

CLIENT ALERT

SBA Questionnaire for PPP Borrowers Will Assess Whether Necessity Certification Was Made in Good Faith

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The Small Business Administration (“SBA”) recently released drafts of two questionnaires it intends, once finalized, to send to for-profit and nonprofit Paycheck Protection Program (“PPP”) borrowers that received over \$2 million in PPP proceeds. The drafts of Forms 3509 and 3510 state that the information provided in response to the questionnaires will be used by SBA loan reviewers to evaluate the borrower’s certification that the economic uncertainty caused by the Covid-19 pandemic made the loan request necessary to support the borrower’s ongoing operations.¹

1. SBA Review of the Necessity of the Loans

When applying for a PPP loan, borrowers were required by the SBA to certify that the economic uncertainty caused by the Covid-19 pandemic made the loan request necessary to support the ongoing operations of the applicant. The certification was required regardless of whether borrowers were exempt from certain other PPP requirements, such as exceptions to the SBA’s affiliation rules for restaurants or SBIC borrowers. [FAQ 31](#), published by the SBA on April 23, 2020, urged

¹ The SBA has yet to state when these questionnaires will be published in final form or distributed by SBA lenders and whether borrowers that have already applied for and received loan forgiveness would be required to complete the questionnaire. The SBA has published a [notice](#) in the Federal Register requesting approval from the Office of Management and Budget for the information collection measures, including Forms 3509 and 3510. See 85 FR 67809. The notice is subject to a 30-day public review period, which expires on November 25, 2020, so it is likely that the final versions will be published sometime after the review period ends.

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borrowers to carefully review that certification and determine whether they were able to make the certification in good faith. FAQ 31 also stated that “it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith.”

The SBA has also previously advised in [FAQ 39](#) that it would review all loans in excess of \$2 million following the submission of the forgiveness application. The SBA’s [FAQ 46](#), published on May 13, 2020, stated that it would assume that the borrower of any loan under \$2 million had made the certification in good faith. For loans above that threshold, however, the SBA stated that if it determines during a review that the borrower lacked an adequate basis for making the certification in good faith, the SBA will seek repayment of the outstanding loan amount and the borrower will not be eligible for loan forgiveness. Additionally, FAQ 46 stated that if a borrower receives notification that the SBA has determined it lacked an adequate basis to make the necessity certification, the SBA will not pursue administrative enforcement or referral to other agencies if the borrower repays the loan.

2. Contents of the Proposed Questionnaires

Given the text of the certification, the questionnaires contain some surprising questions, including questions regarding the borrower’s economic performance, payment of dividends, and executive compensation since the disbursement of the loan. The questions suggest that the SBA may use an expansive set of criteria to determine whether the borrower made the certification in good faith at the time of the application, including economic performance that post-dated the application.

More specifically, the questions are broken into two categories; a business activity assessment and a liquidity assessment. The business activity assessment includes questions related to the borrower’s gross revenue in Q2 2019, whether the borrower was required to alter or voluntarily altered its operations due to the Covid-19 pandemic, and the effect of any such alterations on the borrower.

The liquidity assessment requests information and documentation relating to the borrower’s cash and cash equivalents on the last day of the calendar quarter immediately before the borrower’s PPP application; any capital distributions, dividends, or payments on outstanding loans made during the borrower’s covered period; amounts paid to owners and/or employees above \$250,000 during the covered period; the borrower’s market capitalization prior to applying for a PPP loan; and ownership interests held by publicly traded companies, private equity firms, venture capital firms, or hedge funds. A borrower will have ten days to complete the questionnaire and return the questionnaire to its SBA lender. Of note, the questions related to the borrower’s owners ask for ownership information on the date of the borrower’s PPP loan application. It is unclear how the SBA will treat a borrower that was acquired or sold a portion of its business during the covered period of its PPP loan and how that fact would impact the SBA’s assessment of whether the loan was necessary when the borrower applied prior to the acquisition.

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3. Implications for the Scope of the SBA Review

Regardless of the SBA's commitment not to take action itself in the event it believes the certification was made in bad faith so long as the loan is repaid, borrowers responding to these questionnaires should still take care in their responses, given the risk of False Claims Act ("FCA") prosecutions, private causes of action under the FCA, or independent action or referrals from the Inspector General or congressional oversight committees. A borrower could be held liable under various legal regimes for the representations made to its lender in the loan application, not just to the SBA. Borrowers owned by private equity companies and borrowers that have been acquired by a private equity company since receiving the loan should be particularly vigilant given the intense scrutiny and debate in the initial stages of the PPP surrounding whether the portfolio companies of private equity firms were eligible to receive PPP loans.

Given the breadth of the questions, including questions regarding economic performance since receiving the loan, borrowers should be careful to provide detailed answers to make clear the basis for their good faith belief at the time of the application that the loan was necessary to continue ongoing operations. To the extent that the borrower has performed well since receiving the loan, the borrower should consider how that would reflect on the certification at the time of the application, and may wish to provide a detailed explanation of how the receipt of the loan and subsequent economic circumstances changed the prospects of the company since the proceeds were disbursed. It may be beneficial for borrowers to work with legal counsel to ensure that the facts are accurately presented in order to prevent any unnecessary or undesired scrutiny from the SBA.

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