

Questions Raised by the PPP Loan Necessity Questionnaire

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This article addresses a forthcoming update to the Paycheck Protection Program that is subject to change. It is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.

Under the Paycheck Protection Program ("PPP"), borrowers who received a PPP loan in excess of \$2 million, whether from a single loan or the combined total of loans from the borrowers' affiliates, have known for a while that their loans would receive increased attention from the Small Business Administration ("SBA").

In late April, the SBA announced that it will review all PPP loans in excess of \$2 million. In May, the SBA provided a safe harbor that automatically deems borrowers' certifications that their loan requests were necessary to be "made in good faith." The bad news? Those with a PPP loan in excess of \$2 million (whether a single loan or the total of all loans received by affiliates) are *excluded* from this safe harbor. Instead, these borrowers may show that they had an "adequate basis" for making the good-faith certification on their PPP loan application. The SBA has suggested that factors such as business activity and access to other sources of liquidity would play a role in determining whether a borrower actually had an adequate basis to certify in good faith that it needed a PPP loan when it applied. Thus, borrowers with large PPP loans have known for at least six months that the SBA will review their loans and determine whether these borrowers certified in good faith that their PPP loans were necessary.

Now, it appears that the SBA created two "Loan Necessity Questionnaires" to be completed by certain borrowers to assist in the SBA's effort to review all loans with an original principal amount of \$2 million or greater. On October 26, the SBA's announcement of Form 3509 (Loan Necessity Questionnaire for For-Profit Borrowers) and Form 3510 (Loan Necessity Questionnaire for Non-Profit Borrowers) appeared in the Federal Register. As of the writing of this article, Forms 3509 and 3510 have not been published on the SBA's PPP

webpage, though a copy of Form 3509 can be found here.

When the Loan Necessity Questionnaires are eventually published, it is important for the SBA to fully and clearly answer the following questions.

Who must complete a Loan Necessity Questionnaire?

It is unclear if all borrowers with loans of \$2 million or greater must complete a Loan Necessity Questionnaire. It may be the case that only some borrowers will be required to complete the form upon request from the SBA. In any event, the Loan Necessity Questionnaires require borrowers to answer questions related to business activity and access to other sources of liquidity. Therefore, any borrower with a loan of \$2 million or greater should find the forms helpful in understanding what information the SBA will consider in its review.

When are the Loan Necessity Questionnaires due?

Form 3509 states that the completed form is due to the lender within ten business days of receipt from the borrower's lender. Then, within five business days of receipt, the lender must then upload the form to the SBA PPP Forgiveness Platform and separately input the responses to each question into the platform. There is a lot to unpack here. It is unclear whether it is the responsibility of the lender or the SBA to send the Loan Necessity Questionnaires to the appropriate borrowers. It is also unclear when borrowers must complete a questionnaire in relation to completing its loan forgiveness application. Regardless, a ten-day deadline for borrowers to receive and complete the Loan Necessity Questionnaire seems rather short. One can hope that the SBA will provide a clear timeline of events for both lenders and borrowers to follow when completing a Loan Necessity Questionnaire.

What supporting documentation and additional comments are needed?

Form 3509 requests information such as gross revenue and amount of cash on hand. When answering these questions, the borrower must provide supporting documentation. Similar to SBA's loan forgiveness application, it would be helpful for the SBA to provide instructions as to what types of supporting documentation a borrower should submit. In Form 3509, the borrower also has the opportunity to provide additional comments to supplement its responses. However, additional comments are limited to 1,000 characters per section. Without knowing how the SBA will consider the information provided for each question, it would be difficult for a borrower to know how it should supplement its answers with additional comments. Hopefully, the SBA provides instructions to Forms 3509 and 3510 to assist borrowers in completing the questionnaires.

How do the Loan Necessity Questionnaires fit into the current SBA review framework?

Under current SBA guidance, the SBA has 90 days from the date on which the lender renders its loan forgiveness decision to remit the appropriate forgiveness amount. Yet, the SBA may undertake a review of a PPP loan at any time. This begs the question of how the Loan Necessity Questionnaires will fit into the SBA's review of PPP loans. It remains to be seen whether borrowers must complete the questionnaires in conjunction with a loan forgiveness application. Moreover, if the SBA has reviewed a borrower's loan forgiveness application and questionnaire, may the SBA still undertake a review of the PPP loan at any time?

Given that the Loan Necessity Questionnaires have not yet been officially announced, it is best for borrowers

to await official SBA guidance implementing the questionnaires. We will publish another article when additional information from the SBA becomes available.

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