



Alerts

SBA Questionnaires Increase Scrutiny for PPP Loans Over \$2M

November 13, 2020

Hinshaw Alert

The Small Business Administration (SBA) is seeking comments on two forms of questionnaires: Form 3509 (Loan Necessity Questionnaire for For-Profit Borrowers) and Form 3510 (Loan Necessity Questionnaire for Non-Profit Borrowers). These forms—which Paycheck Protection Program (PPP) lenders would be required to issue—are to be completed by PPP borrowers who, together with their affiliates, received more than \$2 million in PPP loans.

In the form's instructions, the SBA stated that a failure to complete the form and provide the required supporting documents may result in a determination by the SBA that a borrower is ineligible for the PPP loan, the PPP loan amount, or any forgiveness amount claimed. The SBA further noted, too, that in such situations, it may seek repayment of the loan or pursue other available remedies.

The forms must be returned to the lender within ten business days of their receipt along with the requested supporting documentation. The PPP lender is required to upload the form and documents to the SBA Forgiveness Platform. It must separately enter the borrower's responses to each question into the web form available on the platform and upload this information and the required form within five business days after a borrower provides the completed form with all required responses, supporting documents, signatures, and certifications.

Many PPP borrowers will be concerned that the SBA has stated that the forms will be used by the SBA to collect information designed to "inform the SBA of a [borrower's] good-faith certification that economic uncertainty made the [borrower's] loan request necessary to support [its] ongoing operations."

Previously, the SBA has advised PPP borrowers that it will examine all PPP loans in excess of \$2 million, and that a review of the good-faith certification would be part of this examination. With respect to this certification, the SBA has also stated that PPP borrowers "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."

It is not clear when these forms will be available for distribution by PPP lenders. We recommend, however, that PPP borrowers with loans in excess of \$2 million begin preparing their responses and collecting the relevant documents immediately. Once the form has been approved, borrowers should carefully complete the form and any required documentation.

Attorneys

Timothy M. Sullivan

Service Areas

Business & Commercial
Transactions



The forms make it clear that the SBA will be focusing on for-profit borrowers that:

- Are owned by publicly traded companies or private equity, hedge funds or venture capital firms;
- Paid more than \$250,000 in compensation—gross salary, gross wages, gross tips, gross commissions, and allowances for dismissal or separation—to employees or owners);
- Prepaid debt or paid dividends, or made other capital distributions (except as noted below); or
- Had significant cash on hand at the time the PPP application was filed.

For-Profit Questionnaire

The questionnaire is divided into two parts: Business Activity Assessment and Liquidity Assessment.

Business Activity Assessment

For the Business Activity Assessment, a for-profit borrower must disclose the following, along with providing the requested supporting documentation:

- Gross revenue for the second calendar quarter of 2020.
- Gross revenue for the second quarter of 2019.
- Whether the borrower had been ordered to shut down by a state or local authority due to COVID-19 at any time since March 13, 2020 (the date of the issuance of the COVID-19 Emergency Declaration. If so, the borrower must provide:
 1. the name of the state or local authority that issued the shutdown order; and
 2. the start and end dates of the shutdown order, or if it is still continuing.
- Whether the borrower has been ordered to significantly alter its operations by a state or local authority due to COVID-19. If so, the borrower must provide:
 1. the start and end dates of the order to alter its operations, or if it is still continuing;
 2. information concerning the alterations, including whether (a) the number of people permitted in a location at one time was reduced or capped; (b) service was restricted to outdoors; and (c) employee workspaces were reconfigured; and
 3. the borrower's approximate additional cash outlays for these mandatory alterations.
- Whether the borrower voluntarily ceased or reduced its operations due to COVID-19 at any time since March 13, 2020. If so, the borrower must provide:
 1. the start and end dates (or if it is still continuing); and
 2. the reason why the borrower voluntarily ceased or reduced operations.
- Whether the borrower voluntarily altered its operations—outside of ceasing or reducing them—due to COVID-19 at any time since March 13, 2020. If so, the borrower must provide:
 1. the start and end dates for when the voluntary alterations were in place;
 2. a description of how the borrower's operations were altered; and
 3. borrower's approximate additional cash outlays for these voluntary alterations.
- Whether the borrower began any new capital improvement projects not due to COVID-19, between March 13, 2020 and the end of the loan forgiveness covered period of the PPP loan (the "PPP Period").

