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SBA Proposes PPP Loan Necessity Questionnaire

On October 26, 2020, the U.S. Small Business Administration (SBA) issued a [notice](#) that it is seeking approval from the Office of Management and Budget (OMB) to collect and use certain borrower information to evaluate the “necessity” of Paycheck Protection Program (PPP) loans of more than \$2 million. SBA proposes a “Loan Necessity Questionnaire” in slightly different versions for for-profit and non-profit borrowers. The stated purpose of the new questionnaires is “to facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate the good-faith certification” that PPP borrowers made in their loan applications that economic uncertainty made the loan request necessary. The SBA has not officially released the forms; however, versions of the questionnaires have circulated online over the last several days. It is not clear whether the questionnaires are in final form or will undergo additional changes.

While the details of SBA’s timing for use of the questionnaires are still uncertain, affected PPP loan recipients can begin to prepare their responses now. The questionnaires state that each for-profit and non-profit borrower that received PPP loans with an original principal amount of \$2 million or greater is required to complete the form and submit it, along with required supporting documentation, to its lender. According to the *Federal Register* notice, SBA expects approximately 42,000 respondents to the for-profit borrowers’ questionnaire and approximately 10,000 respondents to the non-profit borrowers’ questionnaire.

The questionnaires include two sections: a Business Activity Assessment and a Liquidity Assessment. The Business Activity Assessment of for-profit borrowers requests detailed information and supporting documentation related to:

- Gross revenue in Q2 2019 and Q2 2020

- Whether borrower has been ordered to shut down or to significantly alter its operations by a state or local authority since the COVID-19 National Emergency Declaration on March 13, 2020
- Whether borrower voluntarily ceased, reduced or altered its operations since the COVID-19 National Emergency Declaration on March 13, 2020

The Liquidity Assessment of for-profit borrowers requests detailed information and supporting documentation related to:

- How much borrower owned in cash and cash equivalents immediately prior to the date of the PPP loan application
- Whether borrower has paid any dividends or other capital distributions to its owners between March 13, 2020, and the end of the loan-forgiveness covered period of the PPP loan
- Whether borrower prepaid any outstanding debt between March 13, 2020, and the end of the loan-forgiveness covered period of the PPP loan
- Whether any of borrower's employees or owners who work at the company were compensated by borrower in an amount that exceeds \$250,000 on an annualized basis during the loan-forgiveness covered period of the PPP loan
- Whether any of borrower's equity securities were listed on a national securities exchange on the date of borrower's PPP loan application
- The market capitalization of the borrower or the book value of the borrower
- Whether borrower was a subsidiary of another company on the date of borrower's PPP loan application
- Whether 20% or more of any class of borrower's outstanding equity securities were owned by a private equity firm, venture capital firm or hedge fund on the date of borrower's PPP loan application
- Whether borrower was an affiliate or a subsidiary of a foreign, state-owned enterprise or of a department, agency or instrumentality of a foreign state on the date of borrower's PPP loan application
- Whether borrower directly received funds from any CARES Act program other than the PPP

The Loan Necessity Questionnaire for non-profit borrowers includes a similar set of business activity and liquidity assessment questions tailored to the eligible types of non-profit borrowers that received PPP loans. Both questionnaires require the borrower to certify, "after reasonable inquiry of people, systems, and other information available," that the information and documentation provided is true and correct in all material respects.

The release of these questionnaires, which "will be used to inform SBA's review of [borrowers'] good-faith

certification that economic uncertainty made [the] loan request necessary” to support ongoing operations, is not unexpected given the guidance the SBA previously set forth in the [PPP Frequently Asked Questions \(FAQs\)](#). For example, in response to FAQ #31, SBA advised potential borrowers that they should review carefully the required economic uncertainty certification and “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.” In response to FAQ #39, SBA alerted borrowers that it would review all loans in excess of \$2 million following the lender’s submission of the borrower’s loan forgiveness application.

Assuming the form is finalized and cleared by OMB, borrowers should carefully complete this form and any supporting documentation, particularly given the subjective nature of any review process. A borrower’s receipt of the form does not mean that SBA is challenging that borrower’s certification. SBA has not provided any detail as to its methodology for reviewing the forms, stating only that its determination will be based on the totality of the circumstances. In response to FAQ #46, SBA noted that loans greater than \$2 million may have an adequate basis for making the required good-faith certification, but reminded borrowers that established protocol would still subject such loans to review by SBA for compliance with program requirements. If SBA determines that a borrower lacked an adequate basis to support the certification of the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and notify the lender that the borrower is not eligible for loan forgiveness. The FAQs note that if repayment is made, SBA will not pursue administrative enforcement or referrals to other agencies based on its loan certification determination. Borrowers have the right to appeal certain loan review decisions.

What This Means for Borrowers

As borrowers may have only ten days to submit the questionnaire after receiving it from the lender, borrowers that received a PPP loan of \$2 million or more should begin preparing their responses and collecting supporting documentation now. It appears that the triggering of this form is the application for loan forgiveness. Borrowers who have concerns about issues related to the questionnaire should consult legal counsel promptly and certainly prior to the submission of any completed questionnaire.

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