

SBA Issues New Questionnaires and Guidance for PPP Borrowers with Loans Over \$2 Million

by Anthony J. Zeoli

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Under the Paycheck Protection Program (the “PPP”), PPP loan borrowers are, and always have been, required to certify that the requested PPP loan funds are necessary to support their “ongoing operations” in light of the economic uncertainties created by COVID-19. However, since the inception of the program there has been a lot of ambiguity as to how, and as of when, a particular borrower’s need is to be assessed for purposes of being able to make such certification. That ambiguity recently increased significantly when the Small Business Administration (the “SBA”) started sending out a “Loan Necessity Questionnaire” (the “Questionnaire”) to PPP loan borrowers with PPP loans over \$2 Million.



The Questionnaire is extensive and the requested information primarily relates to the particular borrower’s business activities and liquidity as well as how COVID-19 has affected their particular operations. What has been the most concerning to the receiving borrowers, however, is the fact that the requested information relates both to the period leading up to getting the PPP loan as well as the period during which the PPP loan funds were used (*i.e. after they received the PPP loan*). This has caused many borrowers to fear that the forgiveness of their PPP loan may be jeopardized based on their responses to the Questionnaire; in particular, where Questionnaire responses may show a borrower’s business operations or finances after getting the PPP loan were actually better than anticipated when they originally applied. On December 9, 2020 the SBA released a new FAQ which was intended to quell some of these concerns but it may raise more questions than answers.

Background

Under Title I of the CARES Act, which established the PPP, borrowers applying for a PPP loan are required to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the [a]pplicant.” Originally, this necessity requirement was interpreted very broadly where almost any potential borrower, looking forward into the abyss of an unknown COVID-19 economy, could reasonably believe the loan was “necessary.” In fact, while other SBA loan programs have a “credit elsewhere”¹ test which requires loan applicants to be unable to obtain similar credit facilities from sources other than the SBA in order to be eligible for a loan, the CARES Act specifically excluded that requirement from the PPP loan eligibility requirements.² That being said, following the enactment of the CARES Act the U.S. Treasury and the SBA have released additional guidance significantly narrowing the eligibility requirements with respect to both the borrower’s certification as to need and to how a borrower’s access to outside credit should be considered in assessing such need.

In particular, question #31 of the [FAQ](#) was included to not only caution would be and existing borrowers that they must make (*or in the case of those that have already received a PPP loan have made*) the above certification as to the need for their loan, but also that in making such certification, they should be expressly taking into account “**other sources of liquidity.**” Prior to that release there was no guidance specifically requiring a borrower to take such other liquidity sources into account in determining their need for the loan. That additional component aside, what goes into determining whether a PPP loan is “necessary” still remains far

¹ As defined in [15 U.S. Code § 632\(h\)](#).

² See Section [15 U.S. Code § 636\(36\)\(i\)](#).

from clear.³ However, what has been a general constant across all SBA guidance to date is that **the required certification as to the necessity of a PPP loan is made and evaluated as of, and taking into account the facts and circumstances of such borrower which exist at, the time the borrower submits their PPP loan application.**

Questionnaire and New Guidance

There are two forms of the Questionnaire, one for “for-profit” borrowers ([Form 3509](#)) and one for “non-profit” borrowers ([Form 3510](#)). The Questionnaire was released in connection with the SBA’s previous announcement that it intends to review all PPP loans in excess of \$2 Million.⁴ A Questionnaire is sent out to borrowers by the applicable PPP lender and, once sent, the borrower must return the completed form and related information to the PPP lender within 10 business days of receipt. The PPP lender must then submit the completed Questionnaire (*and all supporting documentation*) to the SBA within five business days of receipt. It should also be noted that the Questionnaire is in a format which significantly restricts the type and amount of information that the borrower can provide in response to each component. As a result, the Questionnaire does not provide an opportunity for borrowers to provide relevant supplemental information which might be necessary to put the subject financial and other information into the proper context (*e.g. information as to why the borrower’s business operations or financial position might have turned out significantly better than anticipated at the time of applying for the PPP loan*).

The issuance of the Questionnaire has created significant concern among PPP borrowers who are expecting to have their loan forgiven. Most notably that, based on how a PPP borrower responds to the Questionnaire, their potential PPP loan forgiveness might be jeopardized. This concern stems from the fact that the Questionnaire asks for a significant amount of financial and other information related to the period **after** the borrower got the PPP loan; including with respect to the borrower’s business activities, financial position and liquidity over their applicable “forgiveness covered period.” This has led to borrower apprehension that the SBA will use the requested information to somehow invalidate their initial certification that the loan was “necessary.” Put another way, PPP borrowers are concerned that if they provide the requested information, and their particular financial circumstances after getting the loan were better than expected and don’t show a clear need for the loan, that the SBA will take that as justification that the borrower never needed the loan to begin with.

The general uncertainty regarding the Questionnaire and how the SBA intends to use the requested information has even given rise to litigation. On December 8, 2020, the Associated General Contractors of America filed a [lawsuit](#) against the SBA in the U.S. District Court for the District of Columbia. The lawsuit seeks (*among other things*) to declare the Questionnaire as being “*arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,*” to enjoin the SBA from “*challenging a borrower’s certification that economic uncertainty made his or her requests necessary to support ongoing operations, solely or exclusively on the information that a borrower provides to SBA in response to the Questionnaire,*” and to adopt a revised questionnaire that (*among other things*) permits the borrower to “*explain the totality of their circumstances as much as reasonably necessary.*”

In response to the growing concern, and seemingly the above lawsuit, on December 9, 2020 the SBA released new question #53 to the [FAQ](#) which provides as follows (*emphasis added*):

Question: *Why are some PPP borrowers receiving a Loan Necessity Questionnaire (SBA Form 3509 or 3510)?*

Answer: *As previously announced, SBA is reviewing all loans of \$2 million or more, and other loans as appropriate, for eligibility, fraud or abuse, and compliance with loan forgiveness requirements. As part of this process, SBA is providing a Loan Necessity Questionnaire to lenders for them to provide to PPP borrowers that, together with their affiliates, received loans of \$2 million or more. Upon request from their lender, borrowers should return the completed questionnaire to their lender within 10 business days of receipt.*

The information that borrowers provide on the questionnaire will help SBA assess those borrowers’ certification in their loan application that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant,” as required by the CARES Act.

