

BORROWER BEWARE V: PREPARE YOUR PPP LOAN FORGIVENESS QUESTIONNAIRE BEFORE THE SBA ASKS FOR IT, AND THOUGHTFULLY IDENTIFY THE “TOTALITY OF CIRCUMSTANCES” SUPPORTING YOUR NECESSITY CERTIFICATION

Hodgson Russ COVID-19 Litigation and Employment Action Team Alert
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On October 26, 2020, the SBA published a notice seeking comments relating to the approval and use of various forms for review of Paycheck Protection Program (PPP) loans, including two Loan Questionnaire Forms—Form 3509 (for-profit borrowers) and Form 3510 (nonprofit borrowers). By December, and at SBA’s direction, lenders started rolling out these forms to borrowers who received PPP loans in excess of \$2 million.

The SBA’s October notice suggests (if you do the math) that borrowers will only spend, on average, less than two hours completing one of these forms. That will likely prove to be a significant underestimation. Borrowers should be prepared to spend many more hours to understand the questions, differentiate the subtleties between them, provide thoughtful and concise narrative responses, and collect the supporting data and information that must be submitted with the forms. The completed form must be returned to the lender within 10 business days, along with supporting documentation. Borrowers destined for audit should consider preparing responses to the form well before the lender or SBA asks for it. The stakes are high: failing to invest adequate time and effort to complete the form could potentially jeopardize loan forgiveness and even subject borrowers to additional government scrutiny by the SBA or other agencies.

Both forms are available on the SBA’s website, with a description stating that “[t]he purpose of this form is to facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate the good-faith certification that borrowers, who together with their affiliates, received PPP loans totaling \$2 million or greater, made on their PPP Borrower Application (SBA Form 2483 or Lender’s equivalent form) that economic uncertainty made the loan request necessary.” The SBA otherwise offers little in the way of explanation as to how a borrower’s responses will be assessed. The instructions simply reflect that:

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The information collected will be used to inform SBA’s review of your good-faith certification that economic uncertainty made your loan request necessary to support your ongoing operations. Receipt of this form does not mean that SBA is challenging that certification. After this form is submitted, SBA may request additional information, if necessary, to complete the review. ***SBA’s determination will be based on the totality of your circumstances.*** (Emphasis added).

The only other meaningful instruction about purpose is a warning about noncompliance: “Failure to complete the form and provide the required supporting documents may result in SBA’s determination that you were ineligible for either the PPP loan, the PPP loan amount, or any forgiveness amount claimed, and SBA may seek repayment of the loan or pursue other available remedies.”

On December 9, 2020, the SBA updated its FAQ by adding question 53: “Why are some PPP borrowers receiving a Loan Necessity Questionnaire (SBA Form 3509 or 3510)?” Much of the response restates content already found in the form instructions. But the FAQ response also offers a little more insight as to how the SBA will use it:

SBA’s assessment of a borrower’s certification will be based on the totality of the borrower’s circumstances through a multi-factor analysis. As described in FAQ #46, SBA will assess whether the borrower had adequate basis for making the required good-faith certification, based on its individual circumstances in light of the language of the certification and SBA guidance. This certification is required to have been made in good faith at the time of the loan application, even if subsequent developments resulted in the loan no longer being necessary. In its review, ***SBA may take into account the borrower’s circumstances and actions both before and after the borrower’s certification*** to the extent that doing so will assist SBA in determining whether the borrower made the statutorily required certification in good faith at the time of its loan application. (Emphasis added).

While the SBA’s instruction and the FAQ indicate that the SBA intends to consider “the totality of the borrower’s circumstances,” the questions as posed, many of which are yes/no check boxes or ask for dollar figures, seem ill-suited to such an analysis. More troubling, however, is the statement in the FAQ indicating that the SBA may take into account the borrower’s circumstances and actions *both before and after it made the certification*. What that ultimately means, or what the SBA will deem relevant to such analysis, remains unstated.

The first portion of each questionnaire is about “Business Activity,” and focuses on comparative Q2 2020 and Q2 2019 gross revenue or gross receipts (for nonprofits) figures and COVID-19 impacts and expenses, business interruption, and capital improvement projects. The second portion of the questionnaire—the “Liquidity Assessment”—is more differentiated between “for profit” and “nonprofit” borrowers. Form 3509 asks about cash position, payments of dividends or capital distributions, earnings of highly compensated employees and owners, book value of the company, market capitalization and equity, and ownership and affiliates. Form 3510 asks about cash, savings and assets, gross receipts from gifts and grants, restrictions on use of funds, endowments, non-cash investments, and highly compensated employees. It also includes specific questions for educational institutions and health care providers. Across the forms, there are only a few questions where a borrower is afforded an opportunity to provide a narrative response or explanation for an answer, and three of those are tied to detailing the COVID-impacts on the business operations. The forms also include two “optional” boxes (one for

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each section) where the borrower may offer a narrative or comment on anything relating to the questions in that section.

Notably, all boxes have a 1,000-character limit, which is hardly enough space for a borrower to itemize, much less explain, the “totality of the borrower’s circumstances” the SBA claims it will consider. Borrowers will need to be concise and direct, while still adequately outlining the totality of circumstances that affected them. This form nonetheless presents a first opportunity for the borrower to identify key issues, reasons, and circumstances that justify the borrower’s “necessity certification” and start building a supportive record. Borrowers can do so by including key words, phrases, brief comments, and documents that identify and call critical factors and circumstances to the SBA’s attention, even if the SBA hasn’t directly asked for such details with its questions. The FAQ states that the SBA may reach out and ask for more detail or information after the form is submitted, in which case the borrower will be afforded an opportunity to provide a narrative response explaining the basis for the necessity certification. But it remains uncertain how that process will unfold, and whether such inquiries will be open-ended or targeted to specific matters included in responses to the forms.

As borrowers are applying for or awaiting forgiveness determinations on First Draw PPP loans, many of these same borrowers are preparing to apply for Second Draw (“PPP2”) loans. Applicants should be mindful that employee headcount and gross receipts comparisons are not the only eligibility requirements for PPP2. The necessity certification is still part of the application process. And the guidance and forms available today offer more current insights about how that necessity certification may be viewed by the SBA, or perhaps serve to foreshadow a more rigorous or restrictive interpretation for PPP2 borrowers. The SBA’s FAQ was updated on January 29, 2021 with a few additional entries, plus a running header indicating that the first 53 responses are in the process of being revised to conform to the new PPP2 legislation and rules. So more guidance is on the way from the SBA that may bear upon PPP and PPP2 loan forgiveness.

If you have questions about PPP or PPP2 loans, eligibility, forgiveness, or how you can implement strategies to better protect your business from SBA review or other government scrutiny, please call [Jason Markel](tel:716.848.1395) (716.848.1395), [Reetuparna Dutta](tel:716.848.1626) (716.848.1626), or [Benjamin Zuffranieri](tel:716.848.1469) (716.848.1469).

Please check our [Coronavirus Resource Center](#) and our [CARES Act](#) page to access information related to both of these rapidly evolving topics.

If you received this alert from a third party or from visiting our website, and would like to be added to our COVID-19 Litigation and Employment Action Team alert mailing list or any other of our mailing lists, please visit us [HERE](#).