

Alerts & Publications



New Strings Attached? SBA Requires PPP Recipients to Re-Prove Need for \$2 Million+ Loans

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In an unusual move that could dramatically increase enforcement risk for large PPP borrowers, the Small Business Administration intends to require recipients of loans greater than \$2 million to re-certify the economic necessity of the funds they previously borrowed under the PPP. To that end, the SBA has developed two forms, one each for nonprofit and for-profit borrowers, that demand detailed information about Q2 business activities and liquidity positions to allow “SBA loan reviewers to evaluate the good-faith certification” of borrowers’ claims that the economic uncertainty of the time truly necessitated a PPP loan. The forms also require an authorized representative of the borrower to attest to the accuracy of the information submitted by including a second certification under penalty of perjury. With only 10 days to complete the forms, PPP recipients should be aware of the risks the SBA’s new procedure creates, and take steps to ensure they are best positioned to withstand the SBA’s review.

The “Necessity” Requirement

In response to the unprecedented disruptions of the COVID-19 pandemic, the Paycheck Protection Program required applicants to initially certify in good faith that the “current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Neither the term “economic uncertainty” nor “necessary” was defined in the PPP, a fact consistent with Congress’s apparent intent to allow maximum flexibility in the face of a once-in-a-lifetime crisis. Previous SBA [guidance](#) did instruct applicants to take 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.” But, the agency gave little insight into its specific views on these issues beyond saying that a large public company would be unlikely to make such a certification in good faith.

In April, in response to public debate over claims that PPP loans went to undeserving recipients, the SBA announced its intent to review all PPP loans over \$2 million upon submission of forgiveness applications, but did not elaborate at that time on the details, parameters, and process for that review.

(It also left open the possibility of evaluating loans under \$2 million, but has not taken any such steps.)

On October 26, the SBA quietly added these two “loan necessity” questionnaires to the list of PPP forms by filing a [Notice](#) in the Federal Register seeking comment. While the SBA has not officially released the questionnaires or commented publicly on them, various third parties have posted copies of the [for-profit form](#) and the [nonprofit form](#). And, although the Notice provides a comment period through November 25, 2020, these forms have already received formal approval for use by the SBA.

These forms, which would be distributed to borrowers by their financial institution lenders, require a wide range of information and documentation about the impact of COVID-related restrictions on borrowers’ business operations, assets, dividends, and executive and owner compensation. After receiving their questionnaires, borrowers will have just 10 days to submit the completed forms to their financial institution lenders.

New Form, New Risks

The SBA’s “loan necessity” questionnaires raise several new issues. First, they require a PPP borrower to recreate and affirmatively document facts and circumstances that supported an application made under earlier circumstances—namely, the initial COVID-19 crisis. While borrowers certainly had good reason to create strong records supporting this application on their own, the loan application itself did not require the submission of substantiating documentation. And, a borrower’s calculation of necessity due to the “economic uncertainty” of the times may look very different on paper now than when the economy appeared headed toward a steep and unremitting fall.

Further, the SBA’s forms require not just that an “Authorized Representative of [the] Borrower” certify the truthfulness and accuracy of the information and documentation being submitted now, but that the Authorized Representative repeat a certification contained in the original PPP application stating that the borrower understands the risk of making false statements to obtain the PPP loan and/or forgiveness. This certification essentially freshens and strengthens the record on which the SBA could seek to take enforcement action. Finally, the short timeline will prove a challenge for many companies that conducted their necessity analysis in the haze of the early stages of the pandemic shutdown.

Steps to Take Now

While awaiting more details, there are steps a PPP recipient can take now to prepare for the potential requirement to complete a questionnaire and any further review by the SBA:

- [Focus on Jobs](#): The PPP’s primary purpose was, of course, to maintain employment for as many people as possible once the crisis hit. Documentation collected and submitted should emphasize

- considerations in mind during the application period related to maintaining employees in both the short and longer term during 2020, and to the extent possible, confirming the success of those efforts.
- Collect and Preserve Records: PPP recipients should be sure to preserve documents or reduce to writing discussions that supported the necessity of their loan application. This would include board minutes, financial projections at the time of the application, projections on likely layoffs without PPP funds, and records indicating difficulty in obtaining outside funding (including emails to banks that elicited no response). Although primary documentation is best, key undocumented discussions should be reduced to writing and maintained as memoranda.
 - Contextualize Supporting Documents: In submitting their “loan necessity” forms, PPP recipients should include explanations aimed at contextualizing the supporting documentation. PPP recipients should be careful to ensure the accuracy of the documents they submit and include caveats or a discussion of assumptions to provide the full picture to SBA reviewers.
 - Explanatory Letters: PPP recipients that had liquid assets at the time of their loan request should include explanatory letters that discuss the factors that went into their determination that the loan was necessary. This should include discussions of industry best practices for liquidity and any long-term effects that would have led to a significantly detrimental impact on the business’s ability to remain a going concern in the future. Small businesses may even benefit from discussing the impact of not receiving a PPP loan on their ability to maintain viability as compared to their larger competitors.

In short, the SBA’s use of these detailed questionnaires to conduct their after-the-fact review of all PPP loans greater than \$2 million will shift the initial burden onto the loan recipients themselves. PPP recipients will be well served by taking steps now to review their records and decision-making process to ensure the record reflects the appropriate considerations.

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