

Publications

PPP Guidance Update: SBA Creates New Loan Necessity Questionnaires for Borrowers that Received \$2,000,000 or More

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CLIENT ALERT | 11.9.2020

Background

On October 30, 2020, the Small Business Administration (SBA) released two new forms which require the disclosure of information from Paycheck Protection Program (PPP) borrowers that received PPP loans with an original principal amount of \$2 million or more. [SBA Form 3509](#) is required to be completed by for-profit borrowers, and [SBA Form 3510](#) is required by non-profit borrowers.

As many PPP borrowers know, the SBA previously released guidance stating that PPP borrowers should be prepared to demonstrate that, as of the date the borrower applied for a PPP loan, the loan was necessary to support the borrower's ongoing operations due to the then-current state of the economy (the Need Certification), as certified to in the PPP loan application. We have outlined this guidance in a prior [client alert](#). After the SBA released this guidance, it created a limited safe harbor, stating that any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million would be deemed to have made the Need Certification in good faith. We have outlined this safe harbor in another prior [client alert](#).

The purpose of the newly-released Loan Necessity Questionnaires is to assist the SBA in evaluating whether or not borrowers made the Need Certification in good faith. A borrower that is required to complete one of the Loan Necessity Questionnaires that fails to do so may result in the SBA determining that such borrower was or is ineligible for (i) the PPP loan as a whole, (ii) the PPP loan amount received, or (iii) any forgiveness amount which the borrower claims. Accordingly, the SBA may seek repayment of the PPP loan or may pursue other available remedies.

Loan Necessity Questionnaire

Each Loan Necessity Questionnaire is generally broken down into two information categories: (i) Business Activity Assessment (Non-Profit Activity Assessment for non-profit borrowers) and (ii) Liquidity Assessment.

The Business (or Non-Profit) Activity Assessment section requires that the borrower provide both answers and supporting documentation regarding the borrower's gross revenue (gross receipts for non-profit borrowers) during the second calendar quarter of 2020, as well as for the second calendar quarter of 2019. This section also asks whether the borrower shut down or significantly altered its operations (either by order of state or local authority or voluntarily) due to COVID-19 since March 13, 2020, and whether the borrower has begun any new capital improvement projects *not* due to COVID-19 since March 13, 2020.

The Liquidity Assessment section requires the borrower to disclose its total amount of cash and cash equivalents as of the last calendar quarter before the borrower's PPP loan application. This section also sets out many questions related to the borrower's performance between March 13, 2020 and the end of its eight or 24-week loan forgiveness covered period, including whether the borrower has prepaid any outstanding debt or has paid any employees in an amount that exceeds \$250,000 on an annualized basis. For for-profit borrowers, this section also includes questions surrounding the borrower's ownership structure that the borrower may not have disclosed on the original PPP loan forgiveness application or otherwise throughout the PPP process. For non-profit borrowers, this section includes questions relating to whether or not the borrower is a school, college or university that has offered financial assistance or tuition reductions due to COVID-19 or whether the borrower is a healthcare provider that has discounted services due to COVID-19. While the Loan Necessity Questionnaire requires all of these disclosures to be made, the form also provides a mechanism to mark any answers as "confidential."

A borrower that receives and is required to complete a Loan Necessity Questionnaire must complete and submit the form to the borrower's PPP lender within ten (10) business days of receipt from the PPP lender. Within five business days after submitting the completed form, along with any required supporting documentation, signatures and certifications required, the PPP lender must submit the completed form to the SBA via the SBA PPP Forgiveness Platform.

Additional Guidance

It is important to note that the Loan Necessity Questionnaire forms are not final until after the comment period expires on November 25, 2020. While the current forms provide the SBA with information that would be necessary to evaluate the Need Certification as it pertains to PPP borrowers, the form noticeably overlooks some other information that would be critical to the SBA's determination, including how many employees were retained as a result of the PPP loan, and does not include projections of how the business would have otherwise performed without a PPP loan.

Although the Loan Necessity Questionnaire forms are not yet final, it is important for all PPP borrowers to whom the forms pertain to begin to review the current version of the applicable form, to compile supporting documentation, and to keep in contact with the borrower's legal counsel, accountants, and PPP lender.

As has been the case throughout the life of the PPP, the rules and regulations are constantly changing. PPP borrowers, especially those who have received PPP loans of \$2 million or more, should frequently review the most current guidance released by the SBA and Treasury, available on the SBA and the Treasury websites. If you have any questions about the PPP or this latest guidance, please call Drew Parobek, Marty Gates, Nick House, Cauley Simmons, or your Vorys attorney today.

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Vorys COVID-19 Task Force

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).