

SBA AND TREASURY'S FAQ #46'S CERTIFICATION "SAFE HARBOR" MAY NOT BE AS SAFE AS BORROWERS THINK

Posted on May 15, 2020 by Michelle F. Schwerin

Tags: [CARES Act](#), [COVID - 19](#), [COVID - Business](#), [Danielle Durban](#), [Michelle Schwerin](#)



[Paycheck Protection Program Loans Frequently Asked Questions](#) On **May 13, 2020**, the Small Business Administration ("**SBA**"), along with the Treasury, released **FAQ #46**, as a follow up to its guidance on **FAQs #31 and #37**, which is discussed [here](#).

As a quick catch up, the SBA and Treasury issued FAQ #31 in response to public outcry against large companies applying for and receiving PPP loans. In the FAQ, the SBA reminded borrowers of PPP loans about the following certification on all PPP loan applications, whereby borrowers certified that the "urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant" (the "**Certification of Necessity**").

In FAQ #31, the SBA added the following commentary:

"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."

Such guidance and commentary is a significant departure from the language of the **CARES Act**, which had explicitly waived the "credit elsewhere" requirement.

If FAQ #31 was in response to public outcry against large companies, it generated a significant public outcry in and of itself. While not a walk back of FAQ #31, FAQ #46—while still reserving discretion to audit borrowers of PPP loans under \$2 million—does provide a **safe harbor** with respect to the Certification of Necessity.

According to the SBA:

*"Any borrower that, **together with its affiliates**, received PPP loans with an original principal amount **of less than \$2 million** will be deemed to have made the required certification*

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

Borrowers should consider the "together with its affiliates" language carefully. A borrower with a PPP loan of *less than \$2 million* is not automatically "good to go" without further consideration. It must first determine whether it has affiliates with outstanding PPP loans and the aggregate amount of such loans. The SBA considers the sum of all affiliate loans together for purposes of applying the "safe harbor" to the Certification of Necessity. If the sum of all affiliate loans is less than \$2 million, the SBA will consider that borrower to have certified its necessity for the PPP loan in good faith, without looking further. If the SBA determines such borrower, together with its affiliates, have PPP loans *in excess of* \$2 million, the safe harbor will not apply to the borrower, ***even if the borrower, on its own, has a loan for less than \$2 million.***

Especially important to note, the "safe harbor" does not apply to any other element of the borrower's application or the borrower's use of PPP loan funds and related substantiation, all of which are subject to SBA/Treasury review.

In addition, please remember that FAQ #46 addresses other important issues aside from the one discussed above, such as the consequences of not making the Certification of Necessity in good faith, which are beyond the scope of this blog post, but important considerations for PPP loan borrowers.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.