

Memo

To: Clients & Friends
From: Rich Shavell, CPA, CVA, CCIIFP
Date: 10/31/20
Re: PPP Loans

SBA Questionnaire Issued re: PPP Loan Necessity

Are you getting tired of SBA changing the PPP loan rules - Well, here we go again...

New Forms Required for Larger Loans

Earlier this week the SBA issued two new forms that requires PPP Borrowers with **loans over \$2 million** to supply financial information to support their prior self-certification that their PPP loan was a financial necessity. For-profit businesses will receive Form 3509 and Not-for-profit entities will receive Form 3510. These forms are not published yet on SBA's website even though the SBA submitted documentation into the Federal Register. This memo will focus on Form 3509. Below is a link you can follow to Form 3509. Form 3509 is broken down into two parts:

“Business Activity Assessment;” and

“Liquidity Assessment.”

The “Liquidity Assessment” section requests specific financial information as if SBA developed unpublished bright-line tests and thresholds.

For commercial contractors with bonded jobs, basic financial analysis may not adequately consider additional working capital requirements that a surety imposes on these contractors.

Shavell & Company, P.A.
PPP Loans: SBA Issues Questionnaire
October 31, 2020

Here are a few of the Form's questions:

- Whether the Borrower has been ordered to shut down or significantly alter its operations by a state or local authority due to COVID-19;
- Borrower's approximate cash outlays for mandatory alterations and voluntary alterations due to COVID-19;
- Whether the Borrower voluntarily ceased or reduced its operations due to COVID-19;
- Borrower's gross receipts for the second quarter of 2020 and 2019;
- Borrower's expenses for the second quarter of 2020 and 2019;
- Borrower's cash, savings, and temporary cash investments prior to submitting their PPP application;
- Whether a pass-through entity Borrower paid its owners any dividends or other capital distributions "other than for pass-through estimated tax payments;"
- Whether the Borrower began any new capital improvement projects (not due to COVID-19) or prepaid any outstanding debt prior to the end of its Covered Period;
- Whether any employee or owner received compensation in excess of \$250,000 on an annualized basis during its Covered Period;
- For non-public companies, what was the Company's book value at the end of the quarter prior to filing the PPP loan application; and
- Whether the Borrower received funds from any other CARES Act program.

Where is the Government Headed?

Excuse the editorializing, but this does not appear to be good public policy. It appears the government's intent is to deny Borrower's forgiveness of PPP loans regardless that:

- The business did exactly what was asked of it: spend the loan proceeds predominantly on payroll and specified overhead costs;
- The Cares Act does not even require that companies be impacted by COVID-19;
- The Cares Act only states that "economic uncertainty" made the loan necessary;
- The Cares Act doesn't even define "economic uncertainty" or even what constitutes 'need' for the PPP Loan;
- SBA provided vague guidance with no clear definitions **after** most Borrowers filed their loan application and self-certified the economic necessity for the PPP loan; and
- The economic outlook continues to be uncertain for much of the business community with recent record daily COVID-19 cases, continuing COVID-19 related deaths, and as a result continuing potential for mandated reduced operations based on varying unknown (as we sit here today) governmental responses.

Query: is it now the SBA’s objective to deny loan forgiveness to eligible Borrowers who had no ability to know at the time of submitting their PPP loan application, what the balance of the year had in store for them. Worse, is the SBA positioning itself to initiate fraud investigations based on the data submitted with these questionnaires?

I suspect the legal community will pursue legal remedies arguing overreach, improper enforcement, and regulatory action in contravention of Congressional intent. That may not be the proper language but you get the idea. After all, Congress wanted the business community to spend the funds and, while there may be some minor level of fraud by “bad actors”, the majority of businesses did exactly what they were directed to do, i.e. use the funds for payroll and specified eligible expenses.

As Always, Documentation is Key

Borrowers with loans under \$2 million, should probably also be wary of this new Questionnaire. It provides clear indicators and guidance of what you should be documenting if asked during the forgiveness process to substantiate the self-certification that you signed. As we previously recommended, all businesses should be prepared for an SBA request for data/documentation supporting the economic necessity of your loan.

Borrowers with loans over \$2 million can now see the perspective from which the SBA is planning to review your circumstances. In all cases, contemporaneous documentation already in hand is better than scrambling to fully document your circumstances once a request is received.

Confidentiality

Form 3509 asks Borrower’s to use drop-down boxes to specify whether responses and financial information is confidential. We should recognize that the government has already supplied to the public stratified (by size of loan) listings of PPP Borrowers by state. This data, which is still available on the SBA’s website includes Borrowers’ names and addresses.

Query: Is the government planning on supplying additional Borrower information in response to future requests under the Freedom of Information Act (“FOIA”)? Certain commentators are suggesting that Borrowers include a statement with any submission reflecting that all information is confidential and thus proprietary. Apparently, this should be done under FOIA “Exemption 4” and all responding Borrowers should discuss this with appropriate counsel.

Regardless of loan size, should you include such a statement when supplying any financial information to the SBA in conjunction with your Application for Forgiveness? That may now be a prudent question for counsel.

When to File an Application for Forgiveness

A current issue is whether it makes sense or not to delay submission of your application for forgiveness. Borrowers may be anxious to remove the PPP debt from their balance sheet. Also, the corresponding income may be very helpful to the Borrower's 2020 income statement.

Previously, we suggested that this issue also be evaluated based on positioning yourself should Congress never resolve the tax deductibility of the expenditures funded by PPP loan proceeds. For many, waiting until 2021 to secure loan forgiveness made sense, i.e. deferring potential taxation to 2021 should Congress (or a new Treasury secretary) never act to rectify the Internal Revenue Service tax position in Notice 2020-32.

Now, in addition to the potential tax issues, Borrowers with loans over \$2 million may also want to delay submitting their application for forgiveness until it's known how the government is utilizing these Form 3509 (and 3510) Questionnaires. Or, at least evaluate whether it makes sense to delay.

Lobbying & Litigation

As we can see, rather than publishing specific and clear guidance on how Borrowers should document their self-certification for economic necessity of their respective PPP loan, the SBA is issuing forms requesting certain data. This is leading many in the business community to question SBA's intentions. This approach is backwards and certainly not helpful.

This will likely now become a heated lobbying issue for the business and commercial construction community. Moreover, depending on how the SBA proceeds, there will likely be litigation.

Link for SBA Form 3509:

https://cdn.ymaws.com/www.naggl.org/resource/resmgr/ppp/SBA_Form_3509_PPP_Loan_Necess.pdf