A request to complete the Loan Necessity Questionnaire does not mean that SBA is challenging a borrower’s certification that is required by the CARES Act. SBA’s assessment of a borrower’s certification will be based on the totality of the borrower’s circumstances through a multi-factor analysis. As described in FAQ #46, SBA will assess whether the borrower

³ For a more detailed discussion on this topic, please see [“Client Alert: Do I Really “NEED” a Paycheck Protection Program \(PPP\) Loan and, if I Already Got One, Should I Give it Back?”](#)

⁴ See question #39 of the [FAQ](#).

*had adequate basis for making the required good-faith certification, based on its individual circumstances in light of the language of the certification and SBA guidance. **This certification is required to have been made in good faith at the time of the loan application, even if subsequent developments resulted in the loan no longer being necessary.** In its review, SBA may take into account the borrower's circumstances and actions both before and after the borrower's certification to the extent that doing so will assist SBA in determining whether the borrower made the statutorily required certification in good faith at the time of its loan application.*

*After a borrower submits its completed questionnaire, SBA may request additional information, if necessary, to complete its review. **When additional information is requested, borrowers will have an opportunity to provide a narrative response to SBA explaining the circumstances that provided the basis for their good-faith loan necessity certification. SBA will make a final determination that a borrower lacked an adequate basis for its loan necessity certification after reviewing any additional information that a borrower chooses to submit.** This targeted, multi-step approach will ensure the integrity of the evaluation process and expeditious processing, as well as properly allocate SBA's finite resources to those loans that require additional review.*

This new guidance doesn't do much to clarify the uncertainty regarding how the Questionnaire and the related requested information will actually be used by the SBA in evaluating a particular borrower. In particular, what the newly mentioned "multi-factor analysis" entails and what criteria will be used to evaluate the results of that analysis remain unknown. However, the above guidance does specify the following points which should be noted by PPP borrowers:

- Getting a Questionnaire doesn't mean that the SBA is questioning the subject borrower's certification. In fact, while not spelled out in the above, all PPP borrowers with loans over \$2 Million are expected to receive, or otherwise be required to complete, a Questionnaire in connection with their application for loan forgiveness.
- A borrower's certification as to the need for their PPP loan is still going to be assessed, and with respect to the circumstances that existed, as of the time of the borrower's application for the loan. As noted, "even if subsequent developments resulted in the loan no longer being necessary," that would not mean that the borrower improperly certified as to the need for the loan when applying. This has been the standard throughout and it should give borrowers some comfort that it still remains the standard.
- The Questionnaire may not be the only information requested by the SBA and the SBA may subsequently request additional information from the borrower. The borrower will then have the opportunity to provide additional supporting information to the SBA which may be necessary to put the Questionnaire information into the proper context. The above response also says that the SBA will review all such additional information prior to making its final determination.

While there still remains a high degree of uncertainty around the SBA's review process, based on the new guidance it would appear that the SBA is utilizing the Questionnaire as more of a fact-finding tool to help identify loans where it may need to drill down further rather than as a bright line test for determining loan forgiveness eligibility. **That being said, we highly recommend that PPP borrowers with loans over \$2 Million who have not yet completed or even received a Questionnaire, proactively complete one and compile the requested information.** Again, it is anticipated that every PPP borrower with a loan over \$2 Million will need to complete a Questionnaire. Moreover, a borrower will only have a 10-business-day window to provide the required information and failure to meet that deadline could jeopardize their forgiveness eligibility so it would be best to have that information ready to go. **We also recommend that all PPP borrowers, regardless of their loan size, do their best to document the reasoning and support behind their initial determination that their PPP loan was "necessary" when they applied for it.** In the event the SBA does contest, or otherwise questions, a PPP borrower's initial need certification, the borrower will benefit by having a clear narrative and supporting documentation ready to be able to promptly respond to the SBA.

There are many variables in the PPP loan forgiveness process that will affect each borrower differently. As a result, PPP borrowers should strongly consider consulting with an attorney as they navigate the process, particularly before they submit a Questionnaire or otherwise respond to any direct request for information from the SBA or their PPP lender.

Freeborn & Peters LLP is committed to providing our clients with up-to-date resources to understand and navigate the PPP loan program and we will continue to follow this and other PPP loan updates as they arise. If you have any questions or would like assistance in navigating any of the above discussed issues, please contact Anthony J. Zeoli (azeoli@freeborn.com) or another member of the Freeborn & Peters LLP CARES Act team.

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Tony concentrates his practice in the areas of banking and commercial finance, securities, real estate, and general corporate law. Anthony is also an industry leader in the areas of crowdfunding, blockchain, securities based cryptocurrency/token offerings, peer-to-peer (P2P) lending, and Regulation A+ offerings. He also personally drafted the Illinois intrastate crowdfunding exemption, which was unanimously passed into law by the Illinois House of Representatives.

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