

Troubling PPP Update: SBA Intends to Require Borrowers with Loans Over \$2 Million to Complete a New Loan Necessity Questionnaire

The Small Business Association (SBA) has circulated Paycheck Protection Program (PPP) loan necessity questionnaire forms that it intends to require borrowers with PPP loans in excess of \$2 million to complete. It is expected that nonprofit entity borrowers will be required to complete [Form 3510](#) and for-profit entity borrowers will be required to complete [Form 3509](#). These troubling new questionnaires specifically require borrowers to disclose information regarding their operations and liquidity during their covered periods.

The SBA asserts that the purpose of the questionnaires is to assist with the “review of your good-faith certification that economic uncertainty made your loan request necessary to support your ongoing operations.” However, some of the additional information aims to evaluate the borrower’s business *during* the pandemic in hindsight and rather than at the time of the PPP application. It appears that the SBA may determine that borrowers did not satisfy the good-faith certification as to the loan’s necessity in situations where their business ended up not being as negatively impacted by the economic effects of the pandemic as anticipated at the time of their application. This is a concerning development for many PPP borrowers and the consequences can range from a denial of the loan forgiveness application to criminal prosecution.

Recall that in the PPP application, borrowers were required to make the following need certification: “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Regardless of the SBA’s stated purpose for the new questionnaires, the requirement to complete these new questionnaires and the information that the SBA is seeking from borrowers contained therein is seemingly a departure from the SBA’s previous position that the need-based certification is evaluated *at the time of the application*.

You may also recall that this same necessity certification was the subject of much controversy and ultimately resulted in a safe harbor period to return PPP funds back in May. Borrowers with loans under \$2 million were automatically deemed to have made this certification in good faith. Borrowers with loans exceeding that amount were allowed to return their PPP funds before the safe harbor date if they determined that they were ineligible for the loan based on additional guidance regarding the interpretation of this certification. That additional guidance clearly indicated that when making the necessity certification, borrowers should consider 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.” While the new questionnaires contain questions clearly aimed at business activities and liquidity, many of the questions ask what *actually happened* to the borrower’s business and liquidity, not what was *anticipated or uncertain* at the time of the application.

Specifically, Form 3510 (for nonprofit entities) asks borrowers questions regarding their business activities, such as: (1) their gross receipts and expenses from certain quarters in 2019 and 2020; (2) if the borrower was subject to a state or local shutdown order or was forced to alter its operations; (3) if the borrower voluntarily ceased or reduced operations; and (4) if the borrower recently undertook any capital improvement projects. Form 3510 also asks nonprofit entities questions regarding the borrowers’ liquidity, such as: (1) how much the borrower had at the time of the application in

cash, savings and cash investments; (2) how much debt the borrower had prepaid during the covered period; (3) if the borrower paid any employees salaries of \$250,000; (4) if the borrower is restricted from using funds in certain ways; (5) information regarding the borrower's endowments; (6) information regarding the borrower's non-cash investments; and (7) if the borrower received funds from any other CARES Act program.

Additionally, universities and colleges are required to provide tuition information and information regarding decreases in revenue. Healthcare providers are required to provide information regarding its program service revenue as well.

Form 3509 (for for-profit entities) seeks similar information from for-profit borrowers. Form 3509 asks borrowers questions regarding their operations, which include: (1) gross revenues in certain quarters of 2019 and 2020; (2) if the borrower was subject to a state or local shutdown orders, was forced to significantly alter its operations due to compliance with those orders, and other information regarding those orders; and (3) if the borrower voluntarily ceased or reduced operations and why. The form also asks for-profit entities questions regarding the borrowers' liquidity, which include: (1) how much the borrower had at the time of the application in cash and cash equivalents; (2) how much the borrower paid its owners in dividends during the covered period; (3) how much debt the borrower had prepaid during the covered period; (4) if the borrower paid any employees or owners compensation in excess of \$250,000; (5) if the borrower's equity securities are listed on the national securities exchange; (6) if any owner of the borrower is publicly traded or a private equity firm; (7) the book value of the borrower; (8) information regarding the parent company of a borrower if it is a subsidiary; and (9) if the borrower received funds from any other CARES Act program.

Not surprisingly, the borrower will need to make new certifications regarding the accuracy of the information disclosed in the questionnaire and the authorization to sign the questionnaire. There is also an acknowledgment regarding prosecution pursuant to federal law for making false statements to obtain a PPP loan or obtain forgiveness of a PPP loan. The completed questionnaire form, along with supporting documentation, is due to the lender servicing the borrower's PPP loan within 10 business days of borrower's receipt of the questionnaire from its lender.

As a reminder, there is still the opportunity to return monies during the SBA review period if the necessity of the loan is questioned. According to SBA FAQ 46, if the SBA in the course of its review determines that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, the SBA will not pursue administrative enforcement or referrals to other agencies so long as the borrower repays the loan after receiving notification.

The attorneys at Bond, Schoeneck and King can help you navigate completing the new loan necessity questionnaire forms. Please contact [Jeffrey B. Scheer](#) or the attorney at the firm with whom you are regularly in contact.



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