Liquidity Assessment

For the Liquidity Assessment, a for-profit borrower must disclose the following, along with providing the requested supporting documentation:

- The cash on hand or cash equivalents as of the last day of the calendar quarter immediately before the date of the borrower's PPP loan application.



- Any dividends or other capital distributions (other than for pass-through estimated tax payments) the borrower paid to its owners during the PPP Period.
- Whether the borrower prepaid any outstanding debt during the PPP Period, and, if so, the borrower must provide the total amount of all debt prepayments during the PPP Period.
- Whether any of the borrower's employees were compensated in an amount that exceeds \$250,000 on an annualized basis during the PPP Period—including gross salary, gross wages, gross tips, gross commissions, and allowances for dismissal or separation. If so, the borrower must indicate:
 1. how many employees were so compensated; and
 2. the total amount of compensation during the PPP Period paid to those employees.
- Whether any of the borrower's owners who work at the borrower were paid more than \$250,000 by the borrower—which on an annualized basis during the PPP Period. If so, the borrower must indicate:
 1. how many owners were so compensated; and
 2. the total amount of compensation during the PPP Period paid to those owners.
- Whether on the date of the borrower's PPP loan application, any of the borrower's equity securities were listed on a national securities exchange and, if so, the borrower must provide the borrower's market capitalization on the date of the borrower's PPP loan application.
- Whether on the date of the borrower's PPP loan application, any publicly traded company owned 20% or more of any class of the borrower's outstanding equity securities and, if so, the borrower must provide the name and market capitalization of such publicly traded companies on the date of the borrower's PPP loan application.
- The amount of the book value (shareholders' equity value) of the borrower as of the last day of the calendar quarter immediately before the date of the borrower's PPP loan application.
- Whether the borrower was a subsidiary of (i.e., was at least 50% of the borrower's common equity, or equivalent equity interest) owned by another company (the parent company) on the date of the borrower's PPP loan application. If so, the borrower must:
 1. provide the name of the parent company;
 2. indicate whether the parent company was organized or incorporated under the laws of a jurisdiction outside the U.S.;
 3. state whether any of the equity securities of the borrower's parent company are listed on a national securities exchange or on a securities exchange in a jurisdiction outside the U.S.; and
 4. provide the market capitalization of the parent company on the date of the borrower's PPP loan application.
- Whether 20% or more of any class of the borrower's outstanding equity securities owned by a private equity firm, venture capital firm, or hedge fund—including a fund managed by any such firm—on the date of the borrower's PPP loan application.
- Whether the borrower was an affiliate or a subsidiary (i.e., at least 50% of borrower's common equity, or equivalent equity interest, directly or indirectly owned or controlled by) of a foreign, state-owned enterprise (i.e., a company at least 50% owned by a foreign state) or of a department, agency, or instrumentality of a foreign state on the date of the borrower's PPP loan application and, if so, the borrower must provide the name of the foreign, state-owned enterprise or the name of the foreign state's department, agency, or instrumentality.
 - For purposes of this question, apply the affiliation test as described in SBA's interim final rule on affiliates.
- Whether the borrower directly received any funds from any CARES Act program other than a PPP loan, excluding tax benefits, and, if so, the name of the program and the amount funded.

Non-Profit Questionnaire

Non-profits will also have to complete a Loan Necessity Questionnaire. This questionnaire includes a similar set of questions to those outlined above which have been designed to address PPP non-profit borrowers.



Certifications

Both for-profit and non-profit PPP borrowers must attest to the following when completing the questionnaire:

- I certify that I have the authority to sign and submit this questionnaire on behalf of the borrower.
 - I certify that the information provided in this questionnaire and in all supporting documentation is true and correct in all material respects. I make this certification after reasonable inquiry of people, systems, and other information available to the borrower.
 - I understand that knowingly making a false statement to obtain a guaranteed loan or forgiveness of an SBA-guaranteed loan is punishable under the law, including under 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 U.S.C. by imprisonment of not more than thirty years and/or a fine of not more than \$1 million.
-

Distributions made by a partnership or S-corporation that are designed to be used only for owners' estimated quarterly tax payments are accepted, as long as they do not exceed the tax liability on profits earned in the first three quarters of 2020, 110% of the pro-rata share of last year's tax liability on distributions, and/or 100% of the pro-rata share of tax liability on total distributions in 2020.