

MEMORANDUM

TO: National Council for Behavioral Health

FROM: Michael B. Glomb
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DATE: January 8, 2021

RE: SBA Form 3510 - Paycheck Protection Program Loan Necessity Questionnaire (Nonprofit Borrowers)

Introduction

Nonprofit organizations that received a Paycheck Protection Program (“PPP”) loan for \$2 million or more from the Small Business Administration (“SBA”) will be asked to complete, along with their loan forgiveness application, SBA Form 3510, Paycheck Protection Program Loan Necessity Questionnaire (Nonprofit Borrowers).¹

The publication of SBA Form 3510 (“3510 questionnaire” or “questionnaire”) has raised significant concerns among borrowers, particularly related to the breadth of information requested and uncertainty as to how the SBA intends to use the information in reviewing a borrower’s loan forgiveness application. As a result, some borrowers have contemplated delaying submission of their forgiveness application until the SBA provides further information on the purpose of the questionnaire or (as some have hoped) significantly modifies the scope of the questionnaire.

Because we believe it is unlikely that the SBA will modify the questionnaire or provide additional clarifying guidance, borrowers should make a good faith effort to complete the questionnaire. If a borrower believes that its specific responses to the questionnaire will be scrutinized by their lender or the SBA, then it might choose to wait to file for loan forgiveness. All borrowers should realize, however, that interest will start accruing if they do not submit their application for loan forgiveness within the time limits set forth below.

Background

In late October 2020, the SBA began distributing SBA Form 3510 to PPP lenders for PPP borrowers to complete in conjunction with their loan forgiveness application if the borrower received a PPP loan with an original principal loan amount of \$2 million or more. The questionnaire states that its purpose is to “facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate [Borrower’s] good-faith certification . . . that economic uncertainty made the loan request necessary.”²

¹ A similar form, SBA Form 3509, is applicable to for-profit borrowers who received a PPP loan with an original principal amount of \$2 million or more. The scope of this memorandum is limited to SBA Form 3510 for nonprofits and all references to “borrowers” refer exclusively to nonprofit organizations.

² SBA Form 3510, Paycheck Protection Program Loan Necessity Questionnaire (Non-Profit Borrowers) (“SBA Form 3510”), available at: <https://home.treasury.gov/system/files/136/SBA-Form-3510-PPP-Loan-Necessity-Questionnaire-Non-Profit.pdf> (last visited, Dec. 28, 2020).

Borrowers that applied for PPP loans had been required to certify in good faith that the “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Although this certification was “mandatory”, the SBA provided little guidance at the time on the meaning of this so-called “loan necessity certification standard.” Thereafter, the SBA issued Frequently Asked Questions (“FAQ”) # 31 and advised borrowers that, although the CARES Act waived the typical requirement for SBA loans that borrowers be unable obtain credit elsewhere prior to applying, borrowers were still required take 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.”³

This delayed guidance on the loan necessity certification standard caused anxiety for borrowers that had already applied for a PPP loan and made the requisite certification. Compounding this anxiety, the Treasury and the SBA issued a Joint Statement on April 28, 2020 indicating that the SBA would review all loans in excess of \$2 million to ensure “PPP loans are limited to eligible borrowers.”⁴ In response, the SBA issued an Interim Final Rule (“IFR”) which provided a “safe-harbor”⁵ to borrowers who received PPP loans based on a “misunderstanding or misapplication of the required certification standard.”⁶ The safe harbor provision was subsequently extended to May 14, 2020⁷ and then again to May 18, 2020.⁸

³ Small Business Administration’s (“SBA”) Paycheck Protection Program Loans Frequently Asked Questions (“SBA FAQs”), # 31, April 23, 2020, *available at*: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> (last visited, Dec. 28, 2020).

⁴ U.S. Department of Treasury Press Release: Joint Statement by Secretary Steven T. Mnuchin and Administrator Jovita Carranza on the Review Procedure for Paycheck Protection Program Loans, April 28, 2020, *available at*: <https://home.treasury.gov/news/press-releases/sm991> (last visited, Dec. 28, 2020).

