

New SBA Questionnaires Ask PPP Borrowers of \$2M or More to Justify Economic Need

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On April 23, the Small Business Administration (SBA) informed borrowers, via Question #31 in the Paycheck Protection Program (PPP) Frequently Asked Questions (FAQ), that “all borrowers must assess their economic need for a PPP loan ... at the time of the loan application,” and borrowers were required to consider their current business activity at the time of application and their “ability to access other sources of liquidity sufficient to support ongoing operations in a manner not significantly detrimental to the business.” To illustrate, the SBA provided an example of a company unlikely to achieve the “necessity” certification as a public company with substantial market value and access to capital markets.

On May 13, the SBA released FAQ #46, which stated that PPP borrowers who, in the aggregate, including their affiliates, received less than \$2 million in PPP loans would be “deemed” to have made the certification of necessity in good faith, and PPP borrowers with loan amounts equal to or greater than \$2 million would be subject to further SBA review.

Finally, at the end of October, the SBA announced its intention to release two new form questionnaires related to the issue of loan necessity — [SBA Form 3509](#) (for for-profit borrowers) and [SBA Form 3510](#) (for nonprofit borrowers) — which are currently unavailable on SBA’s website. Even though unissued, we currently know what information the new SBA forms will require from borrowers.

SBA Forms 3509 and 3510 come as somewhat of an unpleasant surprise to PPP borrowers over the \$2 million loan amount threshold since the SBA has not provided any prior guidance on these issues. With that in mind, we can provide you with the highlights of what information borrowers must provide on the forms and the issues this information can pose to a PPP borrower attempting to make a case for necessity certification.

- The SBA will use the forms to evaluate the PPP borrower’s good-faith certification in its PPP Borrower Application.
- The forms apply to any for-profit or nonprofit, together with its affiliates, that received PPP loans with an original principal amount of \$2 million or greater.
- The forms will be distributed by the PPP lender and will be due back to the PPP lender within 10 business days of receipt from the PPP lender.
- SBA can request additional information from the PPP borrower, if necessary, to complete its review.
- SBA will base its review and determination on the “totality of [borrower’s] circumstances,” so it makes sense for any borrower to provide its actual financials since the date after loan origination, as well as its financial projections and any supporting documentation prepared in connection with its PPP application submission.
- The forms request information about the borrower’s experience after receiving its PPP loan, which such

questions include, but are not limited to: (1) a comparison between the borrower's 2020 Q2 and its 2019 Q2; (2) the "[b]orrower's approximate additional cash outlays" in reaction to mandatory state and local COVID-19-related orders; (3) whether the "[b]orrower has voluntarily ceased or reduced its operations" due to the COVID-19 pandemic; (4) the amount of cash and cash equivalents available to the borrower before PPP loan application submission; (5) whether, between March 13, 2020, and the end of the PPP loan forgiveness period, the "[b]orrower paid any dividends or other capital distributions (other than for pass-through estimated tax payments) to its owners"; (5) whether, during the same period, the borrower "prepaid any outstanding debt (e., paid before contractually due)"; and (5) whether, during the same period, any of the borrower's employees were "compensated in an amount that exceeds \$250,000 on an annualized basis."

Although we are not entirely sure that the current iteration of the forms will be distributed to PPP borrowers, we do know that the forms' questions are not limited to questions about a borrower's circumstances and forward-looking projections at the time of their application. Realistically speaking, at the beginning of the COVID-19 pandemic, it was entirely reasonable for any business to project a bleak and uncertain outlook for the remainder of the year. As such, there is a legitimate question of whether it is fair for the SBA to now look back on the months after PPP loan origination and hold borrowers accountable for what essentially amounts to an inability to see into the future. Nevertheless, the SBA has clearly indicated that it will focus on the reality of post-PPP loan economic performance when it comes to reviewing a borrower's loan file in connection with the "necessity" certification.

SBA's impending issuance of SBA Forms 3509 and 3510, and its subsequent review of them, highlights the need for careful responses in a very tight timeframe once received by the borrower from the lender. With eligibility and loan forgiveness on the line, prudent PPP borrowers that fall within the \$2+ million dollar category need to start collecting the mandatory information to enable them to meet the required "necessity" prong, so they may retain their PPP eligibility and have their forgiveness application acted on favorably.

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