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On October 26, the Small Business Administration (SBA) issued a notice proposing new Form 3509, Loan Necessity Questionnaire (For-Profit Borrowers)—the most recent government attempt to implement retroactive rules for determining borrowers' eligibility for large Payroll Protection Program (PPP) Loans.¹ Shortly thereafter, on October 31, 2020, the SBA published the draft of Form 3509, which warns for-profit borrowers of [PPP Loans](#) in amounts of \$2 million or more that:

"Failure to complete the form and provide the required supporting documents may result in SBA's determination that you were ineligible for either 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."²

SBA Appears Poised to Release New Form for Large PPP Borrowers

By Mary Lundstedt, Esq.

Although this notice is still in draft form, it has already been circulated to lenders, and clearly the stakes are high for impacted borrowers. Thus, every PPP Loan borrower of \$2 million or more should be aware of the draft Form 3509 and prepared in the event that they must substantiate their "good-faith certification . . . that economic uncertainty made the loan request necessary."³

Be Prepared to Get Specific

The Coronavirus Aid, Relief, and Economic Security Act ([CARES Act](#)) created the PPP and indicated that a borrower must make a good faith certification that current economic uncertainty makes the loan request necessary to continue operations.⁴ Significantly, the CARES Act itself did not adequately define "economic uncertainty." Indeed, it didn't even expressly state that a company had to be impacted by COVID-19 specifically. Even the SBA's and Treasury's FAQ #31, provides only that:

"[B]efore submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncer-

tainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must make this certification in good faith, 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."⁵

In contrast, the SBA's proposed draft Form 3509 requires very specific responses from borrowers, including, for example, whether a borrower was ordered to shut down due to COVID-19. The draft Form 3509 clearly states as its purpose:

"[T]o facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate the good-faith certification that you made on your PPP Borrower Application (SBA Form 2483 or Lender's equivalent form) that economic uncertainty made the loan request necessary."⁶

Activity and Liquidity Assessments

The draft Form 3509 is designed to gather information

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needed for the SBA to make a “Business Activity Assessment” and a “Liquidity Assessment.”

A. Business Activity Assessment Section

Most importantly, the Business Activity Assessment Section on the draft Form 3509 delves into:

1. The borrower’s gross revenue;
2. The impact of COVID-19 on the business; and
3. Information on capital improvements made between March 13, 2020 and the end of the covered period.

Specific examples of key questions in the Business Activity Assessment Section include:

- What was Borrower’s gross revenue in the second calendar quarter (Q2) of 2020?
- If Borrower existed in Q2 2019, what was Borrower’s gross revenue in Q2 2019?
- Since the COVID-19 National Emergency Declaration issued by President Trump on March 13, 2020, has Borrower been ordered to shut down by a state or local authority due to COVID-19?
- Between March 13, 2020 and the end of the loan forgiveness covered period of the PPP Loan, did Borrower begin any new capital improvement projects not due to COVID-19?

B. Liquidity Assessment Section

In this section of draft Form 3509, information is requested related to such things as:

- How much cash the borrower had at the end of the calendar quarter immediately preceding the date of the PPP Loan application;
- Whether the borrower paid dividends or distributions to owners between March 13, 2020 and end of the covered period;
- Whether the borrower made any outstanding debt prepayments between March 13, 2020 and the end of the covered period;
- The number of owners and employees who received compensation in excess of \$250,000 on an annualized basis;
- The reported market capitalization if the borrower is publicly traded (or affiliated with a publicly traded company);
- Whether a private equity firm, venture capital firm, or hedge fund owned 20% or more of any class of Borrower’s outstanding equity securities; and
- Whether the borrower received other CARE Act relief other than a PPP Loan.

Conclusion

Remember, this form is still a draft—we don’t know if it will ultimately be finalized in this form, revised, or withdrawn altogether. As it reads now, though, many impacted borrowers are understandably burdened by the prospect that they would be required to provide additional information after (1) already obtaining PPP Loans in good faith and (2) maintaining their full-time payroll accordingly.

Furthermore, borrowers should note that the draft Form 3509 requires them to specify what information is confidential. Without a designation that all information on the form is confidential and proprietary in nature, it is unlikely that the form is exempt from FOIA. In other words, your information could be released upon the request and made public.

We **urge** our readers to consult with an attorney who can interpret these proposed requirements and best protect you through any finalized government plan requiring you to retroactively justify your eligibility for the PPP funds you borrowed.

If you have any questions about the new Form 3509 or PPP Loans, contact our legal team at 410-862-2673 or fill out [our online form](#).

Footnotes

1. You can read the notice in full at: <https://www.federalregister.gov/documents/2020/10/26/2020-23594/reporting-and-recordkeeping-requirements-under-omb-review>.
2. <https://drive.google.com/file/d/1TApXIS0prNbd85aV96CbfEbmoc2iyBqw/view?usp=sharing>
3. *Id.*
4. Pub. L. No. 116-136, §1102.
5. <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.
6. <https://drive.google.com/file/d/1TApXIS0prNbd85aV96CbfEbmoc2iyBqw/view?usp=sharing>