

# Insights

## **SBA Introduces Necessity Questionnaires for PPP Forgiveness**

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On October 30, 2020, the SBA released two additional questionnaires that will need to be submitted by for-profit and non-profit PPP borrowers as part of their loan forgiveness applications. This follows a notice issued by the SBA on October 28 in the Federal Register indicating that the SBA was seeking approval from the Office of Management and Budget to collect information about PPP borrowers through eleven SBA forms related to the PPP. The notice indicated that the comment period would be open for 30 days. This means that the published forms constitute drafts that may change to reflect comments that are submitted.

The published versions of the forms require that PPP borrowers with an original loan amount in excess of \$2 million submit the questionnaire as part of their loan forgiveness application. While not explicitly stated, the forms imply that the lenders will send the questionnaire to their borrowers who must return the form to the lender within ten days of receipt from the lender. Once the lender receives the questionnaire from the borrower, the lender has five days to submit the questionnaire to the SBA.

The SBA indicates in the preamble to the forms that it will use the responses as part of its review process focusing on the good faith certification that the PPP loans were necessary for the borrower in light of the economic uncertainty the borrower faced at the time of the loan application. The SBA also makes clear that it will take into account the totality of a borrower's situation.

In many ways, the questionnaires offer some long awaited guidance on how the SBA will review the good faith certification made by borrowers ("current economic uncertainty makes this loan request necessary to support" the ongoing operations of the business) when initially applying for a PPP loan. However, many unanswered questions remain open about this process.

Each questionnaire form contains two separate sections. Part A asks for information about the borrower. Part B asks a series of questions, and requests supporting documentation, to evaluate the business activity and liquidity of the PPP borrower. The non-profit version adds some questions germane to that sector.

## **Business Activity Assessment**

The business activity assessment portion asks specific mandatory questions about the borrower's business, employment and compensation, its status as a public company and involvement by private equity with the business. It also provides a field that allows the PPP borrower to provide any further comments it desires. The questions in this section look at comparative 2020 and 2019 second quarter financials and probe whether government mandated shutdowns after March 13, 2020, significantly altered the business of the PPP borrower. From these questions, it appears that the SBA will require PPP borrowers to prove they were shut down or that COVID significantly impacted their revenue.

Finally, it will be interesting to see how the SBA uses this information to determine whether the PPP borrower made the necessity determination in good faith. When PPP borrowers initially made the necessity determination when applying for the PPP loan, they faced a global pandemic and unprecedented government shutdowns that resulted in great economic uncertainty. If the PPP borrower, like the SBA, had a hindsight review to the comparative financials and whether a government lockdown would be prolonged or further imposed, the PPP borrower could have made that certification with much more certainty. Unfortunately, that was not the reality surrounding the PPP borrower when the necessity determination was made.

## **Liquidity Assessment**

The liquidity assessment portion asks about a dozen questions and also allows the PPP borrower to provide any further comments. The questions in this section look to the PPP borrower's available cash and cash equivalents, whether distributions or dividends were paid out to owners and if total compensation to an owner exceeded \$250,000 on an annual basis, whether prepayments were made on debt, and whether the PPP borrower is publicly traded or had ownership that is publicly traded, private equity, venture capital, or a foreign state-owned enterprise.

As stated above, it will be interesting to see how the SBA uses this information to determine whether the PPP borrower made the necessity determination in good faith. For one area that may be favorable to the PPP borrower, the questionnaire does not request information regarding the availability of other debt or lines of credit in determining the liquidity of the PPP borrower, which was a significant question (posed by us and others) at the time the necessity determination was made. In addition, the questionnaire carves out disclosure for estimated tax payments distributions to owners of a S-corporation or partnership.

## **Non-Profit Separate Form**

Finally, the separate form to be used by non-profits asks questions similar to the for-profit form but also focuses on the nature of contributions and grants received during the covered period. Further, schools, universities and colleges must make a determination on whether they have offered financial assistance to students during the school year or if they have experienced a decrease in tuition compared to the prior school year.

## Unresolved Considerations

Many questions seem to hang without resolution, including:

- How will the borrower explain its unique approach to the necessity determination? Some of the fields that allow open-ended responses provide limited character counts.
- How will the confidentiality of the information be protected? The forms allow the borrower to indicate that its information is customarily treated as confidential, but the SBA has not indicated that this practice will be honored. The interplay with rights to access SBA data, such as freedom of information requests, remains opaque.
- How will a borrower be able to demonstrate that it used the funds to fill the purposes of the PPP? This can be shown to some degree in the information about the uses of the funds in the base forgiveness application, but the limited narrative opportunities in the questionnaire do not contemplate a linkage to those permitted uses and the necessity determination.
- How will the borrower avoid the 'rear view mirror' effect from the SBA review? Prior guidance made it clear that the good faith determination would be evaluated as of the date of the loan application.
- What is the best timing for moving forward with the forgiveness application? The clock is ticking, and the 30-day comment period will expire with a short time to go for the forgiveness application deadline.
- What if a borrower has already submitted its forgiveness application? Will the process be delayed beyond the comment period in order to allow for the questionnaire to be submitted and considered?

Please [click here](#) for the questionnaire for non-profits and [click here](#) for for-profit businesses.

Krieg DeVault is committed to helping you and your business during these unprecedented times. With your needs in mind, we have established a COVID-19 Resource Center to assist you through this process.

If you have any further questions, comments or concerns, please feel free to contact **Robert A. Greising, Corben A. Lee** or a member of our Business, Acquisitions & Securities team.