The PPP is back in business. Almost.

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The Small Business Administration (SBA) reopened the Paycheck Protection Program (PPP) Monday at 10:30 a.m., once again offering a pipeline for small-business loans and grants. The reopening, however, echoed the previous efforts by the administration to support small businesses with a chorus of complaints from borrowers and lenders alike regarding delays and systems failures holding up the approval process.

The SBA's electronic loan portal was soon overwhelmed by demand and the situation was only made worse by last-minute changes in guidance on how to submit applications. The banking community expressed their frustrations openly with the developing situation. Rob Nichols, president of the American Bankers Association, wrote on Twitter that bankers were “deeply frustrated” and that “we have raised these issues at the highest levels.”

Seeking a smoother process than was seen on April 3, when the first installment of PPP began, the SBA released on Sunday steps aimed at preventing system glitches and a smoothing of distribution of funds among participating banks. Early Monday, banks across the country began processing loans but then reportedly found that the SBA’s portal became unresponsive within an hour of opening and remained down the rest of the day.

As part of this smoother process, the SBA asked banks to submit applications in batches of 15,000 loans when its E-Tran loan portal opened. By midday, however, the allowable batch size was cut to 5,000, to address complaints by smaller banks that they were cut out of the process by the minimum.

The SBA acknowledged some problems with its systems but said that by 3:30 p.m. it had processed 100,000 loans submitted by 4,000 lenders. It did not say how much of the $310 billion had been allocated through those loans, however.

“Unprecedented demand is slowing E-Tran response times,” Jovita Carranza, SBA administrator said in a tweet on Monday, adding that twice as many users were accessing the loan-processing system Monday afternoon, compared with any day during the initial round of the PPP. “The SBA is actively working to ensure system security and integrity when loan processing continues” she wrote.
President Trump acknowledged the issues with the SBA website at a White House briefing Monday, and said, “I heard there was a glitch,” and that he would “find out about that.”

On April 24, 2020, President Trump signed into law the Paycheck Protection Program and Health Care Enhancement Act. As NSA reported previously, the basic provisions of the new law were to provide $310 billion in additional funds for the SBA’s PPP and Emergency Injury Disaster Loans (EIDL), and an additional $75 billion authorized for reimbursements to hospitals and health care providers to support COVID-19 related expenses and lost revenue. Also included was $25 billion in new funding authorized for public health responses to COVID-19, including $11 billion set aside for states and local governments to increase COVID-19 testing capacity.

As the PPP has evolved since its inception on March 27, so too have SBA and the Department of Treasury’s articulation of its requirements. One of the agencies’ primary mechanisms for conveying these requirements to borrowers has been through a regularly updated list of Frequently Asked Questions (FAQ), many of which the SBA then formalizes through interim final rules that it publishes in the Federal Register.

On Sunday, the SBA clarified eligibility rules amid a wave of outrage over provisions that enabled public companies such as Shake Shack Inc. and Ruth’s Hospitality Group Inc., owner of the Ruth’s Chris Steak House chain, to qualify for loans. The Los Angeles Lakers on Monday became the latest to say that it had applied and received money under the first round of funding. The NBA franchise pledged to return it, something several other companies and organizations have done after their participation was revealed.

The SBA said in its new 12-page FAQ guidance issued Sunday that public companies with “substantial market value and access to capital markets” are unlikely to qualify for loans under the program, expanding on guidance issued by Treasury last week. It added that any such borrower that applied previously can return the money by May 7 without being penalized.

PPP applicants are now required to make a number of certifications in connection with their applications, for example concerning their eligibility and the purposes for which they will use the loans. Attention to these certifications has become critical to the application process, given the severe penalties that are possible for submitting false or misleading certifications. One such certification that has drawn particular scrutiny is regarding the certification required by Question 31 of the FAQ document. Question 31 requires that applicants certify that the “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

There appear to be four key takeaways from the new guidance issued Sunday … 1) Borrowers must have considered “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.” This is the first time that SBA or Treasury has suggested the need to consider alternative liquidity. 2) This requirement is retroactive to certifications that pre-dated the guidance (and, indeed, loans already issued). 3) In light of the requirement’s retroactivity, the SBA has announced a safe harbor until May 7, for borrowers to return loans if any of the SBA’s subsequent guidance has changed the validity of their application certifications. On April 24, 2020, the SBA incorporated this safe harbor provision into a new interim final rule. 4) The new guidance suggests that publicly traded companies, in particular, will have to carefully consider their alternate sources of liquidity.

More than 235 public companies have disclosed receiving more than $880 million in PPP loans, according to a Wall Street Journal analysis of securities filings as of Monday afternoon. Eighteen companies have disclosed plans to return $131 million, the Journal found. Ruth’s and Shake Shack are among those returning the money.

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