rules by federal officials the PPP loan program's statutory purpose will fail many of the domestic employees and small businesses it was designed to help. At the advice of counsel, a meaningful number of these small businesses are now returning the PPP money and laying off employees because the ambiguity is not worth the risk. These small businesses, struggling during this pandemic, now face rolling guidance that is ambiguous, shifting, and counter to the statute together with threats of criminal charges for fulfilling the statutory purpose of the PPP loan program. The result is returned PPP funds and workers laid off. Other small businesses are just laying off employees and not applying for PPP loans because they fear that federal guidance could shift again and leave them at risk of criminal prosecution and personal financial ruin.

Partial Repayments

Many small businesses took PPP loans just as the economy began seizing. Some of these businesses were approved and received funds, but now with more economic clarity, they realize they do not need as much. If, for instance, a business received a \$100,000 loan and now knows it only needs \$75,000, then it should be able to return the \$25,000 excess so that another small business borrower may have access to those funds. A small business should be able to return the unused portion of their PPP loan, but should not have to refund the entire initial loan amount.

SBIA recommends that SBA and Treasury, if possible, re-deploy for lending all repaid PPP loan proceeds, including partial repayments, returned by May 7, 2020, the safe harbor date discussed below.

Further, partial repayments should be allowed after May 7th for loans taken out in the second wave of PPP issuances.

² The FAQ make clear in question #31 that companies able to access public capital markets should not apply for a PPP loan regardless of the legal support for their claim. SBIA members invest in small businesses so public capital access does not affect them; however, question #37 implies that even small businesses that may have access to capital from private or governmental sources should not be able to access PPP and, by implication, may face criminal prosecution if they do not first tap those sources for non-economic purposes. Most small businesses will not take on additional debt to pay employees who are not working even if they have a line of credit that is not maxed out. Small businesses may also breach their loan covenants if they accept certain loans that may be available. Small businesses may not have access to further equity or debt infusions from capital providers that have fiduciary obligations to other parties, so while liquidity may be available in theory, in reality it is not. If the plain reading of the statute allows a small business borrower to access a PPP loan and the money is being used to keep workers who would otherwise lose their jobs employed, then an eligible domestic small business should be able to access the PPP loan program.

PPP Loan Eligibility

SBIA urges the SBA and Treasury to make clearer distinctions between loan *eligibility* and loan *forgiveness* in its regulations and guidance.

The CARES Act states that an eligible recipient is a qualifying individual or small business entity for whom the “uncertainty of current economic conditions make necessary” the PPP loan request to support ongoing operations.³ The statute waives for a PPP borrower the “credit elsewhere” requirement that would otherwise govern traditional SBA 7(a) loans, and also waives its affiliation rules for certain qualifying PPP borrowers that meet one of three express waivers. The most recently issued regulation declares that hedge funds and private equity firms are ineligible to receive a PPP loan.⁴

If there is a good faith need because of the economic uncertainty caused by the Covid-19 pandemic for PPP capital for a qualifying small business to keep low- and moderate-income employees economically secure, or to avoid significant detriment to its operation, then the small business clearly qualifies for a PPP loan and should be able to make the necessary certifications to access it. The statute, its regulations, and the PPP borrower application form place the burden on qualifying borrowers to make a good faith certification of loan eligibility based on the uncertainty of current economic conditions.

As the loan program’s regulations continue to emerge, SBIA acknowledges the proposed safe harbor for PPP borrowers deemed by SBA to have made the required certification in good faith if a borrower that applied for a PPP loan before April 24, 2020, repays the loan in full by May 7, 2020. This safe harbor, which itself provides critical certainty for PPP borrowers and lenders, protects the first wave of small business borrowers who received PPP loans and could inoculate them against retroactive application from future regulations because of their “misunderstanding or misapplication of the required certification standard”.⁵ At the very least, the safe harbor should be extended to include any PPP borrower who does not seek forgiveness of the loan and abides by the use restrictions in the statute and guidance.

PPP Loan Forgiveness

There is also concern among PPP borrowers about the uncertain scope of the loan forgiveness prong because there still are no comprehensive regulations from SBA and Treasury that explain it. Specifically, SBIA recommends that SBA and Treasury issue regulations that clearly decouple the rules governing *loan forgiveness* from the gateway certification that a borrower is using PPP loan proceeds for an *eligible use*.

The statute does distinguish that only certain eligible uses trigger loan forgiveness, which convert the PPP loan into a grant, provided that the borrower can prove such use with sufficient documentation.⁶ Any small business that receives a PPP loan should be documenting their economic disruption and how the PPP funds are being used to fulfill the legal mandate of the law. Any unforgiven portion of the borrower’s PPP loan amount remains a *loan* repayable over two years at one (1%) percent, with a payment deferment for the first six months of the loan’s term.

Therefore, if a small business borrower uses its PPP loan proceeds for an eligible use under the SBA’s 7(a) program rules, then the borrower is ineligible for PPP loan forgiveness on that portion of PPP proceeds, at minimum; but, the borrower apparently remains in compliance with the PPP’s “eligible uses” rules because

³ 15 USC 636 (a) (36)(G)(i)(I).

⁴ SBA-2020-0021 at 6 (April 24, 2020).

⁵ Id. at 9.

⁶ 15USC636(a)(F) (Eligible uses that would trigger the PPP loan forgiveness option include certain “payroll costs”; mortgage interest payments; lease payments; and utility payments.)

allowable uses of an SBA 7(a) loan extend to the PPP loan program.⁷ SBIA requests clarity from Treasury and the SBA on this point.

SBIA is concerned that there is a growing perception of legal jeopardy among small businesses that apply for a PPP loan and a serious stigma in accessing the PPP money even if it is used for the statute's purpose of maintaining the salaries and benefits of the low- and moderate-wage employees. The perceived risk is serious and SBIA is aware that some small businesses have decided to forego PPP loans and the associated risks, and instead will lay off their employees. This would be a tragedy and must be avoided during this economic storm.

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As always, SBIA appreciates the opportunity to discuss these issues and looks forward to working together to update applicable regulations to ensure America's small businesses have access to the capital they need.

Sincerely,



Brett Palmer
President
Small Business Investor Alliance

⁷ 15 USC 636(a)(F) (“*ALLOWABLE USES OF COVERED LOANS.— (i) IN GENERAL.—During the covered period, an eligible recipient may, in addition to the allowable uses of a loan made under this subsection, use the proceeds of the covered loan for*” the seven listed eligible uses.) See also 85 Fed. Reg. 20814 (April 15, 2020). (“*While the Act provides that PPP loan proceeds may be used for the purposes listed above and for other allowable uses described in section 7(a) of the Small Business Act (15 U.S.C. 636(a)), the Administrator believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a substantial portion of the loan proceeds for payroll costs, consistent with Congress’ overarching goal of keeping workers paid and employed.*”)