

May 15, 2020, 07:50pm EDT

SBA PPP Loan Borrowers Be Warned: “No Free Pass” After SBA FAQ Issued

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Just hours after the Small Business Administration issued its May 13, 2020 revision of [frequently asked questions \(FAQ\)](#) about the Paycheck Protection Program, experts started weighing in on question 46, “How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?”

PPP Loans Under \$2 Million

Before the FAQ update, business owners who received PPPs needed guidance, especially in light of questions about other sources of potential liquidity, as in the public market. No business, especially no small business, wants to face that painful lack of clarity.

For that reason, FAQ 46 is a godsend. It makes clear that “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 concerning the necessity of the loan request in good faith.”

Clarity

While this does not forgive or excuse mistakes, misstatements or, worse, fraud, it gives existing PPP borrowers a degree of clarity at a time when we still don’t know how the coronavirus pandemic will play out.

The pandemic is a business climate in motion. Just look at today’s headlines: “Workers File 3 Million New Jobless Claims”; “Pandemic Hastens Retail Apocalypse for Struggling Stores”; “Vaccine Expert Denounces US Response”; and how about this headline: “Scientists Probe How to Stem Second Wave.”

When can certainty be achieved? Not for a while, making FAQ 46 is a welcome relief, as [I wrote about on the 13th](#).

Can New Applicants Ignore the Certification?

Does FAQ 46 free new applicants to ignore business necessity?

No, the standard has not changed. All applicants need to show an adequate basis for the loan. That is, applicants need to certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the [a]pplicant."

As Day Pitney lawyers put it in an alert titled "[SBA Safe Harbor Does Not Guarantee Free Pass For Covid-19 PPP Borrowers](#)" posted on May 13, 2020, the day of the FAQ update, anyone who is applying for a PPP loan needs to "conduct due inquiry and analysis prior to making the certification." No one gets a free pass.

SBA Questions Re Certification?

Might the SBA question a loan of \$2 million or less? Perhaps. What would be the consequences of an SBA review? Day Pitney's alert offers this insight:

"[I]f the borrower, after reasonable inquiry, has formulated an honestly held subjective belief as to the truth of the matter asserted in the necessity certification, the consequences to the borrower of being second-guessed by the SBA appear (based on the FAQ) to be limited to (1) loss of forgiveness and (2) acceleration of loan maturity, so long as the borrower does not dispute the SBA's determination that a borrower lacked a good faith basis for the required certification. If the borrower wants to dispute the SBA's determination, it is free to do so, but the SBA then reserves its right to pursue an enforcement action and referral to other agencies."

You can always dispute the SBA's determination. However, "the SBA then reserves its right to pursue an enforcement action and referral to other agencies," according to the alert.

What other agencies? The U.S. attorney's office, for one.

Other Agencies

According to Day Pitney's alert: "The SBA is not the only executive branch entity with the authority to bring action against a borrower. For example, in connection with all required loan certifications, including

the good faith certification regarding necessity, the U.S. attorney's office can bring its own action under 18 U.S.C. § 1001 (criminal charge for knowingly making a false statement to influence an act of the SBA) or the False Claims Act (31 U.S.C. §§ 3729, et seq.).”

Other Expertise

For more expertise, especially on affiliations, check out the [Marcum, LLP website](#).

Michael Maksymiw, partner, Tax & Business Services (SBA Task Force) & Andy Alan, director, Advisory Services (SBA Task Force), at Marcum LLP, had this to add:

“It is important to count affiliates, as we saw back in April many public companies with multiple locations initially received PPP Loans and have either already returned the funds or are planning to do so.”

What's Ahead?

Expect more guidance from the SBA on PPP loans. Go directly to the source: [sba.gov](https://www.sba.gov).