



SBA Rolls Out “Loan Necessity Questionnaire” for Borrowers with PPP Loans over \$2M and Starts Audit Review Process

Earlier in the year, the Small Business Administration (SBA) [announced](#) in an updated FAQ on the program that it will be auditing all Paycheck Protection Program (PPP) loans of \$2 million or more. Borrowers whose loans meet this threshold amount might receive a Loan Necessity Questionnaire from their lender soon after they apply for loan forgiveness.

Even though the official channels indicate the questionnaire is not yet final, we understand that SBA is already sending letters to lenders instructing them to send the questionnaire to specific borrowers within five business days. Borrowers have only 10 business days of receipt of the questionnaire to return a completed version to the lender, which the lender must then submit to SBA within five business days. Both borrowers and lenders may be surprised by the short turnaround time and the extent of detailed information requested, as well as signatures, certifications and supporting documentation. Since the requested information may not be readily available and could take considerable time and effort to compile, borrowers should begin gathering the information on the questionnaire even before they receive the request from their lender.

Insight:

SBA has already sent the questionnaire to some PPP lenders for delivery to borrowers, although SBA has not officially announced the finalization of the form and the process.

For-profit employers will receive Form 3509 asking about business operations, while non-profit employers will receive Form 3510.

Unlike the PPP loan application and loan forgiveness forms, SBA has not yet posted Form 3509 or 3510 on its website. However, copies of Forms 3509 and 3510

have been widely circulated on the internet.

Despite the short turn-around time and complex data required to complete the questionnaire, it seems that extensions of time to complete the questionnaire will not be available. SBA has 90 days under the CARES Act to approve PPP loan forgiveness (regardless of the size of the loan), which may make it unlikely for SBA to grant extensions on information that might be relevant to its approval process.

The following is a summary of the purpose of new Forms 3509 and 3510 (for profit-making borrowers and non-profit borrowers, respectively), which contain the questionnaire, as well as the key items included on both forms.

What is the purpose of the new forms?

It seems that SBA will use the new Forms 3509 and 3510 to evaluate borrowers' good-faith certifications of their economic need for the PPP loan. Some critics view the forms as SBA's attempt to change PPP rules retroactively to penalize borrowers that (in hindsight) did not actually have the requisite financial need to qualify for a PPP loan.

Remember that the PPP was intended to provide disaster relief to small employers (generally those with 500 or fewer employees) facing economic uncertainty (for example, due to COVID-19 governmental shut-down or stay-at-home orders) and for whom the loan was necessary to support the ongoing operations of the business. In the early days of the PPP, some entities received sizable PPP loans even though they were not eligible (often because they did not face the requisite economic uncertainty for the PPP loan).



Widely circulated media reports identified several well-funded publicly traded companies, universities with significant endowment funds and affiliates of such entities that had quickly received PPP loans and may have caused the program's original funding to run out prematurely. Many of those ineligible borrowers returned their loans during an amnesty period that expired in May 2020. To further address possible abuse, the Treasury Secretary said that SBA will closely review all PPP loans of \$2 million or more, seemingly using the Loan Necessity Questionnaires to do so.

Insight:

In the October 26, 2020 Federal Register, SBA estimated that 52,000 borrowers will need to complete these new forms (about 42,000 for-profit borrowers and 10,000 non-profit borrowers).

Notably, the new forms may be sent to borrowers that received a PPP loan of less than \$2 million if they, together with their affiliates, received an aggregate of \$2 million or more in PPP loans. Original PPP program rules generally limited the availability of PPP loans to one loan per controlled group of entities, but in reality, various members of a controlled or affiliated group may have received separate PPP loans. To address that situation, SBA included a box that borrowers must check on their PPP loan forgiveness applications (the Form 3508 series) if they, together with affiliates, received \$2 million or more of PPP loans. SBA will review all loans within that controlled group.

The questions on the new forms seem to indicate that SBA will be evaluating the "economic necessity" for the borrower's PPP loan both on the PPP loan application date and thereafter. The loan application only required borrowers to make a good faith certification of economic necessity as of the loan application date, so it is unclear why SBA is asking about what actually happened to the borrower's operations afterwards.

What are the key items on the new forms?

Each of the forms has two sections: a "Business

Activity Assessment" and a "Liquidity Assessment."

Business Activity Assessment

This section asks for-profit borrowers for detailed information and documentation about the impact of COVID-19 on their businesses, including whether the business was subject to mandatory or voluntary closures and whether it made any changes in its operations. The borrower also must report gross revenue for Q2 2020 and Q2 2019 and indicate whether it made any capital improvements between March 13, 2020 (i.e., the date that COVID-19 was declared a national disaster) and the end of the borrower's "covered period" (a maximum of 24 weeks from the date their PPP loan was funded). Borrowers can include additional comments on any of these questions. Non-profit borrowers must provide similar information, but the definition of gross receipts includes grants, gifts and contributions, and non-profit borrowers must submit Q2 expenses for 2019 and 2020.

Liquidity Assessment

This section asks for the following information:

- All borrowers must disclose:
 - o Whether the borrower prepaid any outstanding debt before it was contractually due, between March 13, 2020 and the end of the borrower's covered period.
 - o The number of employees (including owners paid more than \$250,000 on an annualized basis and the total number of employees and total compensation paid to those employees during the covered period.
 - o Whether the borrower received funds from any CARES Act programs other than the PPP, excluding tax benefits.
 - o Any additional comments that have bearing on any of the liquidity assessment questions.



- For-profit borrowers must disclose:

- o The borrower's cash position as of the end of the quarter immediately before the PPP application date and whether the borrower has paid any dividends or other capital distributions (other than estimated taxes) between March 13, 2020 and the end of their covered period.

- o Whether the borrower (or any affiliate) is publicly traded in the United States or a foreign country (and if so, total market capitalization must be reported).

- o Whether at least 20% or more of the borrower was owned by a private equity, venture capital or hedge fund.

- o Its book value (i.e., shareholder's equity) on the last day of the calendar quarter immediately before the PPP application date.

- Non-profit borrowers must disclose:

- o Cash, cash equivalent and short-term investment position as of the end of the calendar quarter immediately before the PPP application date, as well as the value of non-cash investments.

- o Whether the borrower has restrictions on using net income, cash, savings or investments for payroll and nonpayroll costs otherwise eligible for the PPP forgiveness.

- o Whether the borrower holds assets in endowment funds.

- o If the borrower is a school, college or university, whether it offered additional financial assistance to students and if it had declines in tuition revenue due to COVID-19.

- o If the borrower provides healthcare services, the amount of its program service revenue relating to patient care in Q2 2019 and 2020.

As a reminder, the PPP loan eligibility and loan forgiveness process continues to evolve; hopefully, SBA or the Treasury Department will soon clarify how the answers to these questionnaires may impact borrowers' PPP loan forgiveness.