

SBA To Require PPP Borrowers of \$2 Million or More to Provide Documentation to Support Certification of Necessity Due to Economic Uncertainty



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The U.S. Small Business Administration ("SBA") recently posted a notice seeking comment on draft Loan Necessity Questionnaire Form 3509 (For-Profit Borrowers) and Form 3510 (Non-Profit Borrowers) to be used by the SBA to review Paycheck Protection Program ("PPP") forgiveness applications. The SBA claims that the purpose of the necessity questionnaire is to facilitate the collection of supplemental information used by SBA loan reviewers to evaluate the good-faith certification that borrowers made on their PPP Loan Application that economic uncertainty made the loan request necessary. The completed necessity questionnaire will be due to the PPP lender within ten business days of receipt from a borrower's lender.

These necessity questionnaires present serious concerns for the 29,000 non-profit and for-profit businesses that received PPP loans in excess of \$2 Million. The necessity questionnaires contain many questions requiring disclosure of confidential financial and proprietary information. It is not clear whether responses to the questionnaire will be required disclosures with a loan forgiveness application or whether the responses will be required in advance of, or without, submission of a loan forgiveness application.

The necessity questionnaire has two parts, a "Business Activity Assessment" and a "Liquidity Assessment."

Business Activity Assessment

- A comparison of the gross revenue for the first quarters of 2019 and 2020, including supporting documentation.
- Borrowers must provide information about how COVID-19 has temporarily shut down, caused a reduction in operations, or resulted in additional capital outlays of a borrower.

Liquidity Assessment

- Borrowers are required to provide documentation regarding the amount of liquidity on hand when the PPP loan application was submitted.
- Borrowers are required to provide documentation regarding distributions and dividends paid to owners during the covered period.
- Borrowers are required to provide documentation regarding all debt prepayments and capital expenditures made during the covered period.
- Borrowers are required to provide documentation regarding the amounts paid to owners in excess of \$250,000 annualized during the covered period.
- If privately held, the borrower is required to provide its book value on the last day of the quarter preceding its loan application.
- Borrowers are required to disclose whether they received any other CARES Act benefits, excluding tax benefits.

The necessity questionnaire includes certifications regarding the accuracy of responses, and alarmingly warns that false statements will result in criminal penalties. If you are a borrower with a PPP loan in excess of \$2 Million, you need to consult your legal counsel immediately. The information sought will be used by the SBA to determine whether PPP borrowers were initially eligible for the PPP loans they received due to the category of business, access to capital, or ownership by a foreign entity, among other reasons. For borrowers eligible for a PPP loan, aside from the necessity issue, using hindsight to review the actual impact on the PPP borrower after receipt of PPP funds due to business closures, losses in revenue, and effects on employees is patently unfair. Further, no formal SBA guidance was available on the PPP application date. The SBA urged all businesses to apply quickly to avoid losing out on the opportunity to receive PPP funds. Given the uncertainty with how the SBA will use this information, the confidential and proprietary nature of the information sought (which may be publicly available), PPP borrowers should consult with counsel immediately and before submission of a loan forgiveness application. Borrowers may be best served by waiting as long as possible before seeking loan forgiveness (if ever) to allow for SBA and lender guidance to be issued, legal challenges and resolution, and obtain information from lenders as to how the information will be used.