

Was My PPP Loan Necessary (In Hindsight)? SBA Seeks Additional Information from PPP Borrowers with Loans of \$2 Million or More

By [*Ferdinand Ruplin*](#)

On the roller coaster ride that is the interpretation of the Paycheck Protection Program (“PPP”) by the U.S. Small Business Administration (“SBA”), on October 26, the SBA issued a notice to the Office of Management and Budget (“OMB”) seeking approval of [SBA Form 3509](#) (for for-profit borrowers) and [SBA Form 3510](#) (for nonprofit borrowers) (together, the “Necessity Questionnaires”). The Necessity Questionnaires request important financial and operational information from PPP borrowers who, together with affiliates, received \$2 million or more in PPP loans.

Importantly, the Necessity Questionnaires contain a number of questions related to the borrower’s financial condition and use of capital *after* the borrower applied for its PPP loan. The SBA proposes to use these questions to determine whether a borrower certified in good faith that the PPP loan was “necessary” due to current economic uncertainty (see our previous client alerts on the “necessity” certification [here](#), [here](#), and [here](#)).

The Necessity Questionnaires are troubling for a number of reasons, and may be problematic for borrowers whose financial performance has been better than they expected at the time of making the necessity certification. Borrowers should consult their attorneys and other professional advisors prior to submitting the Necessity Questionnaire.

What information does the SBA seek?

The questions in the Necessity Questionnaires are broken up into two categories. The first category focuses on the business activities of the borrower. The second addresses the borrower’s liquidity and use of capital during the pandemic.

Business Activity Questions

The Necessity Questionnaires require borrowers to report the following information under the “Business Activity” section:

- Borrower’s gross revenue in Q2 for both 2020 and 2019
- Borrower’s expenses in Q2 for both 2020 and 2019

Was My PPP Loan Necessary (In Hindsight)? SBA Seeks Additional Information from PPP Borrowers with Loans of \$2 Million or More

Page 2

- Whether the borrower has been subject to any “shutdown” orders by a state or local authority
- Whether the borrower has been ordered to significantly alter its operations by a state or local authority
- Whether the borrower has ceased or reduced its operations due to COVID-19
- Whether the borrower began any new capital improvement projects not due to COVID-19 between March 13, 2020 and the end of the borrower’s covered period
- Borrower’s six-digit NAICS code

Liquidity Assessment Questions

The “Liquidity Assessment” portion of the Necessity Questionnaires contains numerous questions that address the borrower’s liquidity and use of capital during the covered period for the borrower's PPP loan. Such questions include:

- Borrower’s cash and cash equivalents as of the end of the last calendar quarter prior to its PPP loan application
- Whether the borrower paid any dividend or other capital distributions (in excess of distributions to pay taxes) prior to the end of the borrower’s covered period
- Whether the borrower prepaid any outstanding debt prior to the end of its covered period
- Whether any employees received compensation in excess of \$250,000 on an annualized basis during the borrower’s covered period
- Whether any owners of the borrower received compensation in excess of \$250,000 on an annualized basis during the covered period
- Whether the borrower received funds from any other CARES Act program

Borrowers are required to complete and return the Necessity Questionnaire to their lender within 10 business days after the form is received from their lender. The SBA notes that a failure to complete the form and provide the required supporting documents may result in an SBA determination that the borrower was ineligible for the PPP loan or any forgiveness amount claimed, and that the SBA may seek repayment of the loan or pursue other available remedies.

Why the Necessity Questionnaires Are Problematic



Was My PPP Loan Necessary (In Hindsight)? SBA Seeks Additional Information from PPP Borrowers with Loans of \$2 Million or More

Page 3

The Necessity Questionnaires are troubling because borrowers are required to report information based on business decisions that were made *after* the loan application was filed, despite the fact that (i) it was impossible for many borrowers to know how the pandemic would impact their business at the time their loan applications were submitted, (ii) borrowers were encouraged to apply for PPP loans as quickly as possible in the wake of unprecedented government shutdown orders, and (iii) the SBA had only provided minimal guidance on the necessity certification prior to the issuance of the Necessity Questionnaires.

As we have [previously discussed](#), there was significant economic uncertainty across numerous industries at the outset of the pandemic. The PPP was intended to preserve jobs and paychecks at many businesses in the face of this profound uncertainty, and by all accounts it did so. As COVID cases surge again, it remains unclear whether additional shutdowns will be imposed and when businesses will be able to operate at full capacity. It is difficult to understand how the SBA intends to square the uncertainty then and now with its proposed use of the information requested in the Necessity Questionnaires.

Moreover, the SBA has stated in its [FAQ guidance](#) that PPP borrowers may rely on the laws, rules, and guidance available at the time of the relevant application. (See FAQ #17). Yet, until the Necessity Questionnaires were released, there was nothing in the SBA guidance or rules to suggest that making capital distributions or prepaying debts after taking a PPP loan would impact the SBA's review of the necessity certification provided at the time of loan application.

Ultimately, there is still great uncertainty as to the SBA's review process for the Necessity Questionnaires, and how the SBA will use the information provided. The SBA may issue additional guidance in connection with the Necessity Questionnaires, but that remains to be seen. As written, the information requested in the Necessity Questionnaires will be a hot-button issue for many PPP borrowers with loans of \$2 million or more. These borrowers should be sure to seek advice from counsel before submitting these forms to their lenders.

If you have any questions regarding your PPP loan or the Necessity Questionnaires, [contact](#) your primary Tonkon attorney.

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