

NOTICE – This article has not been updated to reflect new legislation passed by Congress on December 21, 2020. That legislation could significantly affect the content of this article. We plan to update this article during January 2021 to reflect the impact of the new legislation.

SBA Creates Questionnaire for Large PPP Borrowers Related to Loan Eligibility

Questions Compare Liquidity, Revenues, and Expenses for Q2 2020 vs. Q2 2019 Asks for Compensation Information for Employees Making More Than \$250,000 Annually

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The Small Business Administration (SBA) has published two new forms – one for nonprofit organizations and one for other borrowers – that the SBA apparently intends to use in connection with evaluating borrowers' eligibility for obtaining Paycheck Protection Program (PPP) loans of \$2 million or more. [Form 3510](#), the form for nonprofits, is entitled "Paycheck Protection Program Loan Necessity Questionnaire (Non-Profit Borrowers)."

The stated purpose of the form is "to 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."

According to the narrative accompanying the form, each **nonprofit PPP borrower that**, together with its affiliate¹, **received PPP loans with an original principal amount of \$2 million or greater** is required to complete this form and submit it, along with the required supporting documents, to the lender servicing the borrower's loan. The narrative also indicates that borrowers are required to submit the completed form to their lender within 10 days of receiving it from the lender.

(The SBA has separately [announced](#) that it will consider the representations about economic uncertainty made by PPP borrowers of loan amounts of less than \$2 million to have been made in good faith.)

Information accompanying Form 3510 further states:

SBA is reviewing these loans to maximize program integrity and protect taxpayer resources. The information collected will be used to inform SBA's review of your good-faith certification that economic uncertainty made your loan request necessary to support your ongoing operations.

¹ Special rules apply in determining and aggregating affiliate organizations, and special exemptions apply for religious organizations.

Receipt of this form does not mean that SBA is challenging that certification. After this form is submitted, SBA may request additional information, if necessary, to complete the review. SBA's determination will be based on the totality of your circumstances. [Emphasis added.]

Form 3510 has **two main sections – Nonprofit Activity Assessment and Liquidity Assessment.**

Nonprofit Activity Assessment

The Nonprofit Activity Assessment section contains questions about the borrower including, but not limited to:

1. Gross receipts in the second calendar quarter (Q2) of 2020 and Q2 of 2019
2. Gifts, grants, and contributions in Q2 of 2020 and Q2 of 2019
3. Expenses in Q2 of 2020 and Q2 of 2019
4. Has the borrower been ordered to shut down due to COVID-19?
5. Has the borrower been ordered to significantly alter its operations due to COVID-19?
6. Has the borrower voluntarily ceased or reduced its operations due to COVID-19?
7. Has the borrower voluntarily altered its operations (other than ceasing or reducing operations) due to COVID-19?
8. Did the borrower begin any new capital improvement projects not due to COVID-19?
9. What is the borrower's six-digit NAICS [industry] code?
10. Additional comments

Liquidity Assessment

The Liquidity Assessment section contains questions about the borrower including, but not limited to:

1. Cash balances at the end of the calendar quarter preceding the date of the loan application
2. Has the borrower prepaid any outstanding debt?
3. Were any of the borrower's employees compensated in an amount that exceeds \$250,000 on an annualized basis? (Number of employees and aggregate amount of compensation paid to those employees during the borrower's loan forgiveness covered period.)
4. Any restrictions on borrower using its cash for PPP-permissible payments? (Describe.)
5. Does borrower have endowments? (Details.)
6. Value of non-cash investments as of the last day of the calendar quarter preceding the date of the PPP loan application
7. Is the borrower a school, college, or university? (If so, tuition and student financial assistance information is required.)
8. Does the borrower provide health care services? (If so, revenue and patient discount information is required.)
9. Did the borrower offer a discount on its services due to COVID-19?
10. Any other CARES Act funding (excluding tax benefits)?
11. Additional comments

Supporting documentation is required to be submitted in connection with responses to certain of the questions. The form also contains typical truthfulness representations.

What Was the Good-Faith Certification Requirement at the Time of the Loan Application?

Confusion and (ironically) uncertainty have reigned with respect to borrower eligibility since the PPP loan program was launched. Borrowers were required to make a “good-faith certification” when applying for a PPP loan that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” In the view of the author and many others, the operative term in the required certification was and still is “economic uncertainty.” SBA guidance made it clear that the certification was to be made by the borrower based on conditions that existed at the time of the loan application.

Many PPP loan applications were submitted in April of 2020...at the height of the initial uncertainty surrounding the economic impact of the pandemic. Manufacturers were shutting down, churches stopped holding in-person services, schools and colleges were suspending operations, retail stores were closing, doctors and dentists halted operations, hospitals and other medical facilities stopped performing all but the most urgent surgeries and medical procedures, major theme parks were closing, international travel was largely suspended, airlines grounded all or most of their flights, cruise companies canceled sailings, major sports leagues were canceling their competitions, disinfectants could not be found for purchase, neighbors were sharing toilet paper, and innumerable other unprecedented actions were taking place. Massive layoffs, furloughs, and terminations of employees occurred across the country. And these types of events were happening not just in the United States but throughout the world. Under such conditions, it is hard to imagine any nonprofit organization that was not...at that time...experiencing economic uncertainty of epic proportions.

During that same time period, following criticism of large and high-profile companies obtaining PPP loans, Treasury Secretary Steven Mnuchin and SBA Administrator Jovita Carranza announced their intent to scrutinize borrowers for eligibility. Mnuchin and Carranza stated their intent to perform a “full review” of every PPP loan in excess of \$2 million in addition to other loans as appropriate. They also stated that borrowers who determine that they were not eligible for a PPP loan could repay the funds by a certain date (ultimately May 18, 2020) and not be penalized.