⁵ SBA Interim Final Rule (“IFR”) on Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility, originally posted on the Treasury’s website on April 24, 2020, *available at*: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf> (last visited, Dec. 28, 2020). The IFR safe-harbor provided that “[a]ny borrower that applied for a PPP loan prior to the issuance of the [IFR] and repays the loan in full by May 7, 2020 will be deemed by the SBA to have made the required certification in good faith.” *Id.*

⁶ *See* SBA IFR on Extension of Limited Safe Harbor with Respect to Certification Concerning the Need for PPP Loan Request, originally posted on the Treasury’s website on May 8, 2020, *available at*: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Extension-of-Limited-Safe-Harbor-with-Respect-to-Certification-Concerning-Need-for-PPP-Loan-Request.pdf> (last visited, Dec. 28, 2020).

⁷ *Id.*

⁸ SBA IFR on Second Extension of Limited Safe harbor with Respect to Certification Concerning Need for PPP Loan and Lender Reporting, originally posted on the Treasury’s website on May 20, 2020, *available at*: <https://home.treasury.gov/system/files/136/IFR--Second-Extension-of-Limited-Safe-Harbor-with-Respect-to-Certification-Concerning-Need-for-PPP-Loan-and-Lender-Reporting-5-20-2020.pdf> (last visited, Dec. 28, 2020).

On May 13, 2020, the SBA created another safe harbor for borrowers that received PPP loans with an original principal amount of less than \$2 million in which they were deemed to have made the required certification concerning the necessity of the loan in good faith.⁹

Concerns with SBA Form 3510, Loan Necessity Questionnaire

The SBA's request for information regarding a borrower's revenue and expenses for the second quarter of 2020 has raised concerns for borrowers. Borrowers have noted that they were only required to make a "good faith certification" based on facts and information the borrower was aware of at the time of its loan application, as to the "economic uncertainty" which necessitated the loan application. For example, a borrower's "revenue" at the end of the second quarter of 2020 would not have been available to most applicants at the time of certification and therefore could not have formed the basis for the borrower's good faith certification.

In addition, the questionnaire casts doubt on the certification made by borrowers whose revenue exceeded expenses or experienced an increase in revenue in 2020 when compared to the same period in 2019. The questionnaire asks whether the borrower received any funds from any CARES Act Program other than the PPP loan program (excluding applicable tax benefits), and if yes, to provide the funding amount and source. Many businesses and other entities remained in business and in some instances performed better than 2019 because of the PPP loan and other CARES Act funding. Accordingly, a simple comparison between the second quarters of 2019 and 2020 may not account for the additional government support.

The questionnaire also requests information concerning how much the borrower maintained in cash, savings, and temporary cash investments "as of the last day of the calendar quarter immediately before date of the borrowers loan application." Additionally, the questionnaire asks for a borrower's value of its non-cash investments as of the same time period. In response to this requirement, many borrowers are concerned that the questionnaire requests that borrowers provide confidential financial information to the SBA and its lender without the SBA providing any assurance or guidance on how they plan to protect such confidential financial information.

Recommendations

While borrowers may rightfully have concerns regarding the SBA's "post hoc" review process, they should not panic or speculate. When applying for loan forgiveness, borrowers should keep in mind that no one answer will automatically exclude them from loan forgiveness. The SBA's "assessment" and "determination" of a "borrower's certification will be based on the totality of the borrower's circumstances using a multi-factor analysis."¹⁰ Further, the "receipt of [the questionnaire] does not mean that [the] SBA is challenging [your] certification."¹¹ Additionally, on December 9, 2020, the SBA issued

⁹ SBA FAQs, #46. This safe-harbor was established to "promote economic certainty . . . [for] PPP borrowers with more limited resources" and to enable the "SBA to conserve its finite audit resources and focus its reviews on larger loans." *Id.*

¹⁰ SBA FAQs, # 53; *See also* SBA Form 3510 (providing that the "SBA's determination will be based on the totality of [the borrower's] circumstances").

¹¹ SBA Form 3510; *See also* SBA FAQs, # 53, (providing that "[a] request to complete the Loan Necessity Questionnaire does not mean that the SBA is challenging a borrower's certification . . . required by the CARES Act.").

