

BANKING & FINANCE ALERT

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Confession is good for the soul? Paycheck Protection Program loan necessity questionnaire

On Oct. 26, 2020, the Small Business Administration (SBA) announced that it would be releasing two loan necessity questionnaires for borrowers with Paycheck Protection Program (PPP) loans in excess of \$2 million. Surprisingly, only a few days later, the SBA released separate forms for for-profit and non-profit borrowers (Forms [3509](#) and [3510](#), respectively). These forms are not yet final—the SBA proposed these forms in a notice on Oct. 26, 2020 and is soliciting comments on these forms until Nov. 25, 2020. The SBA estimates that 52,000 borrowers will need to fill out these loan necessity questionnaires.

In order to obtain a PPP loan, borrowers originally had to certify in good faith that the uncertainty of the economic conditions at the time of application made the loan request necessary to support the ongoing operations of the borrower. In May, the SBA announced that PPP borrowers which, together with their affiliates, received PPP loans with an original principal amount of *less than* \$2 million will be deemed to have made this certification in good faith. So, these questionnaires only apply to those borrowers (together with their affiliates) that have loans *in excess of* \$2 million and that seek PPP loan forgiveness.

The purpose of these questionnaires is to help the SBA evaluate borrowers' good-faith certifications. Borrowers will have 10 days to fill out the questionnaires after their PPP lender provides them with the form. The SBA has said that it may need more information than the completed questionnaire in order to assess a borrower's good-faith certification. The SBA will base its loan necessity determination on the totality of a borrower's circumstances. If a borrower fails to complete the form, the

SBA may determine that the borrower was ineligible for either the PPP loan, the PPP loan amount, or any forgiveness amount claimed, and it may seek repayment of the loan or pursue other available remedies. Within five business days after a borrower completes the questionnaire, the PPP lender must submit it to SBA's online Forgiveness Platform.

The questionnaires require borrowers to answer questions about their business activity and their liquidity. The questions concerning a borrower's business activity include questions about the borrower's gross revenue and whether a government order related to COVID-19 required the borrower to shut down. The questions concerning liquidity include questions about a borrower's available cash around the time of application, its ownership, dividends and distributions since the onset of the pandemic, debt prepayments and compensation to owners and employees making more than \$250,000. In addition to the questions in the form, borrowers are given an opportunity to provide additional comments regarding their business activity and/or liquidity (although the online forms impose a 1,000 character maximum).

Many of the questions on the forms appear designed to elicit information about potential affiliations which might have rendered a borrower ineligible for PPP financing. Other questions ask about the PPP borrower's response to a government lockdown. Businesses that were deemed essential under state law with facilities that remained open during a government shutdown order should be prepared to explain to the SBA why they did not close. The focus of the questions may give pause to many larger PPP borrowers and lenders. The SBA may use the questionnaires to identify appropriate borrowers to audit at a later date.

Back in March, we originally recommended that clients keep a file of their PPP economic necessity information for future reference, and now the questionnaire requirement mandates that the information be disclosed. The SBA permits borrowers to request that their response be maintained as confidential, and we definitely recommend that our clients so designate their document. To the extent that the SBA forms do not permit a complete explanation of a borrower's economic circumstances, we recommend that the borrower provide a full narrative (with supporting data) to its PPP lender. PPP borrowers only have 10 months from the end of their covered period to apply for loan forgiveness, so they should be preparing their submissions soon. If a borrower has already submitted its application for forgiveness to its PPP lender, it can expect to receive a questionnaire from its bank very shortly after the forms are finalized.

Be on the lookout for an update to this law alert after the comment period expires on Nov. 25, 2020 regarding any changes to the loan necessity questionnaires.

For more information please contact [Jack Beeler](#), [Cassandra Rice](#), [Jack Meadows](#) or any member of Porter Wright's [Banking & Finance](#) Practice Group.