In an official statement issued on April 28, Mnuchin and Carranza commented:

We have noted the large number of companies that have appropriately reevaluated their need for PPP loans and promptly repaid loan funds in response to SBA guidance reminding all borrowers of an important certification required to obtain a PPP loan. To further ensure PPP loans are limited to eligible borrowers, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender’s submission of the borrower’s loan forgiveness application. Regulatory guidance implementing this procedure will be forthcoming.

Secretary Mnuchin also [made reference in public comments to the possibility of criminal charges](#) for borrowers who falsely represent their eligibility for PPP loan funds.

In a “Frequently Asked Questions” document published by the SBA, a Question and Answer (#31) was added on April 23, 2020, stating the following:

Question: Do businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty 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. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

Lenders may rely on a borrower’s certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7 [later extended to May 18], 2020 will be deemed by SBA to have made the required certification in good faith.

Some readers and observers commented that the Q&A reprinted above was intended primarily for large, publicly traded companies. However, an additional Q&A (#37) was added to the document on April 28, 2020, stating the following:

Question: Do businesses owned by private companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?

Answer: See response to FAQ #31. [Refers to Q&A #31 reprinted above.]

These statements, combined with the lack of clarity on the standards for eligibility, continue to cause uncertainty and anxiety among PPP borrowers regarding their eligibility for their PPP loans.

The CARES Act, which established the Paycheck Protection Program, included no specific requirements for liquidity or financial health for borrowers to be eligible for PPP loans. The only provision addressing an organization’s need for the funds in the CARES Act was (and is) a requirement that a PPP loan applicant make a “**good-faith representation**” that “**the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.**”

Significant economic uncertainty for most PPP loan applicants continues to exist today. The unknown nature, extent, and duration of the economic impact of the pandemic on our country and the world means that the economic impact on nonprofit organizations continues to be highly uncertain.

What does all this mean for nonprofits that have obtained PPP loan funds?

We have been expecting more specific guidance from the SBA and/or Treasury related to the matter of loan eligibility since the beginning of the PPP loan process. If the SBA intends to apply specific

criteria in evaluating the validity of a nonprofit organization's good-faith certification as to economic uncertainty at the time of the loan application, it would seem that it would have been appropriate for borrowers to have been apprised of those criteria prior to being required to make such a certification. As the process has turned out, borrowers still do not know what those criteria may be. Nevertheless, borrowers have obtained the loan funds, expended them, and made financial decisions in reliance on their understanding that the loans would be forgiven if they spent the funds on allowable costs within the applicable time period.

Even though the SBA has published the questionnaire forms described at the beginning of this article, it has not, as of the writing of this article, published guidance regarding how the responses to the specific questions in the questionnaires will be used. In other words, the SBA has not yet stated what it will use as a measuring stick to evaluate the validity of borrowers' good-faith certifications about economic uncertainty at the time of the loan application.

Regardless of whether and to what extent official guidance provides any more clarification on the subject of PPP loan eligibility, in light of the developments described above, we believe it is prudent for all PPP loan borrowers (including those who borrowed less than \$2 million) to document their basis for making the representation that "the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient." Documentation should take into consideration factors like the following (**keeping in mind that all considerations are to be based on conditions that existed at the time of the loan application**):

- The nature of the overall economic uncertainty nationally and globally and the unknown extent and duration of the adverse economic impact (noting the types of developments that were occurring at the time of the loan application as described previously in this article)
- Physical impact on the organization's operations, gatherings, meetings, etc.
- Required closures, shutdowns, etc.
- Actions the organization has taken to mitigate the economic impact of the COVID-19 pandemic on the organization
- Uncertainties about the timing for resuming operations safely
- Surveys and other data regarding the impact of the COVID-19 pandemic on giving and revenue levels for similar types of organizations
- The organization's own experiences with impact on revenues
- Projections and forecasts for ongoing revenues under various scenarios (addressing the fact that the organization's future revenues are uncertain and continuing adverse economic conditions could have a lagging negative impact on the organization's revenues)
- Estimates of potential staff reductions and/or pay decreases that would apply if PPP funds were not available
- Risk of permanent loss of employees if they are laid off/furloughed or if their pay is reduced
- Information about staff reductions and/or pay cuts by similar organizations
- Impact of loss on investments
- Availability and adequacy of cash reserves
- Availability of lines of credit
- Impact on the organization of using its available cash reserves and/or lines of credit – including documentation of any reasons that utilizing such funds could be detrimental to the organization (e.g., using borrowed funds such as lines of credit to fund regular operating expenses with no known source for repayment is not a safe financial practice and could be detrimental to the organization and its ability to retain and continue the pay of employees;

reducing cash reserves to an unacceptably low level could be detrimental to the organization and its ability to continue paying employees in light of the continuing significant economic uncertainty)

- Other factors that are relevant in documenting the organization's basis for making the required representation

This is ultimately a legal matter

The question of whether a nonprofit organization is actually eligible for its PPP loan is clearly one of great significance to most PPP borrowers. Given the uncertainty surrounding the question, nonprofit leaders must proceed carefully and cautiously through the process.

We recommend that before any PPP borrower provides information to its lender or the SBA that addresses or relates to its good-faith certification about economic uncertainty that existed at the date of the loan application, the organization should have its legal counsel review such information.

If an organization has obtained PPP loan funds and is concerned about its position with respect to eligibility, the organization should consult legal counsel for guidance.

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