

PPP Risk Management Tips

The rules surrounding the Payroll Protection Program (PPP) under the Coronavirus Aid, Relief, and Economic Security Act (CARES) are evolving. The interim final rules were promulgated a couple of days ago, and are out for public comment. Nevertheless, it is very clear that accountants will play a critical role in the loan application process. How long the program will actually last is uncertain given that there was a surge of applications when the “gates opened” on Friday, April 3rd; and when the money is gone, it’s gone. Some mega banks are allegedly out of their allocation. From a risk management standpoint, there are a couple of things to bear in mind.

- Some CPA firms are struggling with defining their role – consultant versus agent. Agents act on the behalf of the client. They complete and submit applications, expedite the approval process, represent clients with prospective lenders, sign loan applications and closing documents, and do the other things agents normally do. The SBA defines agents as a “loan packager, accountant, attorney, consultant, engineer, architect, appraiser, or any other party that receives compensation from representing an Applicant for an SBA disaster loan.” Consultants would more passively assist clients in the process. They provide guidance, information and services that is not specifically related to the PPP loan. The SBA says an applicant’s “accountant for the preparation of financial statements or tax returns required by the Applicant in the normal course of business and not related to the loan application” is *not* an agent.
 - Under the PPP rules, agents get a percentage of the loans amount – 1% or less depending on the loan amount – and it comes from the lender’s fees. Consultants can charge what they want, but it cannot come from the loan proceeds. Some clients are opting for acting as consultants, rather than agents. This may be risky. It is probably more prudent to act as an agent; but to do so *conservatively* – e.g. require the client to (i) verify the accuracy of the application information, (ii) submit the application, and (iii) sign the loan documents. Otherwise, there is a risk of running afoul of the fee rules, as well as an increase in liability exposure. The result could be a return of the fees paid to accountants as a consultant, not getting paid the fee due an agent, suffering reputational damage in both the eyes of the client and the SBA, and possibly litigation if the loan application is denied. Agents need to complete the SBA’s Fee Disclosure and Compensation Agreement.
 - Assisting clients with the PPP loan application is considered to be a non-attest service. However, auditors should be careful – in helping clients submit applications – not to act in a management capacity; otherwise independence could be impaired.
- Clients should take responsibility for providing accurate and complete information, and submitting the application. Although the accountants may have access to a lot of the required data, it may not be verified or complete as of the time of the application. It is recommended that a provision along the lines of the following should be included in engagement letters.

“Client represents that the information provided will be accurate and complete to the best of its knowledge. <CPA Firm> will not audit or otherwise verify the

data submitted, although <CPA Firm> may ask for clarification if the information appears to be incorrect, inconsistent, or incomplete. Services do not include any procedures designed to discover fraud, defalcations, or other irregularities, should any exist. Client is responsible for the proper recording of transactions in the books, the safeguarding of assets, and for the accuracy of the financial, payroll and other records. Client has final responsibility for the submission. Accordingly, Client should carefully review the application before submitting it.”

- Engagement letters should also make it clear that there is no guarantee that PPP loans will be approved. Language similar to the following should be inserted into PPP loan related engagement letters.

The approval of any loan is at the financial institution’s sole discretion. Client is solely responsible for providing to potential lenders information demonstrating Client’s eligibility for a loan. <CPA Firm> does not guarantee or represent that Client’s application(s) for a loan will be approved, or that Client qualifies for any available loan forgiveness or otherwise. In no event will <CPA Firm> have any liability to Client with respect to the services provided to Client, except to the extent of <CPA Firm’s> gross negligence or intentional misconduct.

- Finally, although it should go without saying, these are very trying and unprecedented times. Anxiety is running high. Rules are being bent and new ones being created. Uncertainty about the future is abundant. Thoroughness often gives way to speed. Nonetheless, failure to obtain a PPP loan may sound the death knell for some clients. Accordingly, accountants need to be especially vigilant when assisting clients with PPP loan application – not only to avoid liability if a loan application is denied; but more importantly to faithfully discharge their professional responsibility as trusted advisors.

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