FAQ #53, reiterating that the “SBA’s assessment of a borrower’s certification will be based on the totality of the borrower’s circumstances through a multi-factor analysis.”¹² There the SBA stated that borrowers “will have an opportunity to provide a narrative response to SBA explaining the circumstances that provided the basis for their good-faith loan necessity certification.”¹³

Specific Recommendations

- In lieu of waiting to apply for loan forgiveness, borrowers should make a good faith effort to complete the questionnaire and gather all supporting documentation.
- Borrowers that have had increased revenue in 2020 or a greater margin on revenue over expenses in 2020 when compared to 2019 should draft responses explaining to the SBA and their lender the reasons for that result. Borrowers should identify other sources of CARES Act funding, the timing of such funds in relation to its loan application, and any other information which the borrower believes is necessary for the SBA to fully understand the borrower’s justification as to the necessity of its loan request at the time of certification. In doing such, it is important to remember that your lender and the SBA is not necessarily familiar with your business operations.
- Although certain sections of the questionnaire limit explanations to 1,000 characters or less, we recommend that borrowers fully articulate their circumstances and “economic uncertainty” necessitating the need for their PPP loan at the time they applied, even if doing so exceeds than 1,000 character limit.
- Borrowers should supplement their loan forgiveness applications with all documentation related to a borrower’s loan certification, including any contemporaneous memoranda prepared at the time of application, as well as a cover letter explaining any unique issues, circumstances or anomalies. The more documentation you can provide with your loan forgiveness application and 3510 questionnaire, the better off you will be in establishing an appropriate administrative record in the unlikely event there is an appeal to the SBA’s Office of Hearings and Administrative Appeals (“OHA”).¹⁴
- After making a good faith effort to complete the questionnaire and gather all supporting documents, borrowers should assess whether its specific responses to the questionnaire are likely to be scrutinized by their lender and the SBA. If so, a borrower might wait to apply for loan forgiveness and see whether the SBA issues any further guidance. Borrowers have at least

¹² SBA FAQs, # 53.

¹³ *Id.*

¹⁴ IFR on Appeals of SBA Loan Review Decision Under the PPP, originally posted to the Treasury’s website on Aug. 20, 2020, available at: <https://home.treasury.gov/system/files/136/PPP-IFR-Appeals-of-SBA-Loan-Review-Decisions-Under-the-PPP.pdf> (last visited, Dec. 31, 2020). Note that only SBA final decisions may be appealed and borrowers may not appeal to OHA any determinations made by lenders. *Id.* Borrowers who wish to appeal will only have 30 days after (i) receipt of the SBA’s loan review decision, or (ii) notification by the lender of the SBA’s final loan review decision, whichever is earlier. Given the rather short timeline to appeal, borrowers should organize all supporting loan forgiveness documentation. Alternatively, some borrowers may choose to simply repay the outstanding loan amount due. SBA FAQs, # 46. If the SBA determines that the borrower “lacked an adequate basis for the required certification concerning the necessity of the loan request,” the SBA will not pursue enforcement or refer individual cases to other agencies such as the Department of Justice if the borrower repays the outstanding PPP loan balance after receiving notice from the SBA. *Id.*

through Spring of 2021 (and likely longer depending on when the borrower received its PPP loan and whether the borrower elected to use either the 24-week or 8-week “covered loan period”) to apply for loan forgiveness without paying any interest.¹⁵

Conclusion

While there still remains concerns and uncertainties surrounding the SBA’s 3510 questionnaire, it is counter-productive for borrowers to worry or speculate on how the SBA will use such information. Although one option is to delay submitting your loan forgiveness application and questionnaire until the SBA issues further guidance, such guidance is not guaranteed and may even create additional concerns or ambiguities.

As such, waiting to apply for loan forgiveness should be an option of last resort. As suggested earlier, borrowers should first attempt to complete the questionnaire and gather all supporting documentation. Only then can a borrower render an informed decision regarding the best possible course of action given the borrower’s specific circumstances.

For further guidance and advice on the PPP loan forgiveness process, the SBA 3510 questionnaire, or the SBA’s appeals process, please do not hesitate to contact one of us.

¹⁵ See SBA FAQs, # 52 (citing the Paycheck Protection Program Flexibility Act of 2020, borrowers have 10 months after the last day of its “loan forgiveness covered period” before loan payments of principal and interest are no longer deferred).