

SBA PROPOSES LOAN NECESSITY QUESTIONNAIRES FOR BORROWERS WITH PPP LOANS IN EXCESS OF \$2 MILLION

The constantly-evolving landscape of the Paycheck Protection Program (PPP) takes another turn for borrowers with loans, together with their affiliates, with original principal amounts in excess of \$2 million. In May 2020, the SBA issued FAQ #46 related to the required good-faith certification concerning the necessity of a borrower's loan request. This FAQ provided a safe harbor threshold of \$2 million, such that any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million are deemed to have made the required certification concerning the necessity of the loan request in good faith. Loans in excess of this \$2 million safe harbor threshold will be subject to review by the SBA. During such review, the SBA may determine that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan, for which they would seek repayment. It appears the SBA may be addressing this with a supplement to loan forgiveness applications, which would request previously unknown details on the assessment of the good-faith certification.

On October 26, 2020, the SBA published a notice on the Federal Register seeking approval from the Office of Management and Budget for information collection, which introduces two new forms under the PPP – Form 3509, *Loan Necessity Questionnaire (For-Profit Borrowers)*, and Form 3510, *Loan Necessity Questionnaire (Non-Profit Borrowers)*. The posting on the Federal Register allows for a 30-day period for public comments, which would conclude on November 25.

Copies of Forms 3509 and 3510 can be found on various websites; however, neither the SBA nor the Treasury has posted any draft (or final) versions of these forms. To date, the SBA has not yet commented on the authenticity of these Forms, nor have they denied these are the Forms out for public comment. This approach is very different from the process surrounding prior SBA releases of forms, Interim Final Rules (IFRs), or other guidance, and some of the information being requested on these Forms does not align with the commonly-believed intent of the PPP provisions. As a result, potentially impacted borrowers are expressing concerns and experiencing some confusion.

Until these forms are formally published by the SBA and/or Treasury, they should be viewed as proposed drafts. As has been the case with the PPP, these are subject to change. While these forms remain unpublished at this point, there are some key factors that borrowers with loans in excess of \$2 million should start to consider with respect to the SBA's assessment of economic necessity. If the purported drafts of these questionnaires resemble what, if any, final versions will look like, below is a summary:

WHO WOULD BE AFFECTED BY THE NEW FORMS Each borrower that, together with its affiliates, received PPP loans with an original principal amount of \$2 million or greater may be asked by the SBA to complete these as part of the forgiveness process.

PURPOSE OF THE FORM The information collected on the Form would be used by the SBA to evaluate a borrower's good-faith certification that economic uncertainty made the loan request necessary to support ongoing operations. This does not mean that the SBA would be challenging the certification. Additional information may also be requested by the SBA.

QUESTIONNAIRE REGARDING LOAN NECESSITY

Business Activity Assessment

- Gross revenue in certain quarters of 2020 and 2019
- Several questions regarding the impact of the COVID-19 pandemic on operations after the National Emergency Declaration on March 13, 2020
- Cash outlays for mandatory alterations to operations due to COVID-19 and other capital improvement projects not due to COVID-19

Liquidity Assessment

- Cash and cash equivalents and equity balances for the calendar quarter prior to applying for a PPP loan
- Payment of dividends or distributions (other than for tax payments for pass-through entity owners) between March 13 and the end of the covered period
- Prepayments of debt between March 13 and the end of the covered period
- Employees and owners making more than \$250,000 on an annualized basis during the covered period
- Access to capital markets via national securities exchange or publicly traded owner
- Information regarding parent company of a borrower (if applicable)
- Whether the borrower is owned in part by a private equity firm or venture capital firm
- Whether the borrower received any funds from other CARES Act programs
- Other nonprofit only items:
 - Cash restrictions for certain costs
 - Assets held in endowment funds
 - Non-cash investment balances
 - Questions on type of activity

All PPP borrowers with loans of \$2 million or greater should use these unofficial draft forms to consider starting to gather data and supporting documentation regarding the good-faith certification in anticipation of needing to provide this information to the SBA. Your professional service team at Miller, Cooper & Co., Ltd. is here to help you understand and navigate the ever-changing landscape of PPP forgiveness. Please contact a member of your service team for additional guidance and assistance.

November 6, 2020