

SBA announces Loan Necessity Questionnaire for PPP borrowers of \$2M or more



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Many businesses that received loans under the Paycheck Protection Program (PPP), a program established under the [Coronavirus Aid, Relief and Economic Security Act \(CARES Act\)](#) to provide forgivable loans to businesses adversely impacted by the 2019 novel coronavirus (COVID-19) pandemic, are now in the loan forgiveness phase. Borrowers have used the proceeds of the loan for eligible costs and are now completing the applicable Loan Forgiveness Application¹ and assembling the required supporting documentation. Borrowers that have already submitted the Loan Forgiveness Application to their lender are awaiting the lender's or Small Business Administration's (SBA's) determination if forgiveness will be granted.

Even if forgiveness is granted, a lingering question remains: How will SBA audit PPP loans? SBA has previously indicated that it will review all loans \$2 million or more with respect to the good-faith certification required to be made at the time of the loan application that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA subsequently issued further guidance, via questions 31 and 37 in their [Frequently Asked Questions \(FAQ\)](#) document, requiring borrowers to consider the certification 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. With little guidance on what constituted “current business activity,” “ongoing operations” or “other sources of liquidity,” borrowers assessed the need for the loan based on their individual facts and circumstances at the time of the application and internally documented the financial information, projections and other information that was considered in making the certification.

On Oct. 26, 2020, SBA published [a notice in the Federal Register](#) seeking approval of the Office of Management and Budget (OMB) to release two new forms under the PPP, the Loan Necessity Questionnaires, [Form 3509](#) for for-profit borrowers and [Form 3510](#) for non-profit borrowers. The questionnaires are still subject to final approval of the OMB and are not available as of this writing on SBA's website.

The questionnaire will be sent by the lender to borrowers who, together with their affiliates, received PPP loans of \$2 million or more. The questionnaire must be completed and returned with supporting documentation to the lender within 10 business days of receipt. Failure to complete the questionnaire and provide the supporting documentation may result in SBA's determination that the borrower was ineligible for the PPP loan, the PPP loan amount or any forgiveness amount claimed, and SBA may seek repayment of the loan or pursue other available remedies.

¹ On June 16, 2020, SBA released an updated version of the [SBA Form 3508](#), Loan Forgiveness Application, and [related instructions](#), as well as [SBA Form 3508EZ](#), a short-form “EZ” Loan Forgiveness Application, and [related instructions](#). On Oct. 8, 2020, SBA released an alternative loan forgiveness application, [Form 3508S](#), and [related instructions](#) for loans of \$50,000 or less.

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice and does not create an attorney-client relationship. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

A borrower's receipt of the questionnaire does not mean SBA is challenging the borrower's eligibility for the PPP loan. Rather, the questionnaires are intended to facilitate SBA's collection of information that will be used in evaluating the good faith certification made by borrowers that economic uncertainty made the loan request necessary. After the questionnaire is submitted, SBA may request additional information and the final determination will be made based on the totality of the borrower's circumstances.

What is in Loan Necessity Questionnaires?

The questionnaires include two sections, the Business Activity Assessment and the Liquidity Assessment, which require the borrower to provide responses to questions and provide supporting documentation regarding the following:

Business Activity Assessment

- The borrower's gross revenue in the second quarter of 2020 and 2019 (other periods may be used for seasonal businesses or businesses that did not exist during the second quarter of 2019)
- Since March 13, 2020, whether the borrower was required to shut down or significantly reduce its operations by a state or local authority due to COVID-19
- Since March 13, 2020, whether the borrower voluntarily ceased, reduced or otherwise altered its operations due to COVID-19
- Between March 13, 2020, and the end of the loan forgiveness covered period, whether the borrower began any new capital improvement projects not due to COVID-19

Liquidity Assessment

- The amount of cash and cash equivalents owned by the borrower as of the last day of the calendar quarter immediately before the date of the PPP loan application
- Whether the borrower paid any dividends or other capital distributions (other than pass-through tax distributions) to its owners between March 13, 2020, and the end of the loan forgiveness covered period
- Whether the borrower made any prepayments of debt between March 13, 2020, and the end of the loan forgiveness covered period
- Whether the borrower paid any compensation to employees or owners in excess of \$250,000 on an annualized basis during the loan forgiveness covered period
- Whether, as of the date of the PPP loan application, the borrower's equity securities were listed on a national securities exchange and, if not, the book value (shareholders' equity value) of the borrower as of the last day of the calendar quarter immediately prior to the date of the PPP loan application
- Whether, as of the date of the PPP loan application, any publicly traded company, private equity firm, venture capital firm or hedge fund owned 20 percent or more the borrower's equity
- Whether, as of the date of the PPP loan application, the borrower was a subsidiary of another company
- Whether the borrower received any funds under any other CARES Act program, excluding tax benefits

The questionnaires also include optional sections to allow the borrower to provide additional comments on any question included in the questionnaire.

Start assembling documentation now

It is unclear when lenders will start sending the questionnaire to borrowers. There is also uncertainty how the questionnaire will affect the loan forgiveness process. Hopefully, SBA will issue additional guidance on the questionnaire and how it affects the loan forgiveness process. However, given the relatively limited time to respond, borrowers should begin reviewing the questionnaire, assembling supporting documentation and preparing additional commentary for the optional sections to help tell their story of why the economic uncertainty made the PPP loan necessary.