



## A Robinson+Cole Legal Update

### Coronavirus (COVID-19)

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## PPP Update: Loan Necessity Questionnaires

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The U.S. Small Business Administration (SBA) will require Paycheck Protection Program (PPP) lenders to issue “loan necessity” questionnaires to all borrowers of PPP loans of \$2 million or more. On October 26, 2020, the SBA published a [notice](#) seeking comment in the Federal Register for the two forms of “loan necessity” questionnaires – one for for-profit borrowers (Form 3509) and one for non-profit borrowers (Form 3510). As of November 9, 2020, it appears that the SBA has not officially released either questionnaire. However, we have located forms that may be current through online and other resources, which appear consistent with publicly-available information. Copies of the current forms are available here: [SBA Form 3509](#) and [SBA Form 3510](#).

The questionnaire states that its purpose is to “facilitate the collection of supplemental information” that will be used “to inform SBA’s review of [a PPP borrower’s] good-faith certification that economic uncertainty made [such borrower’s] loan request necessary to support [its] ongoing operations.” Borrowers are required to complete and submit the form, along with the required supporting documentation, within 10 business days of receipt from their lenders. Failure to complete the form may result in the SBA’s determination of ineligibility, and the SBA may seek repayment of the loan or pursue “other available remedies.”

PPP borrowers that received loans of \$2 million or greater have known that their loan would be subject to review by the SBA for compliance with PPP requirements. However, the questionnaires require extensive amounts of information and are not limited to questions about a borrower’s circumstances at the time it applied for its PPP loan. As discussed in further detail below, this forward-looking request for information is a new and notable development. Although it is not yet clear whether the released questionnaires are final or accurate, here are some of the key takeaways from Form 3509 (i.e., the “loan necessity” questionnaire for for-profit PPP borrowers).

- **Completion Deadline and Potential Repercussions:** The instructions to Form 3509 indicate that the completed form, including supporting documentation, must be provided to the PPP lender within 10 business days of a request for such information from the PPP lender. A PPP borrower’s failure to submit a completed Form 3509 (and required supporting documentation) within the 10-business-day period may result in the SBA’s determination that a PPP Borrower is ineligible for the PPP loan, the PPP loan amount, or any forgiveness amount claimed. Further, if a PPP borrower fails to satisfy the 10-business-day requirement, the SBA may seek repayment of the loan or pursue “other available remedies.”

- **Purpose:** The purpose of Form 3509 is to “facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate the good-faith certification” made in a PPP borrower’s loan application. The SBA is conducting this review to “maximize the integrity of the PPP program and protect taxpayer resources.” The questionnaire specifically states that receipt of Form 3509 does not mean the SBA is challenging a PPP borrower’s “good-faith certification,” and borrowers are reminded that the SBA’s determination will be based on the totality of each borrower’s circumstances.
- **Information Sought:** The questionnaire requires PPP borrowers to answer questions about their financial circumstances at the time the PPP loan application was made, including, but not limited to: (1) whether, on the date of the PPP loan application, the PPP borrower or its parent company was publicly traded; (2) whether, on the date of the PPP loan application, any publicly-traded company, private equity firm, venture capital firm, or hedge fund owned 20% or more of any class of the PPP borrower’s outstanding equity securities; and (3) whether, on the date of the PPP loan application, at least 50% or more of the PPP borrower’s common equity, or equivalent equity interest, was owned, directly or indirectly, by another company or by a foreign, state-owned enterprise. However, what has come as a surprise to most, is that Form 3509 is not limited to questions concerning a PPP borrower’s economic circumstances at the time of PPP loan application; rather, it includes many questions that elicit responses pertaining to the PPP borrower’s economic circumstances following receipt of the PPP loan. These questions include, but are not limited to: (1) a PPP borrower’s “approximate additional cash outlays” for various alterations to its operations; (2) whether the PPP borrower, between March 13, 2020, and the end of the covered PPP loan forgiveness period “paid any dividends other capital contributions (other than for pass-through estimated tax payments)” to its owners; (3) whether the PPP borrower, during the same period, prepaid any outstanding debt; and (4) whether the PPP borrower, during the loan forgiveness period of the PPP loan, paid any of its employees compensation in an amount that exceeds \$250,000 on an annualized basis. It remains unclear whether (or how) the SBA will retroactively apply factors that were unknown at the time of a borrower’s PPP loan application when evaluating a borrower’s good-faith certification that “economic uncertainty” made the loan request “necessary” to support ongoing operations.
- **Required Certifications:** Form 3509 requires an “authorized representative” of the PPP borrower to make three certifications, including: (1) that he/she has authority to sign and submit the Form 3509 questionnaire on behalf of a PPP borrower; (2) that the information and all supporting documentation provided, after making reasonable inquiry of people, systems and other information available to the PPP borrower, is true and correct in all material respects; and (3) that he/she understands that knowingly making a false statement to obtain a guaranteed loan or forgiveness of an SBA-guaranteed loan is punishable by imprisonment and/or fines.
- **Conclusion:** The SBA’s inquiry into a PPP borrower’s economic circumstance after receiving the PPP Loans is a new and surprising development. However, the SBA has not clarified how the information provided on Form 3509 will be evaluated, or under what circumstances the SBA will deny forgiveness. For now, it seems the PPP borrowers and PPP lenders are left awaiting official guidance regarding implementing and/or interpreting these questionnaires.

*Robinson & Cole LLP has been tracking government relief programs being offered to help alleviate the economic impact of COVID-19 on businesses in the United States. The SBA, in consultation with the Treasury, has provided and continues to provide guidance in the form of [Interim Final Rules](#) and [Frequently Asked Questions](#) (FAQs) to address borrower and lender questions concerning the implementation of the Paycheck Protection Program (PPP), established by section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). For more information on the PPP, see our [Primer, FAQ on the PPP](#), our [article on SBA affiliation rules](#), our [article on the Paycheck Protection Program and Health Care Enhancement Act](#), our [article on the “necessity certification,”](#) our [article on the PPP loan forgiveness application](#), our [article on The Paycheck Protection Program Flexibility Act](#), our [article on PPP Update: Loan Forgiveness FAQs](#), our [article on Treatment Of Owners And Forgiveness Of Certain Nonpayroll Costs](#), and our article on [PPP Update: SBA Procedural Notice - Paycheck Protection Program Loans and Changes of Ownership](#).*

*This alert is being issued as of November 9, 2020. Please note that future legislation, guidance and regulations could modify certain provisions of the topics discussed above.*

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